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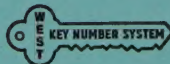
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CALIFORNIA REPORTER

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The FLYING TIGER LINE, Inc., a corporation, Plaintiff and Respondent,

v.

U. S. AIRCOACH, a corporation, and Fritz Hutcheson, Defendants,

Fritz Hutcheson, Appellant.*

Civ. 22671.

**District Court of Appeal, Second District,
Division 3, California.**

June 24, 1958.

Rehearing Denied July 17, 1958.

Hearing Granted Aug. 21, 1958.

Action by creditor of corporation to recover from its sole owner funds advanced to the corporation. The Superior Court of Los Angeles County, Otto J. Emme, J., rendered a judgment for the plaintiff, and defendants appealed. The District Court of Appeal, Shinn, P. J., held, *inter alia*, that where creditor advanced funds to corporation, under agreement with sole owner, under which all corporate stock was hypothecated as security, and which provided that sole owner had no personal liability for the debt, so long as it retained the stock, creditor could not rescind the agreement and look to corporate owner for payment, even if owner was corporation's alter ego and even if creditor's assertions that he had misappropriated funds causing the corporation to become insolvent, after it had advanced the funds under the agreement, were correct.

Reversed with directions.

I. Appeal and Error ⌘766

Where appellant's briefs presented only the evidence considered favorable to him, ignoring the other and made no pretense of

giving court fair statement of evidence, findings would be deemed supported by evidence.

2. Corporations ⌘247

Where lender entered into agreement with sole owner of corporation under which lender agreed, in advancing funds, not to hold corporate owner personally responsible for any of the indebtedness, if the agreement was supported by a consideration, it was sufficient to protect the corporate owner from responsibility, and the rule that release does not extend to liabilities which at the time are unknown to the creditor could not be invoked to allow the lender to recover for the indebtedness from the corporate owner on any theory that owner had appropriated corporate assets.

3. Corporations ⌘247

Where creditor advanced funds to corporation, under agreement with sole owner, under which all corporate stock was hypothecated as security, and which provided that sole owner had no personal liability for the debt, so long as it retained the stock, creditor could not rescind the agreement and look to corporate owner for payment, even if he was corporation's alter ego and even if creditor's assertions that he had misappropriated funds causing the corporation to become insolvent, after it had advanced the funds under the agreement were correct.

4. Corporations ⌘247

That corporate debtor's stock which had been hypothecated to its creditor as security for loan had assertedly been impaired by act of sole owner of corporate debtor could furnish ground for rescission of agreement under which money was lent but

not an excuse for failure to rescind. West's Ann.Civ.Code, § 1689, subd. 2.

5. Contracts ⚖260

A party to a contract may rescind, if, through fault of party as to whom he rescinds, consideration for his obligation has failed, either in whole or in material part. West's Ann.Civ.Code, § 1689, subd. 2.

6. Contracts ⚖83

A contract which is subject to rescission upon ground of failure of consideration or material part thereof is not a nullity, and once in effect, it remains effective until it is rescinded. West's Ann.Civ.Code, § 1689, subd. 2.

7. Contracts ⚖266(1)

Statutory principle that one who rescinds contract must restore, or offer to restore, everything of value received thereunder bears exception, as where consideration is worthless or where party seeking to rescind is entitled to retain that given as consideration in any event. West's Ann. Civ.Code, §§ 1689, subd. 2, 1691, subd. 2.

8. Appeal and Error ⚖110

Order denying new trial is not appealable.

John W. Preston, John W. Preston, Jr., Lawrence L. Light, Los Angeles, for appellant.

Hill, Farrer & Burrill, William S. Scully, Los Angeles, for respondent.

SHINN, Presiding Justice.

U. S. Aircoach (Aircoach) is a chartered air line wholly owned, managed and controlled by defendant Hutcheson. On October 15, 1953, it was indebted to the Flying Tiger Line (Lines) in the sum of \$52,000 for plane rental and other credits. On that date a contract was entered into with Hutcheson by which Lines agreed to extend further credit to Aircoach and Hutcheson agreed to pledge all the stock of Aircoach as security for its debts, past and future. The agreement read in part as follows: "In the event default in payments shall be made

by U. S. Aircoach for a period of thirty days after notice in writing the F. T. L. may take title to all or any part of said shares of stock at a value to be agreed upon at said time by the said Fritz Hutcheson and F. T. L., and such value shall be applied against the then existing indebtedness. *It is specifically agreed that the said Fritz Hutcheson is not personally responsible for any indebtedness existing between U. S. Aircoach and F. T. L., other than as created by this instrument.*" (Emphasis added.) Thereafter proper steps were taken to complete the pledge, the stock was reissued to Lines, as pledgee, and at the time of trial was in the hands of an independent escrow holder, pursuant to the agreement.

Lines extended further credit to Aircoach until the debt reached \$72,946.48 for which it brought suit against Aircoach and Hutcheson on June 3, 1954. Defendants answered and filed a counterclaim for damages largely in excess of the sum demanded by plaintiff. After a lengthy trial the court by minute order directed judgment for the defendants. Some months later the court reversed its ruling and upon extensive evidentiary findings rendered judgment in favor of plaintiff against both defendants on the complaint and the counterclaim. Hutcheson made a motion under Section 663, Code of Civil Procedure, for entry of another and different judgment which was denied. He appeals from the judgment and the order denying his motion for a different judgment.

The complaint sought judgment against Hutcheson under a theory made up of the following contentions: (1) Aircoach was the alter ego of Hutcheson who, for that reason, was liable for its debts; (2) After October 15, 1953, Hutcheson misappropriated the funds of Aircoach so as to render the corporation insolvent; (3) These facts were unknown to plaintiff until long after it had extended the additional credit to Aircoach and therefore the agreement was not a release of Hutcheson's liability. The same contentions are urged in support of the judgment against Hutcheson.

The answers of defendants denied the allegations of the alter ego relationship and the allegations of fraud. There was a separate defense pleaded by Hutcheson based upon the above quoted nonliability provision of the October agreement.

The court found that the corporation was the alter ego of Hutcheson and that the latter had misappropriated moneys of the corporation until it was rendered insolvent. It was also found that plaintiff was without knowledge and was not chargeable with knowledge of these facts prior to the institution of the action.

[1] Hutcheson assails these findings, and findings adverse to the counterclaim, as being without support in the evidence. His contentions are not deserving of consideration. The oral proceedings fill 1,100 pages of the reporter's transcript; 52 exhibits were introduced in evidence. A vast amount of this evidence related to the findings that are criticized by appellant. His briefs state the evidence he considers favorable to him, ignores that of the plaintiff and makes no pretense of giving this court a fair statement of the evidence relevant to the findings which he assails. The findings will be deemed supported by the evidence. *Hickson v. Thielman*, 147 Cal.App.2d 11, 304 P. 2d 122. This, however, is of no moment. Those findings afford no support for the judgment.

[2] Plaintiff contends that the October 1953 agreement was not a release because it did not know at the time of the alter ego relationship or of Hutcheson's manipulation of the corporation's finances. Cases are cited which state the rule that a release does not extend to liabilities which at the time are unknown to the creditor, and hence not within the contemplation of the parties. The rule is a familiar one but it is inapposite since it is of no consequence whether the agreement, under the circumstances, and the situation of the parties, met the requisites of a valid release. If it was an agreement which, for a consideration, absolved Hutcheson of liability for the debts of Aircoach it was binding upon plaintiff as long as it remained in effect.

We come now to the special defense of Hutcheson based upon the nonliability provision of the agreement. The defense is that this provision was an integral part of the agreement of pledge, that plaintiff holds the stock in pledge, has not rescinded or offered to surrender the stock, and is estopped to sue him on the debt. Appellant also argues that long after plaintiff had knowledge of his ownership and control of the affairs of Aircoach, and his transactions with the corporation, it insisted upon performance of the pledge agreement and still stands upon it. It is true that Lines demanded performance and the stock was issued to it as pledgee after the suit was brought, but the question of ratification is not a material one.

[3] Hutcheson's contention that Lines cannot be permitted to retain the security of the stock and at the same time hold him liable for the debt is unquestionably sound. Plaintiff attempts to answer it by pointing to the findings of Hutcheson's fraud.

It argues that it was not required to rescind or to restore the certificates. It asks in its brief: "Why *should* The Flying Tiger Line, Inc. rescind the Agreement when, as seen above, it [the agreement] has nothing whatever to do with the basis and reasons for holding Appellant personally for the contract debt of his corporation in consequence of his fraudulently tortious acts?" A sufficient answer to this contention is that the circumstance that the value to plaintiff of the pledged security was materially impaired by appellant's subsequent acts would furnish grounds for a rescission but not an excuse for a failure to rescind.

All that plaintiff can claim as the effect of the finding of the loss of value of the security is that it might have had a right to rescind the agreement and disaffirm its implied promise not to look to Hutcheson for payment of the debt, or to stand upon the agreement and sue for damages.

The agreement as to Hutcheson's nonliability was inseparable from his pledge of the stock. As long as the agreement re-

mained in effect plaintiff was bound by it; not only by those parts which were advantageous to it, but by those which operated to its disadvantage.

[4-7] A party to a contract may rescind if, through the fault of the party as to whom he rescinds, the consideration for his obligation has failed, either in whole or in material part. Civ.Code § 1689, subd. 2; *McCreary v. Mercury Lumber Distributors*, 124 Cal.App.2d 477, 486, 268 P.2d 762. But a contract which is subject to rescission upon that ground is not a nullity; once in effect it remains in effect until it is rescinded. *Scheel v. Harr*, 27 Cal.App.2d 345, 352, 80 P.2d 1035. One who rescinds a contract must restore, or offer to restore, everything of value received thereunder. Civ.Code § 1691, subd. 2. There are several exceptions to the rule. One exception is that a worthless consideration need not be restored as a condition precedent to rescission. *McElligott v. Freeland*, 139 Cal.App. 143, 33 P.2d 430; *Newark Trust Co. v. Kriebel*, 49 Cal.App. 614, 193 P. 962. Another is that the rescinding party need not restore the consideration where he would have been entitled to retain it in any event. *Richards v. Fraser*, 122 Cal. 456, 55 P. 246; *Kales v. Houghton*, 190 Cal. 294, 212 P. 21; *Morris v. Cole*, 218 Cal. 676, 24 P.2d 785. Neither exception is applicable here. In the first place, the court did not find that the stock had become worthless and there was no evidence that it was worthless. There were widely different estimates as to the value of Aircoach's certificate under which it could operate. Some estimates were far above the amount of its debt to plaintiff. In the second place, plaintiff would not have been justified in retaining the stock upon rescinding for the reason that it claims the right to possession of the security by virtue of the very agreement whose validity would be denied by a rescission. Proof that the corporation was the alter ego of Hutcheson would not entitle plaintiff to retain the stock which it claims only under its agreement that he was not liable.

In our opinion, plaintiff was precluded from maintaining an action against appellant on the debt. The judgment against Hutcheson on the complaint was erroneous. No error appears with respect to the denial of plaintiff's liability on the counterclaim.

[8] The order denying a new trial not being appealable, the purported appeal from that order is dismissed.

The judgment and the order denying Hutcheson's motion to vacate the judgment and enter a different judgment are reversed, and the court is directed to enter judgment that plaintiff recover nothing as against Hutcheson on its complaint, and that Hutcheson recover nothing from plaintiff upon his counterclaim.

PARKER WOOD and VALLÉE, JJ.,
concur.



161 Cal.App.2d 385

**PEOPLE of the State of California, Plaintiff
and Respondent,**

v.

**Lewis F. MARQUIS and John R. Heath,
Defendants and Appellants.**

**Lewis F. MARQUIS, as Executor of the Estate of Harriet Allen Heath, Deceased,
Cross-Complainant, Counter-Claimant and Appellant,**

v.

**PEOPLE of the State of California and
Franchise Tax Board of the State of California, Cross-Defendants, Counter-Defendants and Respondents.**

Civ. 9335.

District Court of Appeal, Third District,
California.

June 18, 1958.

Hearing Denied Aug. 13, 1958.

Action by state to recover part of refund allowed on tax paid on income of testatrix' estate. The executor of estate counterclaimed to recover entire amount

of tax paid on that part of income of testatrix' estate which had been paid to estate of her husband and which was distributed to charitable corporations pursuant to his testamentary disposition. The Superior Court, Sacramento County, Grover W. Bedeau, J., entered judgment for state and executor appealed. The District Court of Appeal, Van Dyke, P. J., held that where, in accordance with terms of testatrix' will, one sixth of net income from estate was distributed to charitable corporation and balance to estate of testatrix' deceased husband, even though charitable corporations ultimately became recipients of income from testatrix' estate under terms of husband's will as residuary legatees, executor was not entitled to refund claimed on theory that all of net income was irrevocably committed to charitable corporations.

Affirmed.

1. Taxation Ⓒ895(6)

Where, in accordance with terms of testatrix' will, one sixth of net income from estate was distributed to charitable corporation and balance to estate of testatrix' deceased husband, even though charitable corporations ultimately became recipients of income from testatrix' estate as residuary legatees under terms of husband's will, executor of testatrix' will was not entitled to refund of taxes paid with respect to income which was distributed to husband's estate on theory that all of net income was irrevocably committed to charitable corporations. West's Ann.Rev. & Tax.Code, § 18132.

2. Taxation Ⓒ895(6)

Under statute providing that there shall be allowed as deduction in computing net income of estate or trust, any part of gross income, without limitation, which pursuant to terms of will or deed creating the trust is during the taxable year paid or permanently set aside for religious, charitable, scientific, literary or educational purposes, dedication of fund to charity must in all cases derive from will or

deed, and statute could not be construed to afford a ground for deduction apart from terms of will or deed creating trust even though income ultimately is used for charitable purposes. West's Ann.Rev. & Tax.Code, § 18132.

John R. Heath and Downey, Brand, Seymour & Rohwer, Sacramento, for appellants.

Edmund G. Brown, Atty. Gen., by Edward P. Hollingshead, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from (1) a money judgment rendered in favor of plaintiff in an action brought to recover part of a refund allowed on the tax paid on the income of the estate of Harriet Heath for the taxable year ending May 31, 1949, and, (2) from a judgment that defendants take nothing by their cross-complaint.

Mrs. Heath died on December 2, 1947, leaving an estate valued in excess of \$2,300,000. Her husband died on September 11, 1948, leaving an estate valued in excess of \$1,780,000. At the time of Mrs. Heath's death her total indebtedness was \$32,345.39 and the specific bequests made by her last will and codicil thereto aggregated \$42,500, all of which were paid prior to July 3, 1948. At the time of Mr. Heath's death his total debts amounted to \$41,912.33 and the aggregate amount of the specific bequests made by his last will and codicil was \$191,000. Charitable corporations were the residuary legatees under his will.

The net income of Mrs. Heath's estate during the year June 1, 1948 to May 31, 1949 was \$246,391.09, none of which was required for the payment of taxes, debts, bequests, or the expenses of administration. Consequently, it became a part of the residue of Mrs. Heath's estate and, in accordance with the terms of her will, 1/6th thereof was distributed to a charitable corporation and the balance to the estate of her deceased husband from whence it

was distributed to two charitable corporations. The executors of the estate of Mrs. Heath reported this income and paid a tax thereon to the State in the amount of \$13,693.43. Thereafter they made a claim for a refund of the total amount of the tax paid on the ground that all of the income was ultimately distributed to charitable corporations and was, therefore, exempt from taxation under the provisions of Section 18132 of the Revenue and Taxation Code. A refund of the amount of the tax paid on the income distributed to the estate of Mrs. Heath's husband was denied, but \$3,108.31 of the claim was allowed as the amount of the tax paid on that part of the income distributed to the charitable corporation, together with interest thereon. However, upon recalculation, the respondent board determined that the allowable refund was only \$2,278.60, and the present action was brought to recover the excess of \$829.71 which had been refunded. By way of counterclaim and cross-complaint appellant sought to recover \$11,229.55, being the amount of the tax paid on that part of the income of Mrs. Heath's estate which was paid to the estate of her husband and which became a part of his \$1,190,000 residual estate which, pursuant to his testamentary disposition, was distributed to charitable corporations. The trial court found that the income so distributed to the charitable corporations had not been paid to them or permanently set aside for charitable purposes "pursuant to the terms" of Mrs. Heath's will and, therefore, was not deductible under the former provisions of Section 18132 of the Revenue and Taxation Code, which then read:

"There shall be allowed as a deduction (in lieu of the deduction for contributions authorized by Section 17315 and Section 17383) in computing the net income of the estate or trust, any part of the gross income, without limitation, which *pursuant to the terms of the will or deed creating the trust is during the taxable year* paid or permanently set aside for the purposes and in the manner specified in those sec-

tions *or is to be used exclusively for* religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance, or operation of a public cemetery not operated for profit." (Emphasis ours.) [Now West's Ann.Rev. & Tax.Code, § 17734].

[1] Appellant argues that since, under the facts of this case, the income of Mrs. Heath's estate was, prior to the end of the taxable year, irrevocably committed to charity, the statutory deduction was allowable. The fallacy in this argument lies in the fact that the commitment was not "pursuant to the terms" of Mrs. Heath's will but "pursuant to the terms" of Mr. Heath's will. Under the terms of Mrs. Heath's will her executors were enjoined to pay $\frac{5}{6}$ ths of her residuary estate, which included the income in controversy, to her husband. They were neither directed nor vested with discretion to divert it to charitable purposes as were the trustees in *Old Colony Trust Co. v. Commissioner*, 301 U.S. 379, 57 S.Ct. 813, 81 L.Ed. 1169, 1173. To paraphrase the language in *Bowers v. Slocum*, 2 Cir., 1927, 20 F.2d 350, 352, one of the cases upon which appellant relies, the pivotal question is whether the income of the estate of Mrs. Heath was permanently set aside for charitable purposes by her will. Appellant's arguments that it was have been refuted by the decision in *Williams v. United States*, D.C.Cal.1957, 158 F.Supp. 227, 228, affirmed, 9 Cir., 1958, 251 F.2d 847, which is factually indistinguishable from the present case. There the husband died January 8, 1951, and his surviving wife died September 18, 1951. By the terms of their reciprocal wills, each was given the entire estate of the other, but the remainder of the estate of whichever spouse survived was left in trust for the benefit of charitable corporations. The executor of the estate of the predeceased husband brought action for a refund of the tax paid on income of his estate which was paid into the wife's estate and from that estate was distributed in trust for charitable purposes. It was

contended that upon the death of the surviving wife all the future income of the husband's estate became irrevocably committed to the charitable trust established by the wife's will and, therefore, was not taxable income of the husband's estate under the applicable federal statute which was the counterpart of Section 18132 of the Revenue and Taxation Code. Recovery of the claimed refund was denied, the court holding that:

"The language of Section 162(a) conditions the charitable deduction upon the commitment of income to charitable purposes by the will of the decedent. It is not necessary that the will definitely direct the charitable contributions claimed as deductions if the contributions are actually made during the taxable years as a consequence of discretionary authority granted by the will. *Old Colony Trust Co. v. Commissioner*, 1937, 301 U.S. 379, 57 S.Ct. 813, 81 L.Ed. 1169. But, the statute plainly contemplates that the [charitable] contribution must be the result of a charitable intent expressed in the will.

"Plaintiff cites no authority supporting her position that the deduction is allowable even though the commitment of the income to charitable purposes during the taxable year results from circumstances entirely extraneous to the decedent's will. Plaintiff urges that the purpose of the statute is to encourage gifts for charitable purposes, *Old Colony Trust Co. v. Commissioner*, supra, and that the certainty that income will eventually go to the charity is, in itself, sufficient to justify the statutory deduction. But here the commitment of the income from Preston's estate to charity did not result from any statutory encouragement given him to make a charitable bequest. He willed his entire

estate to his wife. The allowance of the claimed deduction would not be in furtherance of the statutory purpose."

So herein, Mrs. Heath's will did not set aside the income to charitable purposes nor were her executors authorized to divert it thereto. Under the terms of her will the income in question was payable to her surviving husband and was in fact paid to his estate. The charitable corporations became the recipients of the income from Mrs. Heath's estate not because of her charitable bequest nor "pursuant to the terms" of her will, but because of the fortuitous circumstance that the charitable corporations were the residuary legatees under the will of Mr. Heath, who survived his wife and whose residuary estate included the income from his wife's estate.

[2] We have considered, but are not persuaded by, appellant's argument that the statute, properly construed, provides an alternative right to deduction independent of the terms of the will or deed creating the trust.

The contention is that the clause "or is to be used exclusively for * * * charitable * * * purposes," being stated in the alternative, affords a ground for deduction quite apart from the terms of the will or deed creating the trust; that if, as in this case, a situation arises whereby the income will be used exclusively for charity, the deduction is authorized. We do not agree and read the statute as requiring that the dedication of the fund to charity must in all cases derive from the will or deed. As we read the statute, the deduction is not allowable unless by "the terms of the will or deed" the income is to be used for charity.

The judgment is affirmed.

PEEK, J., and WARNE, J. pro tem,
concur.

161 Cal.App.2d 621

Delger TROWBRIDGE, Petitioner,

v.

**SUPERIOR COURT of the State of California
IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, George W. Schonfeld, Judge thereof, Respondents.**

No. 18081.

District Court of Appeal, First District,
Division 1, California.

June 25, 1958.

Mandate proceeding for review of denial of attorney fees for conduct of defense of an administrator in an action. The District Court of Appeal, Fred B. Wood, J., held that on appeal from denial of allowance of attorney fees, trial court had power under circumstances to order that there be added to proposed settled statement on appeal "all of the proceedings" in the main action "in the form of the record on appeal from the judgment" in said action "as and when the same is finally settled and certified."

Order under review affirmed, alternative writ of mandate discharged and petition for peremptory writ of mandate denied.

1. Appeal and Error ☞650

Where attorney appealing from denial of allowance of fees, submitted a statement on appeal comprising a clerk's transcript and condensed narrative of oral proceedings, and adversaries proposed as substitute a complete reporter's transcript of the proceedings, court did not abuse discretion in permitting such substitution even if there was extraneous matter in the reporter's transcript, in view of inferential finding that condensed statement failed to give completely adequate picture.

2. Appeal and Error ☞648

On appeal from denial of allowance of attorney fees, trial court had power under circumstances to order that there be added to proposed settled statement on appeal "all of the proceedings" in the main

action "in the form of the record on appeal from the judgment" in said action "as and when the same is finally settled and certified." West's Ann.Rules on Appeal, rule 11.

3. Stipulations ☞14(8)

Where attorney stipulated that all proceedings in main action should be put in evidence for consideration upon hearing of his motion for attorney fees, attorney should furnish reviewing court a record of such proceedings on appeal from denial of attorney fees, especially where record thereof was in course of preparation for use in appeal in the main action.

4. Appeal and Error ☞648

Trial court did not exceed its jurisdiction in directing that settlement of record upon appeal from denial of attorney fees should be continued pending settlement of the record upon appeal from judgment in the main action, thus retaining jurisdiction to modify its order.

Delger Trowbridge, San Rafael, petitioner in pro. per.

Morris Lowenthal, Juliet Lowenthal, San Francisco, for real parties in interest.

FRED B. WOOD, Justice.

Petitioner questions the validity of certain features of an order made by the trial court in a proceeding for settlement of a proposed agreed statement for use upon petitioner's appeal from an order denying his motion for allowance of attorney fees for the conduct of the defense of an administrator of an estate as defendant in the trial of a case in that court.

Petitioner as such appellant prepared and submitted to the opposite parties and to the trial court a proposed statement on appeal. This statement was in two parts. One part in substance was a clerk's transcript. The other part was in form a condensed narrative of the oral proceedings had upon the motion for allowance of fees.

The respondent real parties in interest proposed no amendments to the first part

of appellant's proposed statement. As a substitute for appellant's statement of the oral proceedings, they proposed a reporter's transcript of those proceedings and presented a complete transcript, certified by the reporter, for use in effecting such substitution.

[1] The court granted the request for such substitution. Petitioner claims that in so doing the court committed an abuse of discretion and exceeded its jurisdiction, but has failed to convince us that there is in the record before us a basis for us so to hold. He argues that there is much extraneous matter in this reporter's transcript. That may be true (he condensed 78 pages into 47), but it is a fair inference that the trial court found and concluded that appellant's elimination of the extraneous matter actually resulted in a condensed statement which fails in various respects to give a completely adequate picture to a reviewing court of what was presented to the trial court during the course of the oral proceedings.

Another feature of the order to which appellant takes exception is a direction that there be added to the proposed settled statement "all of the proceedings" in the main action "in the form of the record on appeal from the judgment" in said action "as and when the same is finally settled and certified by the above entitled court; and that the hearing on the settlement of the proposed settled statement on appeal of Delger Trowbridge, and the final settlement, engrossment and certification of said settled statement be and the same is hereby continued until after the settlement of the record on appeal from the judgment in the" main action.

This feature of the order was based upon a finding that "all of the proceedings in the" main action "were introduced in evidence at the hearing on Delger Trowbridge's motion for attorney's fees and that it is necessary and essential that all of the proceedings in the" main action "be made

a part of said settled statement on appeal of Delger Trowbridge, and that said proceedings be added to said settled statement in the form of the record on appeal from the judgment in said action, and that it is necessary to continue the matter of the settlement of said settled statement on appeal of Delger Trowbridge until such time as the record on appeal from the judgment in said action is finally settled and certified by the Court."

[2, 3] Petitioner contends that the trial court was without power to make such an order. We are not persuaded. It seems entirely logical that appellant furnish the reviewing court a record in some appropriate form of the proceedings had upon the trial of the main action in view of his stipulation putting all of those proceedings in evidence for consideration by the trial court upon the hearing of his motion for attorney fees. It happens that the record of those proceedings is in course of preparation for use in an appeal which petitioner's clients have taken from the judgment rendered in the main action. Why should that record, when completed, not be made available for use upon the appeal from the order denying petitioner's motion for attorney fees? That would avoid the effort and the cost of producing an independent record or of a duplicate record. That is what the questioned order avoids. It operates as an incorporation by reference of the record of the proceedings in the main action when prepared and settled.¹ This will save appellant the cost of preparing an independent record and seems entirely in harmony with the stipulation whereby he incorporated by reference all of those proceedings as evidence upon the hearing of his motion.

[4] Nor do we find that the trial court exceeded its jurisdiction when it included in the order a direction continuing the settlement of the record upon the appeal from the motion pending the settlement of the record upon the appeal from the judgment

1. This is a true incorporation by reference, not a consolidation pursuant to rule 11 of the Rules on Appeal.

in the main action. By so doing the trial court retains jurisdiction to modify its order if a change in circumstances (for example, failure to complete the preparation of an appeal record in the main action) indicates that modification is necessary or desirable.²

The order under review is affirmed; the alternative writ of mandate is discharged and the petition for a peremptory writ of mandate is denied.

PETERS, P. J., and BRAY, J., concur.



161 Cal.App.2d 454

Jane Reed KISSINGER et al., Plaintiffs
and Respondents,

v.

CITY OF LOS ANGELES, a municipal corporation, et al., Defendants and
Appellants.

Civ. 22678.

District Court of Appeal, Second District,
Division 3, California.

June 19, 1958.

Hearing Denied Aug. 13, 1958.

Action seeking a declaration of rights by property owners on an ordinance which rezoned their property from multiple dwellings to single family residential. Judgment for the property owners in the Superior Court of Los Angeles County, Alfred E. Paonessa, J., and the city and others appealed. The District Court of Appeals, Nourse, J. pro tem., held that a spot zoning ordinance was invalid as arbitrary, discriminatory and as denying due process and taking property of the plaintiffs without payment of compensation; that the evidence established that the purpose of the ordinance was to depress the

value of the plaintiffs' property so that it might be acquired for airport purposes at a depressed value; and that where there was a total compliance with the provisions of the city charter and no compliance with the provisions of the charter as implemented by the ordinance, the council was without power to adopt the ordinance.

Judgment affirmed.

1. Municipal Corporations ⇨63(1, 2)

Wisdom of a zoning ordinance is a matter of legislative determination, and if there is any reasonable justification of the action of the council in passing the ordinance, the court may not substitute its judgment for that of the council.

2. Municipal Corporations ⇨63(2), 601(17)

If the facts show that the reasonableness of a zoning ordinance is fairly debatable, the courts may not disturb the legislative determination, and the findings and conclusions of the trial court as to the reasonableness of the ordinance are not binding on an appellate court.

3. Municipal Corporations ⇨601(17)

Courts may inquire as to whether an ordinance which rezones property so as to restrict the uses which may be made of the property is unreasonable, oppressive or discriminatory.

4. Constitutional Law ⇨278(1)

Eminent Domain ⇨2(1)

Municipal Corporations ⇨625, 626

A spot zoning ordinance which rezoned property from a zone permitting multiple dwellings to single dwellings and which restricted the use of the plaintiffs' property while leaving all similarly situated property subject to the provisions of the comprehensive zoning ordinance and in the zone permitting multiple dwellings was arbitrary, discriminatory and an attempt by the city to use its police power to take the plaintiffs' property without

2. If for any reason such a record does not become available for incorporation by reference, it is conceivable that a brief description of those proceedings

well might be found appropriate and adequate if petitioner-appellant were to prepare and present such a statement.

due process of law and without payment of compensation. U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, §§ 13, 14.

5. Municipal Corporations Ⓒ122(4)

While the motives influencing a legislative body in passing a zoning ordinance which is within its power to pass may not be inquired into, where the facts show an attempt to exercise police power in such a manner as to oppress or discriminate against individuals, the courts may give weight to the evidence disclosing a purpose other than that declared by the ordinance in determining its validity.

6. Eminent Domain Ⓒ2(1)

A zoning ordinance may not be used as a device to take property for public use without payment of compensation. West's Ann.Const. art. 1, § 14.

7. Municipal Corporations Ⓒ122(4)

Evidence established that purpose of a spot zoning ordinance changing classification of the plaintiffs' property from a zone permitting multiple dwellings to a zone permitting single dwellings was to depress the value of the property in order that it might be acquired for airport purposes at a depressed value, and hence the court was entitled to give weight to such evidence in determining the validity of the ordinance as disclosing a purpose other than that declared by the ordinance.

8. Municipal Corporations Ⓒ41

Charter provision of the city of Los Angeles imposing duty on the planning commission to hold all public hearings required by law for the adoption, extension or modification of a zoning plan required the commission to hold public hearings where required to do so by ordinance. St. 1941, pp. 3497, 3499.

9. Municipal Corporations Ⓒ41

City planning is a "municipal affair" and the planning commission is not subject to the general laws of the state governing unchartered municipalities and hence the only public hearing that could

be required of it by law are those required by ordinance.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Affair".

10. Municipal Corporations Ⓒ41

Charter of the city of Los Angeles was construable as requiring that where a change in zone is initiated by the council it must submit the proposed ordinance to the planning commission, which must within the time set forth in the charter hold a public hearing upon notice in accordance with the municipal code.

11. Municipal Corporations Ⓒ600

Property owners must be heard before ordinances which substantially affect their property rights are adopted. West's Ann. Gov.Code, §§ 65500-65509, 65803, 65804.

12. Municipal Corporations Ⓒ41

Charter provisions of the city of Los Angeles were not construable as requiring the council to make but a token submission of a spot zoning ordinance changing classification of plaintiffs' property to the planning commission without giving that commission the power to perform the duties cast upon it by the charter.

13. Municipal Corporations Ⓒ41

Under the charter provisions of the city of Los Angeles, the report which the planning commission must make to the council with respect to a change in zoning is a report based upon an investigation and hearing.

14. Municipal Corporations Ⓒ41

Property owners were entitled to complain of the lack of a hearing before the planning commission recommending a change in zoning though the commission recommended against the adoption of the ordinance where the commission's recommendation was based upon the fact that no opportunity was given to it to hold a public hearing.

15. Municipal Corporations Ⓒ601(15)

Provisions of the Municipal Code of the City of Los Angeles authorizing the city council by ordinance to change zones

established under the comprehensive zoning plan that such changes may be initiated by the city council, and providing for a hearing, are not void as an attempted limitation upon the power granted by the charter to the city council but are valid as an implementation of the charter's provisions.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., and Claude E. Hilker, Deputy City Atty., Los Angeles, for appellants.

Ralph Swagler, Burbank, Dunlap, Holmes, Ross & Woodson and Kenneth A. Millard, Pasadena, for respondents.

NOURSE, Justice pro tem.

By their complaint in this action respondents sought a declaration of their rights under an ordinance passed by the Council of the City of Los Angeles which rezoned their property from zone R-3 (multiple dwellings) to zone R-1 (single family residential). By its judgment the trial court decreed that the ordinance was invalid and void for, among others, the following reasons:

"3. Said ordinance deprives plaintiffs of their property without due process of law, in violation of Section 13 of Article One of the Constitution of the State of California.

"4. Said ordinance, if sustained, would constitute confiscation of plaintiffs' property, in violation of Section 14 of Article I of the Constitution of the State of California.

"5. Said ordinance is a nullity because it was not enacted in the manner provided by law.

"6. Said ordinance is unreasonable, arbitrary and discriminatory and is an abuse of the legislative discretion vested in the defendant City Council."

From this judgment the defendants appeal.

The facts in this matter are not in dispute. They are: The plaintiffs are the owners of

12 lots which are bounded on the south by Victory Boulevard, a heavily traveled main thoroughfare, in the city of Los Angeles, and on the north by an alley 20 feet in width. These lots constitute the entire frontage on Victory Boulevard between Gothic Avenue on the west and Valjean Avenue on the east.

From 1932 to 1946 plaintiffs' property and all property facing upon Victory was zoned R-3. In 1946 defendant city, by ordinance, adopted a comprehensive zoning plan and under this plan plaintiffs' property and the property facing upon Victory Boulevard for a considerable distance both east and west of plaintiffs' property was zoned R-3.

The plaintiff Kissinger acquired 42 acres which included the subject property in 1946 and in 1953 she subdivided a portion of that 42 acres which subdivision included the subject property and 12 lots facing upon Victory Boulevard situated between Gothic Avenue and Odessa Avenue (this constitutes the block immediately west of subject property). This subdivision was designated as Tract No. 17133 and the map thereof as recorded designated all of the property therein as zoned R-3.

After the recording of the subdivision map plaintiff Kissinger sold lots 1 to 13 and there was erected on each thereof a multiple dwelling two stories in height. In 1954 the property facing Victory Boulevard and lying immediately east of the subject property was rezoned by the defendant city from R-3 to C-2 (commercial) and prior to February 1956 had been developed for commercial purposes including buildings designed and used for a super market and other retail businesses.

Tract No. 17133 is situated one mile south of the southerly end of the north to south runway of an airport owned by the city and maintained and operated by its Department of Airports. The property lying between the subject property and the airport is zoned R-1 with the exception that the lots facing on Van Owen Street are zoned R-3, that certain corner lots at the intersections of Van Owen and other main highways are

zoned C-2 and a public school, the land occupied by which is zoned R-4.

This airport is used by the California National Guard for the operation of fighter-type aircraft, including jet planes, and also used by privately owned planes. The flight pattern for aircraft approaching the airfield from the south encompasses the subject property and all property for more than a mile west of the subject property including a high school and also encompasses all of the property lying to the north of the subject property above mentioned. This flight pattern which was in existence in February of 1956 was established in 1932. Aircraft using this flight pattern are required to maintain an altitude of 4,000 feet until final approach to the air strip which must be completed at an altitude of not less than 500 feet. Under federal regulations aircraft must maintain a rate of descent not greater than 40 to 1. (C.A.A. TSO 18.) The airport has been used by the National Guard since prior to 1949 and between that date and the time of trial of the action there had been but a slight increase in the use of the field.

The subject property (except the most easterly 3 lots thereof) and the property in the block immediately to the west of it lie within the zone over which aircraft taking off from the airport in a southerly direction would pass. Such aircraft are required to maintain as high a rate of climb as is consistent with safety.

On February 28, 1956, plaintiffs applied for a variance so as to reduce the distance between proposed 6-unit apartment buildings which they proposed to build on each of the 12 lots from 10 feet to 9 feet, 10 feet being the distance required by the ordinance for R-3 property. This was granted on March 8. On March 29 plaintiffs applied for building permits to construct 6-unit apartments and garages on lots 13, 14 and 15 of Tract No. 17133. The permits were granted on April 2 but on March 30, pursuant to oral clearances from the city's building department, actual construction of these apartments was commenced and the

work continued through April 4. The work consisted of the clearing of the property, erection of the power poles, trenching and setting of forms for foundations, the prefabrication of plumbing and delivery of lumber onto the property. Plaintiffs expended in excess of \$2,300 in doing this work.

On April 2, 1956, the city council was advised by one of its members of the proposed development by plaintiffs of the subject property and that the building permits, above referred to, had been issued; that the property was "*within the area that will shortly be acquired for airport purposes*" (italics ours) and thereupon a motion was adopted by which the Board of Airport Commissioners were requested to "*consider condemning this property in order that the same may be acquired on a basis of its present value as vacant land*" (italics ours) and which also provided that the city attorney be notified of the council's action.

On April 4th the city council adopted a resolution which directed the city attorney to prepare an emergency ordinance changing the zoning of the subject property from R-3 to R-1. In the recitals which form the basis for the resolution it was stated that 6-unit multiple dwellings had already been started on the subject property and that if the subject lots were classified in the R-1 zone fewer persons would be affected by the operations of the airport.

On April 5 the Department of Airports directed a letter to plaintiffs advising them that the Board of Airport Commissioners had formulated a plan for expansion of the San Fernando Valley Airport under which plan it was contemplated that a portion of the subject property would be acquired for the south approach to the airport and that, if a bond issue then on the ballot was approved by the voters, the city would purchase or condemn a portion of the subject property and demanded that plaintiffs desist from the construction of the proposed apartment buildings for which permits had been issued.

On April 4 or April 5 an emergency ordinance changing the zoning of the subject property from R-3 to R-1 was drafted by the city attorney and forwarded to the City Planning Commission.

On April 5 the City Planning Commission disapproved the ordinance upon the grounds that it would not be good policy to effect a change of zone without a public hearing and notification to the affected property owners. No hearing was had before the commission or the council and no notice of the proposed change of zone was given to the plaintiffs or to the public. The action of the commission was reported to the city council April 6 and the council on that date suspended its rules and the ordinance in question was adopted by the unanimous vote of the council.

A section of the ordinance recites, as the facts justifying the ordinance as an emergency one to take effect immediately upon its passage, that the subject property lies within the approach zone of the San Fernando Valley Airport; that the construction of a 6-unit multiple dwelling had already started on a portion of the property; and "the construction of similar improvements [evidently contemplated] on the balance * * * would create an undue density of population at this location" and that, rezoning of the property would minimize the number of buildings which might otherwise be located thereon and result in fewer persons being affected by the operation of the airport.

Upon receiving the letter from the Department of Airports and on being notified of the passage of the ordinance plaintiffs ceased work and shortly thereafter commenced the present action.

The evidence shows without conflict and the court found that the subject property zoned for R-3 usage had a reasonable market value on the date of the adoption of the questioned ordinance of \$114,000 but zoned for R-1 usage had a value of but \$48,000.

Section 12.32 of the Municipal Code of the City of Los Angeles provides in sub-

stance that whenever public necessity, convenience, general welfare or good zoning practice justifies, the city council may by ordinance change the zones or regulations established under the comprehensive zoning plan; that such changes may be initiated by the city council, that any proposed change of zone shall be set for public hearing before the planning commission or an examiner thereof and that notice of such hearing shall be given by at least one publication ten days before the date of hearing in a newspaper of general circulation and by mailing a postal card or letter notice to the property owners affected and whose property lies within 300 feet of the area proposed to be rezoned.

The trial court made findings in substantial accordance with the facts we have recited and concluded that the ordinance was a nullity because not enacted in the manner provided by law; that the ordinance was unreasonable, arbitrary and discriminatory and an abuse of the legislative discretion vested in the council and further concluded, among other things, that the ordinance if sustained would constitute a taking of the plaintiffs' property without the payment of just compensation contrary to the provisions of section 14, article I of the Constitution of this state.

Appellants do not nor could they well assert that the evidence was insufficient to uphold the findings of fact made by the trial court; but do attack the conclusions arrived at by that court from the facts found.

[1-3] They assert that the wisdom of the ordinance is a matter of legislative determination and that if there is any reasonable justification of the action of the council in passing the ordinance the court may not substitute its judgment for that of the council; that if the facts in any given case show that the reasonableness of the ordinance is fairly debatable the courts may not disturb the legislative determination and that the findings and conclusions of the trial court as to the reasonableness of an

ordinance are not binding upon an appellate court.

[4] These contentions are undoubtedly valid. *Johnston v. City of Claremont*, 49 Cal.2d 826, 323 P.2d 71; *Lockard v. City of Los Angeles*, 33 Cal.2d 453, 461-463, 202 P.2d 38, 7 A.L.R.2d 990. This does not mean however that the courts may not inquire as to whether an ordinance which rezones property so as to restrict the uses which may be made of the property is unreasonable, oppressive or discriminatory for it is the duty of the courts to set aside an ordinance which under the facts is clearly unreasonable and oppressive or discriminatory. *Lockard v. City of Los Angeles*, *supra*; *Wilkins v. City of San Bernardino*, 29 Cal.2d 332, 338, 175 P.2d 542; *Reynolds v. Barrett*, 12 Cal.2d 244, 83 P.2d 29; *Hurst v. City of Burlingame*, 207 Cal. 134, 143, 277 P. 308; *Hagenburger v. City of Los Angeles*, 51 Cal.App. 2d 161, 124 P.2d 345; *Bank of America Nat. Trust & Sav. Ass'n v. Town of Atherton*, 60 Cal.App.2d 268, 273, 140 P.2d 678. And see cases cited at Annotations, 51 A.L.R.2d at pages 311-314.

The ordinance here in question constitutes what is known as "spot zoning" in that by rezoning it from zone R-3 to zone R-1 it restricts the use of plaintiffs' property while it leaves all similarly situated property subject to the provisions of the comprehensive zoning ordinance and in zone R-3. We are of the opinion that the present ordinance is arbitrary, discriminatory and that it in effect, is an attempt on the part of the city to use its police power to take plaintiffs' property without due process of law and without payment of compensation for that taking.

The evidence shows without conflict that there has been no change in the character of the subject property or the surrounding neighborhood since the adoption of the comprehensive zoning plan by which it was placed in zone R-3. It further shows that the city has not attempted to rezone any of the other properties which were zoned R-3 and which lie in the flight plan of the

airport. The evidence further establishes that within that flight zone the city has permitted the erection of multiple dwellings upon land zoned R-3; that the block immediately west of the subject property has been developed within three years before the passage of the ordinance in question with multiple-unit dwellings of the same class and character of those proposed to be erected by the plaintiffs upon their land; and that the block immediately east of plaintiffs' property has been rezoned to a higher classification, i. e. C-2 and developed to commercial uses. It is further established that the city has permitted property to be zoned R-4 and two public schools erected within the flight plan.

The sole reason assigned for the exercise of the police power in rezoning this property was to prevent an undue congestion of population in the area and thus expose fewer people to the hazards arising from the operation of the air field, the nearest boundary of which was one mile distant. This same hazard existed at the time the property was originally zoned R-3; at the time the schools were erected within the flight zone and at the time the property immediately to the west of the subject property was improved with two-story multiple dwellings and the property immediately to the east was rezoned C-2 and permits were given for the erection of the super market and retail stores thereon. The same hazard exists as to all the property zoned R-3 or R-4 or C-2 within the flight pattern and yet no property other than the plaintiffs' property has been rezoned. It is argued by appellants that a large proportion of the properties zoned R-3 or C-2 have been developed as R-1 properties and that their rezoning would not accomplish the purpose of preventing congestion in population. This does not answer the question of the arbitrariness of the ordinance or its discriminatory effect for it is conceded that the value of plaintiffs' property is cut in half and yet the property is no more subject to the hazards created by the operation of the air field

than are any other properties within the flight area.

When we have heretofore said that there has been no change in the conditions affecting the subject property and other property within the flight zone we refer to the existing conditions but the evidence does show without conflict that the city at the time of the passage of the ordinance had in contemplation an extension of the airport runways for a distance of over 2,000 feet to the south and the establishment of a fan-shaped approach zone extending over most of the subject property and all of that portion of Tract No. 17133 which lies to the west of the subject property. The evidence establishes that to accomplish the enlargement of the airport and the creation of the approach zone above mentioned the city intends to condemn the subject property. The inference is clear that the true purpose of the ordinance was to prevent the improvement of the subject property in order that it might be acquired at a lesser price for airport purposes.

[5.6] While it is true that the motives which influence a legislative body in passing an ordinance which is within its power to pass may not be inquired into, where, as here, the facts are such as to show an attempt to exercise the police power in such a manner as to oppress or discriminate against an individual or individuals we are entitled to give weight to the evidence disclosing a purpose other than that declared by the ordinance in determining its validity. *Dobbins v. City of Los Angeles*, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, 176-177; *Coulter v. Pool*, 187 Cal. 181, 185, 201 P. 120. A zoning ordinance may not be used as a device to take property for public use without the payment of compensation. *Dobbins v. City of Los Angeles*, supra; *State ex rel. Tingley v. Gurda*, 209 Wis. 63, 243 N.W. 317; *Grand Trunk Western R. Co. v. City of Detroit*, 326 Mich. 387, 40 N.W. 2d 195, 199.

[7] That the purpose of the ordinance was to depress the value of the plaintiffs' property in order that it might be acquired

for airport purposes at such depressed value is crystal clear from the evidence. The motion upon which this entire proceeding was initiated refers only to the advisability of condemning plaintiffs' property on the "basis of its present value as vacant land." It makes no mention whatsoever of the need to prevent an increase in the density of population. The letter addressed by the Department of Airports to the plaintiffs clearly states the intent to condemn the property and demands that the plaintiffs desist from improving the property until such time as it could be determined whether the city would have funds to proceed to acquire the property. The witness, City Planner Karl Ourston, of the defendant city, testified, when asked if any proceedings had been initiated for the rezoning of lots 1-12 of Tract No. 17133, that the best plan for the property within the flight pattern was to take the property so that there would be no residences within the approach area and that there was an emergency as to both improved and vacant properties and that the solution of the emergency as to vacant property was to rezone it and as to the improved property to acquire the land and take the buildings off.

In short the ordinance arbitrarily rezoned the plaintiffs' property to a use to which it could not economically be put, lying as it does between multiple-dwelling development and commercial development and discriminates against the plaintiffs by preventing the use of their property for the use for which it is best fitted, while permitting all other property similarly situated and zoned to be used as R-3 property.

As applied to lots 13, 14 and 15 of the subject property the ordinance is clearly void for another reason. The city issued building permits for the construction of multiple dwellings on each of these lots and plaintiffs expended the sum of \$2,300 in work done under these permits. Plaintiffs thus had a vested right to construct the multiple dwellings for which the permits had been issued, and the ordinance if enforced as to these lots would result in the taking of plaintiffs' property without com-

pensation and without due process of law. County of San Diego v. McClurken, 37 Cal.2d 683, 690-691, 234 P.2d 972; Wheeler v. Gregg, 90 Cal.App.2d 348, 365, 203 P.2d 37; Dobbins v. City of Los Angeles, supra, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, 176; Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal.App.2d 776, 194 P.2d 148 and cases there cited.

Appellants admit that if the provisions of section 12.32 of the Municipal Code (hereinafter mentioned) are applicable to proceedings for a change in zone initiated by the council that the council was without power under the charter to pass the ordinance in question here. They assert, however, that by section 12.32 the council attempted to limit the power to pass zoning ordinances invested in it by the charter and that it could not validly so do.

In support of this contention the appellants rely upon Thompson v. Board of Trustees of City of Alameda, 144 Cal. 281, 77 P. 951 and Briare v. Matthews, 202 Cal. 1, 258 P. 939. These cases are not controlling here. In each of them the statute or charter involved had imposed the absolute right and unconditional duty upon the council to legislate as to the matters involved in the cited cases and in each case the Supreme Court held that the council could not by ordinance place any limitation upon its duties and powers.

[8,9] In the present case, however, the council's powers to pass ordinances rezoning property are not unconditional, for by section 97 of the city charter (Stats.1941, p. 3499) it is prohibited from adopting an ordinance changing, amending or altering any zone until the proposed ordinance has been first submitted to the City Planning Commission and it is made the duty of the City Planning Commission, within 30 days after receiving a proposed ordinance, to cause an investigation to be made by the Director of City Planning and to report the result of such investigation to the council. If the planning commission recommends against the adoption of the ordinance the council may only pass it by a two-thirds

vote of the whole council. Should the planning commission recommend approval or fail to make any recommendation the council may adopt such ordinance by a majority vote. By section 96½ of the charter (Stats.1941, p. 3497) it is made the duty of the planning commission to hold all public hearings which may be required "by law" for the adoption, extension or modification of the zoning plan. The provisions of section 96½ must be construed as requiring the planning commission to hold public hearings where required to do so by ordinance. City planning is a municipal affair and the planning commission is not subject to the general laws of the state governing unchartered municipalities and therefore the only public hearings that could be required of it by law are those required by the ordinance. Pimental v. City of San Francisco, 21 Cal. 351.

[10] As we construe sections 96½ and 97 of the charter they require that where a change in zone is initiated by the council it must submit the proposed ordinance to the planning commission and the planning commission must, within the time set forth in the charter, hold a public hearing, upon notice, in accordance with the provisions of section 12.32 of the Municipal Code. Any other interpretation would deprive the provisions of section 97 of the charter, making a condition to the council's right to pass a zoning ordinance the submission of the ordinance to the planning commission, of substance or any real effect; and would give the council full power to pass the ordinance by merely going through the form of forwarding the ordinance to the planning commission with directions that it act forthwith without any opportunity for investigation by the commission or hearings before it.

[11] Certainly sound common sense and wise public policy would require an opportunity for property owners to be heard before ordinances which substantially affect their property rights are adopted and we must assume that the framers of the charter had such purposes in view in limiting, by

section 97, the council's right to act. 23 Cal.Jur. § 139, p. 766; San Joaquin & King's River Canal & Irr. Co. v. Stevenson, 164 Cal. 221, 229, 128 P.2d 924.¹

[12, 13] It would be absurd to construe these charter provisions as appellants would have us construe them, i. e. as requiring the council to make but a token submission of the ordinance to the planning commission without giving that commission the power or opportunity to perform the duties cast upon it by the charter. Such a construction is not to be placed upon the charter unless required by the plain provisions thereof. That the provisions of the charter do not require such an absurd result is too clear for argument. San Joaquin & King's River Canal & Irr. Co. v. Stevenson, supra; Merced Security Sav. Bank v. Casaccia, 103 Cal. 641, 645, 37 P. 648. The report which the planning commission is required to make to the council is a report based upon an investigation and a hearing and it is to be assumed that the council will give due consideration to the facts submitted to it by the planning commission in its report before adopting an ordinance against the recommendation of the commission.

[14] We therefore cannot agree with appellants' contention that the respondents cannot complain of the lack of a hearing before the commission because the commission recommended against the adoption of the ordinance. The commission's recommendation was based upon the fact that no opportunity was given it to hold a public hearing. If there had been a hearing the recommendation would have been upon the merits.

[15] Under the construction we have placed upon the charter provisions, section 12.32 is not void as an attempted limitation upon the power granted by the charter to the city council but is valid merely as an implementation of the charter's provisions, and the council was bound by the provision of the ordinance.

In the present case as there was but a token compliance with the provisions of the charter and no compliance with the provisions of the charter as implemented by the ordinance the council was without power to adopt the ordinance.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



161 Cal.App.2d 522

Matter of Appointment of Umpire for Don C. FALLOON, doing business as Falloon Floor Covering.

Don C. FALLOON, Petitioner and Respondent,

v.

CALEDONIAN INSURANCE COMPANY, Respondent and Appellant.

CALEDONIAN INSURANCE COMPANY, Petitioner and Appellant,

v.

DON C. FALLOON, doing business as Falloon Floor Covering, Respondent.

Clv. 17492, 17566.

District Court of Appeal, First District, Division 1, California.

June 23, 1958.

Rehearing Denied in No. 17566

July 23, 1958.

Hearing Denied in No. 17566 Aug. 21, 1958.

Proceedings with respect to an award entered by appraisers and umpire, who had been appointed pursuant to an appraisal agreement, between insurer and insured. The Superior Court, County of Alameda, Richard Chamberlain and Marvis Sherwin, JJ., entered an order appointing an umpire, an order denying a motion to vacate the appraisal and an order denying motion to vacate the order denying the motion to vacate the appraisal and the insurer appealed. The District Court of Appeal, Fred B.

1. This is the policy adopted and declared by the Legislature with the provisions

of sections 65500-65509, 65803, 65804, Government Code.

Wood, J., held that under fire policy providing that if insurer and insured failed to agree as to amount of fire loss, each shall select a competent and disinterested appraiser who shall select a competent and disinterested umpire, where insured was one of 100 to 150 customers of employer of appraiser appointed by insured but employer had made no recent sales to insured and appraiser had not been assigned to territory in which insured's business was located and appraiser stated he could act in a fair-minded manner as to both parties, appraiser, for purposes of conducting an appraisal, was disinterested and was qualified to act.

Order denying motion to vacate the appraisal or award affirmed, appeals from the other two orders dismissed.

1. Appeal and Error ⚡113(1)

An order appointing an umpire pursuant to appraisal agreement to determine amount of fire loss under fire policy and an order, which denied a motion to vacate an order which denied motion to vacate appraisal of fire loss sustained by insured, were not appealable. West's Ann.Code Civ.Proc. §§ 963, 1280-1293.

2. Appeal and Error ⚡113(2)

An order denying a motion to vacate an appealable order is not appealable.

3. Insurance ⚡570

Under fire policy providing that if insurer and insured failed to agree as to amount of fire loss, each shall select a competent and disinterested appraiser, who shall select a competent and disinterested umpire, where insured was one of 100 to 150 customers of employer of appraiser appointed by insured but employer had made no recent sales to insured, appraiser had not been assigned to territory in which insured's business was located and appraiser stated he could act in a fair-minded manner as to both parties, appraiser, for purposes of conducting an appraisal, was disinterested and was qualified to act.

4. Insurance ⚡570

Under an appraisal agreement between insured and insurer providing that each party shall appoint a "disinterested" appraiser, in event amount of fire loss could not be agreed upon, and authorizing either party to apply to court for appointment of a "disinterested umpire", if appraisers failed to agree upon an umpire, it is appropriate, in proceedings for appointment of umpire by court, to raise question of disinterestedness of appraisers and determination as to disinterestedness does not have to be made after making of an award pursuant to agreement.

5. Insurance ⚡571

Where several continuances were granted in response to insurer's requests in matter of appointment of an umpire to determine amount of award for smoke damage to insured's rugs, hearing on matter of qualifications of insured's appraiser was concluded on June 6, and at June 6 hearing insurer did not move that case not be heard on that day but insurer's counsel stated that insurer wanted further hearings postponed to June 11, or if that was impossible, to June 25 and insurer had ample opportunity to prepare for trial of issues and made no showing that examination of insured's appraiser prevented insurer from presenting any evidence material to issues, trial court did not abuse its discretion in denying insurer a continuance.

6. Witnesses ⚡245

In proceedings for appointment by court of an umpire, pursuant to an appraisal agreement between insured and insurer, to make determination of fire loss, where insurer had not interviewed certain witnesses and did not make an offer of proof as to their testimony, curtailment of insurer's examination of witnesses and curtailment of questions that had been asked and answered several times and as to two questions, which at most would have elicited evidence that would have been merely cumulative, did not amount to error, prejudicial or otherwise.

7. Insurance Ⓒ574(2)

Where, pursuant to terms of insurance appraisal agreement, a meeting between umpire and appraisers was scheduled to determine amount of award to insured, counsel for insurer prior to meeting sent letter to appraisers and umpire setting forth its views in the matter and two weeks before award was made insurer had knowledge that meeting had taken place, insurer could have interposed any afterthoughts it had in matter of award during two weeks prior to award and insurer's failure to do so did not invalidate award.

8. Insurance Ⓒ572

Where, under appraisal agreement, both insured and insurer were entitled, in event parties failed to agree on amount of loss, to select disinterested appraisers who were authorized to select competent and disinterested umpire, failure to give insurer formal notice of meeting of umpire and appraisers did not prejudice insurer in absence of any showing to the contrary. West's Ann.Code Civ.Proc. §§ 1287, 1288.

9. Insurance Ⓒ574(1)

Where appraisers and umpire, who had been appointed pursuant to an appraisal agreement between insurer and insured to determine amount of loss caused by smoke to insured's rugs, entered award and insurer did not seek to have umpire's signature acknowledged, absence of acknowledgment did not render award fatally defective. West's Ann.Code Civ.Proc. § 1288.

10. Insurance Ⓒ574(1)

Lack of some of elements of a formal certification or authentication of an award is not one of situations which requires vacation of an award made pursuant to appraisal agreement between insured and insurer. West's Ann.Code Civ.Proc. § 1288.

11. Insurance Ⓒ574(1)

Where umpire, who had been appointed by court to enter an award with respect to fire loss pursuant to an appraisal agreement between insured and insurer, signed an award in which he declared he concurred in findings made by insured's ap-

praiser and thereafter appraiser filed affidavit to effect that he had submitted his findings in writing to umpire and that the findings were his honest and disinterested appraisal of loss, appraiser's affidavit cured any defect which might have flowed from appraiser's failure to sign award.

12. Insurance Ⓒ574(2)

Under appraisal agreement providing that if appraisers failed to agree as to amount of fire loss suffered by insured they shall submit differences to umpire and providing that an award in writing of any two of three shall determine amount of loss, where insurer's appraiser had notice of meeting between appraisers and umpire but had no excuse, such as illness or other engagement, for not appearing and insurer's appraiser voluntarily chose not to appear, failure of insurer's appraiser to participate in appraisal did not infect award, subsequently signed by umpire, with invalidity.

13. Insurance Ⓒ574(2)

Where appraisers were selected by insurer and insured to appraise amount of fire loss, pursuant to appraisal agreement providing that appraisers shall appraise the loss and, failing to agree, shall submit their differences to an umpire and appraiser appointed by insurer arbitrarily and unfairly refused to act with appraiser appointed by insured and voluntarily did not appear at a meeting with umpire, umpire had power to make an award and insurer could not defeat award on theory that insurer's appraiser had not been given an opportunity to agree or disagree with insured's appraiser.

14. Insurance Ⓒ571

Where court entered order appointing an umpire to act pursuant to appraisal agreement between insured and insurer but added proviso that if that umpire declined or failed to act then another umpire was appointed as alternate, first umpire wrote court that he would be unable to serve but thereafter, two days later, revoked his refusal to act and court sent copies of letters to insurer notifying it that first appraiser would act as umpire in matter, alternate

umpire had not replaced first umpire and first umpire had authority to act with respect to award.

15. Insurance ☞574

Where motion to vacate an award, which determined amount of fire loss sustained by insured, stated that motion would be based on notice, petition of insurer, affidavit and memorandum of points and authorities in support of motion and no mention was made of intent to use oral testimony or to examine any witnesses and there was no evidence in record that competent evidence was offered at hearing of motion and rejected, insurer had not been prejudicially denied right to produce witnesses and to cross-examine affiants upon hearing of motion by refusal to grant delay to some later date.

Bert W. Levit, Victor B. Levit, Long & Levit, San Francisco, for appellant.

Bernard Allard, Oakland, Leon G. Seyranian, Oakland, of counsel, for respondent.

FRED B. WOOD, Justice.

[1,2] These are appeals from (1) an order appointing an umpire to determine the amount of fire loss under a policy of insurance issued to Don C. Falloon by Caledonian Insurance Company (No. 17492), (2) an order denying a motion to vacate the appraisal of a fire loss sustained by the insured (No. 17566), and (3) from a subsequent order which denied a motion to va-

cate the order mentioned in clause (2) above (No. 17566). The appeals mentioned in clauses (1) and (3) above, must be dismissed because taken from nonappealable orders¹ but the points raised by the appellant company are available for review upon the appeal mentioned in clause (2).

Rugs and linoleum belonging to the insured were damaged by smoke. He and the company failed to agree as to the amount of the loss.

This brought into play provisions of the policy which declare that if the parties fail so to agree, each shall "select a competent and disinterested appraiser" who shall "select a competent and disinterested umpire." If the appraisers fail for 15 days to agree upon an umpire, the umpire shall be selected upon the request of the insured or of the company, by a judge of a court of record in the state in which the appraisal is pending. The appraisers shall then appraise the loss. If they fail to agree they shall submit their differences to the umpire. An award in writing of any two of the three shall determine the amount of the loss.

To serve as appraisers, the insured appointed Robert W. Elfving and the company appointed Ben B. Smith. The appraisers failed for 15 days to agree upon an umpire. Upon ex parte application of the insured an order was made by the superior court appointing an umpire. That order was held invalid for lack of notice to the company. *Caledonian Insurance Co. v. Superior Court*, 140 Cal.App.2d 458, 295 P.2d 49.

1. We need not, for this purpose, decide whether this is an arbitration proceeding governed by sections 1280-1293 of the Code of Civil Procedure or a proceeding that comes within the general equity jurisdiction of the court, for neither of the orders mentioned in clause (1) or in clause (3) qualifies as an appealable order under section 1293 or under section 963 of the code.

Concerning the nonappealability of an interlocutory order in an arbitration proceeding, see *Sjoberg v. Hastorf*, 33 Cal. 2d 116, 199 P.2d 668. It is true that in *Cecil v. Bank of America*, 107 Cal.App. 2d 38, 236 P.2d 408, an appeal from an order refusing to disqualify an arbitrator

was entertained. However, it does not appear that the question of appealability was presented to the court for consideration. Furthermore, it does appear that appellant Cecil had asked that an allegedly interested arbitrator be removed or be enjoined from acting. It is conceivable, therefore, that the reviewing court may have treated it as an appeal from an order refusing to grant an injunction.

As to the nonappealability of an order denying a motion to vacate an appealable order, see *Mather v. Mather*, 22 Cal.2d 713, 720, 140 P.2d 808, and *Knox v. Knox*, 129 Cal.App.2d 795, 797, 277 P.2d 854.

Thereafter the insured filed a new petition for appointment of an umpire. The company filed an answer. After trial of the issues thus framed, the court appointed Wilbur J. McDaniel as umpire, finding him capable and qualified; also finding Ben B. Smith and Robert W. Elfving duly appointed, qualified and acting appraisers.

After the loss was appraised, the company moved to vacate the award upon various grounds. This motion after a hearing was denied.

Our examination of the record convinces us that none of the asserted defects or irregularities operated to vitiate any phase of the judicial proceedings involved or the appraisal and that the order refusing to vacate the appraisal should be affirmed.

[3] (1) *Did the evidence show as a matter of law that Mr. Elfving, the appraiser appointed by the insured, was not disinterested?* No.

Mr. Elfving was in the employ of Walton Moore, selling goods for Moore upon a commission basis. At the time of Elfving's appointment in November, 1955, the insured was one of 100 to 150 of Moore's customers to whom Elfving sold on behalf of Moore, but he had made no sales to the insured since January, 1956. Our attention has been directed to no evidence that the insured was still a customer or potential customer of Moore. There is evidence that since January, 1956, Elfving has not been assigned by Moore to territory in which the insured's business is located. Elfving testified repeatedly that he could act in a fair-minded manner as to both parties. These facts do not establish disqualification as a matter of law. See *Cecil v. Bank of America*, 107 Cal.App.2d 38, 236 P.2d 408. This is unlike the case of the stockholder deemed disqualified to act as umpire because his firm became an agent of one of the parties to the arbitration after his appointment as umpire and before the arbitration. *Schwartzman v. London & Lancashire Fire Ins. Co.*, 1927, 318 Mo. 1089, 2 S.W.2d 593.

[4] In its closing brief in No. 17492 appellant cites *Petition of Dover Steamship*

Company, D.C., 143 F.Supp. 738, as holding that it is incompetent under the Federal Arbitration Act for a federal court to determine the disinterestedness of an appraiser or arbitrator until after the making of the award. It invokes that case as authority for the contention that in our case the trial court prematurely decided the qualifications of Mr. Elfving.

We do not find the *Dover Steamship* ruling applicable, especially in view of the fact that in that case the arbitration agreement (in contrast to the appraisal agreement in this case) did not require an arbitrator or an appraiser to be "disinterested."

Where, as here, the appraisal agreement requires each party to appoint a "disinterested" appraiser and authorizes either party to apply to a court for the appointment of a "disinterested umpire" if the appraisers fail to agree upon such an umpire, it would seem quite appropriate in any such proceeding for either party to raise the question of disinterestedness of an appraiser. The parties are rightfully in court for the appointment of an umpire. The question whether the parties have appointed disinterested appraisers would seem reasonably relevant to the question whether the court should presently exercise its power of appointment; i. e., if the question is raised by either party. Why wait until the award has been made and then vacate it because one of the appraisers lacked the quality of disinterestedness from the very date of his appointment?

This does not necessarily mean that a party must raise such a question at this stage or be foreclosed from later raising it, nor does it mean that a finding of disinterestedness made at this stage of the proceeding precludes a party from later questioning the disinterestedness of an appraiser upon the basis of facts occurring subsequent to the date of such a finding.

We conclude it was quite proper for appellant to question the disinterestedness of Mr. Elfving at the time it did and for the court to decide that question as of that time in the proceeding for an appointment of umpire.

[5] (2) *In the proceeding for the appointment of the umpire did the court abuse its discretion when it denied appellant a continuance? No.*

Several continuances were granted in response to appellant's requests therefor. On May 7, 1956, appellant's counsel said he would be ready within ten days. On May 29 the matter came on for trial. The court examined the issue of the bias of respondent's appraiser. On June 1 appellant filed a notice of motion to continue to June 25. At the June 6 hearing, counsel did not move that the case not be heard on that day, but stated that he wanted further hearings postponed to June 11, or, apparently, if that was not possible, to the 25th. The matter was actually concluded on the 6th as to Mr. Elfving's qualifications, so there was no necessity for naming another day on which to proceed. It appears that counsel had ample opportunity to prepare for the trial of the issues which he himself had raised in the proceeding. He has made no showing that starting the examination of Mr. Elfving on May 29 and continuing and completing it on June 6, prevented him from presenting any evidence material to the issues.

[6] (3) *In the proceeding for appointment of an umpire, was appellant's examination of witnesses unduly curtailed? No.*

The asserted curtailment pertained to questions that had been asked and answered several times and two questions which at most would have elicited evidence that would have been merely cumulative.

Appellant also sought a continuance for the purpose of examining certain witnesses whom he had not interviewed and concerning whose testimony he made no offer of proof. Indeed, he was unable to make any offer of proof.

We perceive therein no error, prejudicial or otherwise.

[7, 8] (4) *In the appraisal process, were appellant's rights to notice and an opportunity to present evidence violated? No.*

Appellant claims it was prejudiced by the asserted failure to give it formal notice

of a meeting of the umpire and the appraisers held on July 7, 1956. There is some question whether it was entitled to notice and an opportunity to present evidence (see *Sapp v. Barenfeld*, 34 Cal.2d 515, 521-522, 212 P.2d 233), a question we need not decide. As early as July 4, counsel for appellant knew that such a meeting was imminent and wrote a letter to the appraisers and the umpire setting forth appellant's contentions in the matter. Moreover, counsel knew two weeks before the award was made that the July 7 meeting had taken place and could have interposed any afterthoughts he had in the matter during those two weeks. His failure to do so did not invalidate the award.

Appellant relies upon *Stockwell v. Equitable F. & M. Ins. Co.*, 134 Cal.App. 534, 25 P.2d 873. It is not applicable because of elements of collusion there involved. Incidentally, the court in that case recognized that notice is not always essential, saying "[t]here are cases which hold that this service of notice may be waived by the interested parties." 134 Cal.App. at page 542, 25 P.2d at page 876. Nor is *Stockton, etc., Works v. Glen Falls Ins. Co.*, 98 Cal. 557, 33 P. 633, applicable. There the court set aside an award because there had been no true appraisal.

Moreover, appellant did not allege any facts from which it could be inferred that it was prejudiced by the asserted failure to give notice. See *Code of Civil Proc. § 1288* and *Pacific Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal.2d 228, 240-241, 174 P.2d 441.

[9] (5) *Did the failure to acknowledge the award render it fatally defective? No.*

In an arbitration proceeding, any party may apply for confirmation "within three months after the award * * * which award must be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate * * *" (*Code of Civ.Proc. § 1287*).

The award was evidenced by a letter of July 24, 1956, from the umpire to appellant. The writer's signature was not acknowl-

edged or otherwise proved at the time. Without seeking such proof appellant on August 1, 1956, filed its petition to vacate the award.

We do not think the lack of acknowledgment or equivalent proof was fatal here. Such proof would serve the purpose of giving the parties assurance that the acknowledged document is indeed the award and start the time within which either party might petition to confirm the award. Appellant apparently considered it had sufficiently reliable information to justify its initiation of a proceeding to vacate the award. And, as it happened, during the course of that proceeding, both the umpire and respondent's appraiser filed affidavits stating that this was in fact their award.

[10] Moreover, lack of some of the elements of a formal certification or authentication is not one of the situations in which the statute declares a court "must" vacate an award. Code Civ.Proc. § 1288.

Under these circumstances we perceive no prejudice to appellant's rights. Had appellant chosen to disregard the award, and later claimed the lack of acknowledgment as a defense to a demand to act under the award, the demand conceivably might be found premature.

[11] (6) *Was the award fatally defective because not originally signed by appraiser Elfving?* No.

In the award signed by the umpire he declared that he concurred in the findings made by appraiser Elfving. Elfving made and filed in this proceeding his affidavit that he submitted his findings in writing to the umpire and that they were his honest and disinterested appraisal of the loss suffered by respondent. We think this cured any defect that may have flowed from Elfving's failure to sign the award in the first instance. (Our discussion of point (5) applies here.)

[12] (7) *Did the failure of appraiser Smith (appointed by appellant) to partici-*

pate in the appraisal infect it with invalidity? No.

From the affidavits presented by appellant and respondent, respectively, it reasonably appears that appraiser Smith had notice of the July 7 meeting, had no excuse, such as illness or other engagement, for not appearing, and voluntarily chose not to appear. The law can not suffer appellant to take advantage of such a refusal by its own appointed appraiser to participate and thus utterly frustrate the entire appraisal proceeding.

[13] (8) *Did the umpire have power to act in the absence of the company-appointed appraiser?* Yes.

Appellant directs attention to that portion of the insurance policy which says that "the appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of the loss." (Emphasis added.)

Appellant says that its appraiser was not given an opportunity to agree or disagree with the other appraiser, and would have us conclude that the event never occurred which conferred upon the umpire the power and duty of acting. The fallacy of this argument is the fact that it overlooks the finding (expressed in an opinion filed by the trial judge and amply supported by the evidence) to the effect that the appraiser appointed by appellant "arbitrarily and unfairly" refused to act with the appraiser appointed by the respondent. (Our discussion of point (7) applies here.)

[14] (9) *Did the person originally named as umpire fail to accept his appointment as umpire?* No.

The order appointing an umpire designated one Wilbur McDaniel as such but added a proviso that if he declined or failed to act then one Harry Polse was appointed as alternate to act in the place of McDaniel.

McDaniel wrote the court he would be unable to serve. On the same day Polse wrote the court that he would accept the appointment "upon notification." Two days later McDaniel revoked his refusal to act. Subsequently and on July 5, 1956, the Court wrote Polse (sending copies to the appraisers and to counsel for the parties) referring to McDaniel's revocation of his refusal and stating that "Mr. McDaniel by his acceptance and pursuant to the order previously made, will act as umpire in this matter." Groundless, therefore, is appellant's contention that Polse replaced McDaniel as umpire and that the latter's participation in the appraisal process was without authority.

[15] (10) *Was appellant erroneously and prejudicially denied the right to produce witnesses and to cross-examine respondent's affiants upon the hearing of its motion to vacate the award?* No.

Appellant initiated the proceeding to vacate the appraisal or award by means of a written "motion to vacate" setting forth most of the grounds discussed in paragraphs (1) to (9) of this opinion. This notice declared that "said motion will be based upon this notice, petition of Caledonian Insurance Company, affidavit of Victor B. Levit, affidavit of Ben B. Smith, and memorandum of points and authorities in support of motion to vacate award, copies of which are served herewith." No mention was made of intent to use oral testimony or to examine any witnesses.

The engrossed statement on appeal states that the following occurred at the hearing on the motion: "Mr. Levit stated that, after looking over the affidavits served and filed in opposition to the Petition, he wished to cross-examine the persons who signed such affidavits and to produce oral testimony in support of said Petition, but that he was not then and there immediately prepared to produce any such oral testimony." In the order denying the motion to vacate the award the court declared "[i]t was not indicated that the motion would be based upon oral testimony, and none has been received."

Appellant contends that it was a "denial of appellant's right to a fair hearing" not to receive oral evidence. This contention is overruled upon the ground that there is no showing in the record that competent evidence was offered at the hearing of the motion and rejected. The engrossed statement indicates that counsel merely requested a delay to some later date. There is nothing in the record to indicate what that evidence might have been so as to enable a court to form a conclusion as to whether its exclusion was prejudicial. It may well have been cumulative of the evidence in the affidavits and unnecessary to a decision of even the factual disputes.

We conclude that it was within the trial judge's discretion to refuse appellant's nebulous request. See *People v. Kirk*, 109 Cal.App.2d 203, 209, 240 P.2d 630; *Muller v. Muller*, 141 Cal.App.2d 722, 731, 297 P.2d 789.

The order denying the motion to vacate the appraisal or award is affirmed. The appeals from the other two orders are dismissed.

PETERS, P. J., and BRAY, J., concur.



161 Cal.App.2d 485

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

ONE 1955 FORD CROWN VICTORIA, License No. FRU 756, Serial No. U5RW 152111, Defendant,

Bank of America National Trust and Savings Association, Legal Owner and Respondent.

Civ. 5499.

District Court of Appeal, Fourth District, California.

June 19, 1958.

Hearing Denied Aug. 13, 1958.

Proceeding to forfeit interests of registered owner and mortgagee in automobile

allegedly used to unlawfully convey marijuana. From portion of judgment of Superior Court of San Diego County, Arthur L. Mundo, J., excepting mortgagee's interest from forfeiture, the state appealed. The District Court of Appeal, Griffin, Acting P. J., held that the evidence sustained finding that mortgagee had made reasonable investigation of moral responsibility, character and reputation of mortgagor before mortgage interest in automobile was created.

Portion of judgment appealed from affirmed.

1. Forfeitures ☞5

Where, in substance, from all the information furnished, one might reasonably deduce that purchaser or mortgagor was of good character and moral responsibility, direct inquiry of his employer as to character or morals of purchaser or mortgagor, particularly as to use of narcotics, is not essential to satisfy statutory requirement as to reasonable investigation of moral responsibility, character and reputation of purchaser or mortgagor before acquiring interest in automobile as a prerequisite to protection of such interest against forfeiture for use of automobile in violation of narcotics laws. West's Ann.Health & Safety Code, § 11610 et seq.

2. Forfeitures ☞5

In proceeding to forfeit interests of registered owner and lien claimant in automobile seized for unlawful transportation of marijuana, evidence sustained finding that interest of lien claimant under chattel mortgage taken as security for loan to purchase automobile was created only after reasonable investigation of moral responsibility, character and reputation of mortgagor, as required by statute in order to protect interest of lien claimant against forfeiture. West's Ann.Health & Safety Code, § 11610 et seq.

3. Forfeitures ☞5

Under statute requiring proof that lien on automobile was created after reasonable

investigation of moral responsibility, character and reputation of purchaser or mortgagor as a prerequisite to protection of such interest against forfeiture for use of automobile in violation of narcotics laws, action of lien claimant must be governed by a reasonable consideration of facts of each case. West's Ann.Health & Safety Code, § 11610 et seq.

4. Forfeitures ☞5

Reviewing court will not interfere with judgment excepting from forfeiture lien claimant's interest in automobile used in violation of narcotics laws, where record discloses substantial evidentiary support for finding that lien claimant made reasonable investigation of moral responsibility, character and reputation of mortgagor. West's Ann.Health & Safety Code, § 11610 et seq.

Edmund G. Brown, Atty. Gen., and Bonnie Lee Hansen, Deputy Atty. Gen., for appellant.

Samuel B. Stewart, San Francisco, Hugo A. Steinmeyer, Anthony T. Oliver, Jr., and Winfield Jones, Los Angeles, for legal owner and respondent.

GRIFFIN, Acting Presiding Justice.

This proceeding was instituted by plaintiff-appellant The People of the State of California, under section 11610 et seq. of the Health and Safety Code, to forfeit the interests of Ismael Herrera, the registered owner, and the respondent Bank of America National Trust and Savings Association, lien claimant (hereinafter referred to as the Bank) under a chattel mortgage on the described Ford automobile.

The court found the car was used by Herrera on October 6, 1956, to unlawfully convey marijuana found in a wallet on his person, in violation of section 11610, supra, and that the interest of the claimant Bank was created in the vehicle after a reasonable investigation of the moral responsibility, character and reputation of the purchaser, as prescribed by that section.

The main question presented on this appeal is the sufficiency of the evidence to support this finding. Based thereon, the interest of the registered owner was forfeited to the State subject to the lien of the claimant Bank in the sum of \$879.64. The court ordered the said vehicle or sufficient proceeds from the sale thereof to pay the lien, be delivered or paid to defendant Bank and adjudged that said Bank had a valid interest in the vehicle in the amount indicated. Plaintiff appeals from this portion of the judgment, claiming that there was an insufficient showing of investigation as to moral responsibility, character and reputation of the purchaser, and cites such authority as *People v. One 1955 Oldsmobile Hardtop*, 159 Cal.App.2d 365, 323 P.2d 1059; *People v. One 1952 Ford Sedan*, 146 Cal. App.2d 183, 303 P.2d 832; *People v. One Harley-Davidson Motorcycle*, 5 Cal.2d 188, 53 P.2d 970; *People v. One Lincoln Eight*, etc., 12 Cal.App.2d 622, 55 P.2d 925; and *People v. One 1939 Buick 8 Coupe*, 43 Cal. App.2d 411, 110 P.2d 1013.

It was stipulated that at the time the Bank acquired its interest it had no knowledge that the vehicle was to be used for unlawful purposes and that the unpaid balance owing the Bank on the chattel mortgage was \$879.64. The evidence shows that after crossing the Mexican border Herrera was directed to park his car. He was searched and in his wallet was found a crushed marijuana cigarette which looked like it had been there for some time. Marijuana seeds were found on the floor of the car. Subsequently he was, in a criminal action on a charge of possession, found not guilty. It is conceded this acquittal would not be determinative of the issues presented in this civil action. *People v. One 1950 Cadillac 2-door Club Coupe*, 133 Cal.App.2d 311, 284 P.2d 118.

As to the investigation made, the evidence includes two documentary exhibits and the testimony of witnesses which will be summarized in the light most favorable to the lien claimant. Herrera, aged 21, in August 1956, applied to defendant Bank for a loan to purchase the automobile here involved.

He was directed to fill out an application for a personal loan of \$1,485 to purchase the car. (Exhibit AA, dated August 10, 1956.) Therein he recited his age, residence, telephone number, name and address of his employer, and that he had been employed there one year as meat packer and was earning between \$300 and \$450 per month. He gave the Bank of America at Chula Vista as the branch where he carried his account and that his nearest relative not living with him was his sister. He gave her name and address. He also furnished the names and addresses of individuals or concerns with whom he had credit dealings and the amounts paid by him per month on his obligations to them. The officer in the Bank then told him to return after an investigation had been made by the Bank. He testified he first gave him this form of application because it required the applicant to answer in detail more questions about himself than the Bank would ordinarily require on a direct loan on an automobile, particularly so due to the applicant's age; that he did not immediately decide to make the loan, and after investigation told the applicant to come back several different times for further interviews; that in the meantime the Bank checked on his employment with the firm named and verified the fact that he had been with that company for one year; that he had a savings account with the Bank indicated and that he was a customer of that Bank at the time; that the Bank's dealings with him had been satisfactory; that this bank maintained a central file reflecting any past transactions of applicants for loans and the history of such applicants; that a report was returned to him: "No record" adverse or otherwise; that had any of the banks in California known of any derogatory information about previous lending it would have been reported; that he purposefully personally interviewed and conversed with the applicant on these several occasions to determine his personal appearance, honesty and character; that the persons or firms with whom or for which he had dealt were contacted and the result of the information obtained was that Herrera had a

"satisfactory" or "very satisfactory" rating; that his five years of experience in that business made him a fairly good judge as to whether or not a person may or may not pay; and that he had no misgivings relative to Herrera's character; that he felt further inquiry would not be necessary in this case; that he evaluated the fact that a year's employment with one firm spoke well for his character; and that considering all of this, together with his personal observation of the man, he "felt that he was a man of good character". It then appears that to further satisfy the Bank, they had Herrera fill out the standard form of application for credit and insurance (Exhibit BB) pertaining to a motor vehicle. It was dated August 20, 1956. He gave additional information, including Social Security number, driver's license number, and the description of the car intended to be purchased. He testified they then finally decided to grant the requisite loan.

[1] It does appear that the Bank did not contact the applicant's sister as to Herrera's character and did not directly question his employer as to whether he was a user of narcotics or such related habits. The court, as well as the bank, might well have believed that his sister would not degrade him and that any such inquiry would not be of much benefit in determining his real moral character. A direct question of the employer as to the employee's character is not essentially necessary if, in substance, from all the information furnished, one might reasonably deduce that he was of good character and moral responsibility. It has been said that the law does not require lenders to ask specific questions as to a borrower's morals, particularly as to his use of narcotics, since it might be detrimental to the employee or raise doubts in the mind of his employer. *People v. One 1955 Chevrolet Bel Air*, 157 Cal.App.2d 851, 321 P.2d 870. Herrera was a boy of 21 years of age and

it does not appear that he had ever been arrested or accused of this or any other offense prior to this time. There is no showing that any facts were known to the mortgagors which might indicate that Herrera was not of good moral responsibility or of good character and reputation.

[2-4] We conclude that the trial court was justified in finding that there was sufficient credible evidence to satisfy a reasonably prudent person of the borrower's moral character under the statute in question, as it existed at the time the investigation was made. *People v. One 1953 Pontiac*, 135 Cal.App.2d 195, 286 P.2d 885; *People v. 1957 Ford 2-Door Sedan*, 160 Cal.App.2d 797, 325 P.2d 676; *People v. One 1954 Chevrolet Bel Air*, 140 Cal.App.2d 934, 296 P.2d 55; *People v. One 1949 Ford Tudor Sedan*, 115 Cal.App.2d 157, 251 P.2d 776; *People v. One 1941 Cadillac Club Coupe*, 63 Cal.App.2d 418, 147 P.2d 49; *People v. One 1955 Chevrolet Bel Air*, *supra*; *People v. 1952 Ford Sedan*, 146 Cal.App.2d 183, 303 P.2d 832; *People v. One 1940 Chrysler Coupe*, 48 Cal.App.2d 546, 120 P.2d 117. It was properly said in *People v. One 1939 Buick Coupe*, 56 Cal.App.2d 163, 167, 132 P.2d 308, 310:

"In the absence of any more definite or extensive requirements for such investigation the action of such lender must be governed by a reasonable consideration of the facts of each case. When such consideration has been exercised according to the circumstances it is not proper for the reviewing courts to interfere with the judgment 'if the record discloses any substantial evidentiary support therefor.'" (Citing cases.)

The portion of the judgment from which this appeal has been perfected is affirmed.

MUSSELL, J., and McCABE, J. pro tem., concur.

EASTWOOD HOMES, Inc., a corporation,
Plaintiff and Respondent,

v.

K. P. HUDSON et al., Defendants,

Lafayette Land Company, a partnership,
and K. P. Hudson, Defendants and
Appellants.

No. 17635.

District Court of Appeal, First District,
Division 1, California.

June 23, 1958.

Rehearing Denied July 23, 1958.

Hearing Denied Aug. 21, 1958.

Action for breach of contract to convey by which plaintiff, a subdivider needing adjoining land for further subdividing was to purchase such property from the defendants who were to deed the property to a title company in escrow and wherein plaintiff was to pay for the property only after it had constructed homes thereon and sold them. Judgment for plaintiff in the Superior Court, County of Contra Costa, Wakefield Taylor, J., and the defendants appeal. The District Court of Appeal, Bray, J., held that the evidence did not establish that plaintiff was guilty of an anticipatory breach of contract; that the contract was not void for uncertainty and lack of mutuality and that the trial court applied the proper measure of damages.

Judgment affirmed.

I. Vendor and Purchaser ⇨350

Where plaintiff was a subdivider and needed adjoining land for further subdividing and defendants owned such land and property was to be deeded to a title company in escrow and the plaintiff was to pay for the property only after it had constructed homes thereon and sold them, in action for breach of contract to convey, evidence sustained finding that plaintiff performed its portion of the contract and made no anticipatory breach and that defendants breached the contract by refusing to deed the property to the plaintiff.

2. Mechanics' Liens ⇨199

Vendor and Purchaser ⇨77

Where plaintiff was a subdivider and needed adjoining land for further subdividing and defendants owned such land and property was to be deeded to a title company in escrow and the plaintiff was to pay for the property only after it had constructed homes thereon and sold them, fact that subjecting the property of defendants to a construction loan would have deprived them of a vendor's lien as a first lien upon the property was immaterial where the parties so intended it, and in any event defendants' vendor's lien would have been subject to mechanics' liens arising from the construction of houses upon the property.

3. Vendor and Purchaser ⇨251

A vendor's lien does not arise until the vendors transfer the legal title to the vendee.

4. Contracts ⇨313(1)

A repudiation of an original contract must be unequivocal.

5. Contracts ⇨323(1)

Repudiation of a contract is a question of intent to be determined ordinarily as a fact.

6. Contracts ⇨10(5)

Vendor and Purchaser ⇨21

Where plaintiff was a subdivider and needed adjoining land for further subdividing and defendants owned such land and property was to be deeded to a title company in escrow and the plaintiff was to pay for the property only after it had constructed homes thereon and sold them, the contract was not void for uncertainty and lack of mutuality notwithstanding the contract did not expressly state that moneys for house construction would come from a construction loan where it was necessarily implied therein.

7. Specific Performance ⇨28(1)

A greater amount of certainty is required in an agreement which is to be specifically enforced in equity than is necessary in an action for damages at law.

8. Contracts ⇨10(5)

Where plaintiff was a subdivider and needed adjoining land for further subdividing and defendants owned such land and property was to be deeded to a title company in escrow and the plaintiff was to pay for the property only after it had constructed homes thereon and sold them, contract did not lack mutuality because there was no time limit fixed for payment, in that the price was not to be paid absolutely but only out of escrow and there was no promise by plaintiff to build any house nor was the type of house or its cost expressed, in view that plaintiff by agreeing to pay from a certain fund, obligated itself to do those acts which would bring the fund into existence. West's Ann.Civ.Code, §§ 1643, 1656.

9. Contracts ⇨168

Under the statutes, courts are not empowered under the guise of construction to depart from the plain meaning of the contract and insert a term or limitation not found therein but implied covenants are justified when they are not inconsistent with some express term of the contract, and in the absence of such implied terms the contract could not effectively be enforced. West's Ann.Civ.Code, §§ 1643, 1656.

10. Vendor and Purchaser ⇨79, 322

Where plaintiff was a subdivider and needed adjoining land for further subdividing and defendants owned such land and property was to be deeded to a title company in escrow and the plaintiff was to pay for the property only after it had constructed homes thereon and sold them, where plaintiff was obligated to pay \$2,800 per lot out of a fund to be realized in a certain way, there was an implied obligation to use reasonable diligence in performing the act upon which the payment was contingent, and in default of due diligence, payment became due without the performance of the condition, and in event plaintiff failed to use such diligence defendants would have been able to seek damages from the plaintiff for failure to pay as promised.

11. Vendor and Purchaser ⇨351(1)

The test of bad faith in refusal to perform a contract is merely whether the party deliberately or without just cause or excuse refused to perform the contract.

12. Vendor and Purchaser ⇨351(1)

Where plaintiff was a subdivider and needed adjoining land for further subdividing and defendants owned such land and property was to be deeded to a title company in escrow and the plaintiff was to pay for the property only after it had constructed homes thereon and sold them, award of damages to plaintiff for breach of contract of \$6,000 paid by plaintiff plus \$14,500, constituting difference between price agreed to be paid in the agreement for the property, and the value of the property at the time of defendants' refusal to convey was proper where evidence supported finding that defendants refused to convey without just cause or excuse. West's Ann.Civ.Code, § 3306; West's Ann.Bus. & Prof.Code, §§ 11538, 11541.

13. Joint Adventures ⇨1.15

Where plaintiff was a subdivider and needed adjoining land for further subdividing and defendants owned such land and property was to be deeded to a title company in escrow and the plaintiff was to pay for the property only after it had constructed homes thereon and sold them and if purchase price was to come out of the sale price of both the house and lot in action for breach of the agreement, evidence did not establish that the parties were joint adventurers.

Carlson, Collins, Gordon & Bold, Richmond, Fitzgerald, Abbott & Beardsley, Oakland, for appellants.

Hoey, Hoey, Hall & Conti, Sam W. Hall, Tinning & DeLap, Robert Eshleman, Martinez, for respondent.

BRAY, Justice.

Defendants Lafayette Land Company, a partnership, and K. P. Hudson appeal

from a judgment in favor of plaintiff in the sum of \$20,500.

Questions Presented.

1. Sufficiency of the evidence. This depends primarily upon whether or not plaintiff was guilty of an anticipatory breach.

2. Was the contract void for uncertainty and lack of mutuality?

3. Was the measure of damages incorrect?

1. Evidence.

Plaintiff was engaged in the business of constructing and selling houses and was developing a small subdivision in Lafayette. It was interested in the subject property in order to expand its subdivision. Defendant Lafayette Land Company was a partnership in which defendant Hudson was the sole general partner and Shahbazian and Cleverdon were limited partners. Lafayette Co. owned the property and had filed a tentative map of it with the County Planning Commission. Cleverdon Co. was in the business of grading, paving and constructing sewer and drainage facilities. The company was owned by Cleverdon, who was president, Shahbazian and Cleverdon's sister-in-law. Grading of the property had been begun by Cleverdon Co. and an indebtedness of Lafayette Co. to Cleverdon Co. therefor in the sum of \$4,000 incurred. Lafayette Co. had no funds with which to develop the property and was relying therefor on Cleverdon Co. and plaintiff, if plaintiff could be interested in the property. On July 1, 1954, plaintiff and Lafayette Co. entered into an agreement for the purchase by plaintiff of the property. The terms of the contract important here and as modified by changes made July 19th, follow: Plaintiff agreed to purchase 29 lots as designated on the tentative map above mentioned for \$2,800 per lot. Lafayette Co. agreed to complete the filing of the map with the county and the California Real Estate Commissioner, and was to level each lot for homesite according to plot plans fur-

nished by plaintiff and as required for F. H. A. and G. I. loans. Grading and certain other work on 17 lots was to be completed by Lafayette Co. by September 10th. Plaintiff was to advance to Lafayette Co. for sewers, curbs and grading an amount not to exceed \$14,000 payable weekly based upon the work accomplished. Plaintiff was to advance monies to cover the cost of installing road pavements, payments likewise to be made weekly based upon the work accomplished, pavement to be completed within 30 days after plaintiff determines the starting date, which must not be later than October 1st. All moneys advanced are to be deducted proportionately from the selling price of the lots "when the house and lot is sold and cleared through escrow." "As each lot and house is sold, the full purchase price \$2,750, less the proportionate amount of the monies advanced to Lafayette Land Company and Ebmud, will be paid to Lafayette Land Company out of escrow." (Emphasis added.)¹ Plaintiff paid Lafayette \$500 on the execution of the contract and was to pay it \$1,500 five days thereafter, "at which time Lafayette Land Company will issue instructions to the Title Company to deed seventeen (17) lots" to plaintiff, "post bond with Contra Costa County and start grading on the seventeen lots." Plaintiff agreed to purchase the remaining 12 lots within 24 months.

Plaintiff's secretary-treasurer, Monson, represented plaintiff in the transaction. He was informed that the tentative map had been presented to the planning commission and that the final map was ready for filing. After the contract was executed, he frequently informed Lafayette Co. of the necessity of filing the final map, since plaintiff could not go through the requisites of building on the subdivision until the map was filed. Plaintiff paid the \$1,500 required by the contract. In July Monson saw that Cleverdon Co. was grading on the property. He objected to its being done un-

1. The lot price was originally \$2,750. It was changed to \$2,800 on the first page

of the agreement, and inadvertently not changed in the above clause.

til the map was filed. Defendant Hudson promised to have the map filed as fast as possible.

Toward the end of July, Cleverdon Co. needed money to meet its payroll. Cleverdon and defendant Hudson told one Koepke, bookkeeper for Cleverdon Co., to get \$4,000 from plaintiff. Koepke advised Monson of the necessity for this money. Monson asked where the map was. Koepke said they were working on it and unless Cleverdon got some financial help work would have to stop and plaintiff would never get the map. Monson told Koepke to stop the work. Actually, at this time, while Lafayette Co. owed Cleverdon approximately \$4,000, only \$2,000 of the indebtedness was due for work on the subject property. Monson then notified Hudson that plaintiff did not feel safe in paying for grading work until the map was filed and asked Hudson to give a deed of trust on the property. Hudson refused. However, plaintiff paid the \$4,000 when a deed of trust arrangement on adjacent property owned by Cleverdon and Shahbazian was made, which deed of trust was to be reconveyed upon Lafayette's crediting the \$4,000 and the \$1,500 on plaintiff's agreement. When plaintiff paid the \$4,000 he again asked that the map be recorded.

Cleverdon continued work on the property. Plaintiff was not asked for more money. The final map was approved by the board of supervisors November 3rd and recorded November 5th. At that time the title company man who had worked out the deed of trust arrangement, prepared, on his own initiative, a holding agreement which he sent to the parties. It provided that Lafayette would transfer title to the title company and then the property could be conveyed to plaintiff for the purpose of obtaining construction loans, and then reconveyed to the title company. Then when \$2,775 per lot was received by the title company the lot would be reconveyed to plaintiff's order. Plaintiff had nothing to do with the insertion of \$2,775 instead of the agreed price of \$2,800 in the holding agreement. Nor did it expect to pay less than \$2,800. Monson on receiving the agreement brought it to the title company

man for explanation and then signed it. Hudson refused to sign although he testified that he might have offered to sign it under his own instructions. In November a conference was had between plaintiff and defendants (except Cleverdon). The parties disagree as to what was said at this conference. Plaintiff contends it was called to meet the situation caused by the exceedingly poor work being done by Cleverdon Co. and that all that was discussed was the elimination of Cleverdon Co. and the suggestion that plaintiff do the work itself deducting the cost from the purchase price. The proposed holding agreement was not discussed nor was any suggestion made that plaintiff was in default. Defendants claim that they objected to the proposed holding agreement, both because of the mention therein of \$2,775 per lot instead of \$2,800, and of the provision to the effect that plaintiff was to obtain a building loan on the property before paying for the lots.

The main difference between the parties is whether the agreement contemplated that the title to the property should be deeded to plaintiff so that it could obtain a construction loan on it. Plaintiff did not default. Under the contract it paid \$2,000 and advanced \$4,000. Its further advances were only to be made "weekly based upon the work accomplished." At the time it advanced \$4,000 the work accomplished came to approximately \$2,000 only. At no time thereafter was it presented with estimates of the work accomplished nor a demand made for any further advances. As to the mention of \$2,775 as the lot price in the proposed holding agreement, the evidence supports the conclusion that this was the error of the title company man and that at no time was plaintiff claiming that as the purchase price.

[1] The court found, in effect, that plaintiff's version that it was intended that the plaintiff be allowed to borrow on the property for the moneys with which to construct the contemplated homes, that the title be held by the title company subject to such loan, and then to be deeded lot by lot to plaintiff's order upon receipt of the

\$2,800 less moneys advanced by plaintiff, said sum to come from the sale of each lot and house, was the correct one. The court further found that plaintiff performed its portion of the contract and made no anticipatory breach and that defendants breached the contract by refusing to deed the property to plaintiff. While the evidence was in conflict, the court resolved, as it had the right to do, that conflict in favor of plaintiff. The evidence substantially supports the findings.

[2, 3] Defendants discuss at some length their contention that subjecting the property to a construction loan would have deprived them of a vendor's lien as a first lien upon the property. While this is true, the evidence shows that the parties so intended it. Moreover, even upon defendants' theory that there was to be no construction loan their vendor's lien would have been subject to mechanics' liens arising from the construction of houses upon the property. Any discussion of vendor's lien is out of place under the circumstances of this case. Under the theory of both parties the title company was to hold the title and not convey it to plaintiff until the purchase price was paid, the only difference being that under plaintiff's theory the title was to be subject to a lien for the construction money. Either way the title company would be holding the title in trust for Lafayette Co. until the purchase price was paid and hence there could be no vendor's lien. A vendor's lien does not arise until the seller transfers the legal title to the vendee. *Maltby v. Conklin*, 1920, 50 Cal. App. 201, 204, 195 P. 280.

[4, 5] Defendants cite authorities on anticipatory breach of a contract. They are not in point for the reason that the evidence here supports a finding that there was no such breach and that defendants did not treat the presentment of the proposed holding agreement as a repudiation by plaintiff but still considered the contract in effect. Under plaintiff's evidence, found to be true by the trial court, the November conference was for the purpose of pro-

ceeding under the contract with the substitution of plaintiff as the one to do the grading work instead of defendants. Such evidence is also susceptible of the finding that plaintiff was always willing to perform and pay the \$2,800 per lot, and that the holding agreement was not its but that of the title company man which, although signed by plaintiff after it was explained to Monson, was not insisted upon by plaintiff. It is significant that although defendants concede that there was to be a holding agreement they at no time suggested that the proposed one be modified in accordance with their claim as to what was intended to be in it. Plaintiff at no time unequivocally stated that the holding agreement must be in the form proposed by the title company man. For there to be a repudiation of the original contract, such repudiation must be unequivocal. (See 12 Cal. Jur. 2d § 248, p. 475.) Repudiation is a question of intent to be determined ordinarily as a fact. *Nemanick v. Christensen*, 1948, 87 Cal. App. 2d 844, 846, 197 P. 2d 785.

2. Was The Contract Void For Uncertainty And Lack Of Mutuality?

[6] No. The contract is by no means a model. However, reading the agreement in the light of the circumstances, it is clear what the agreement provided. Plaintiff was a subdivider. It needed land adjoining its subdivision for further subdividing. Defendants owned such land and wanted to dispose of it. Probably because Cleverdon, one of defendants' special partners, was engaged in the grading business, defendants proposed to do the necessary grading, sewerage, etc., for a subdivision before turning the property over to a purchaser. Both parties knew that the property was to be deeded to the title company "in escrow" and that plaintiff was to pay for the property only after it had constructed homes thereon and sold them, the lot purchase price to come out of the sale price of both house and lot. While the contract does not expressly state that the moneys for house construction would come from a construction loan it necessarily was implied therein.

The contract provides that the property is to be paid for at \$2,800 per lot, less proportionately the moneys advanced by plaintiff for grading, etc., such amount to be paid to defendant "out of escrow" "[a]s each lot and house is sold." (Emphasis added.) It is obvious that under modern subdivision practices plaintiff could not construct houses without getting a construction loan on the property and to place the property in condition for that purpose, Lafayette "will issue instructions to the Title Company to deed seventeen (17) lots of Unit No. 2." ²

Defendants concede that the contract implied a "holding agreement" was to be executed by the parties with the title company. They do not concede, however, that it was to provide for a construction loan.

[7] The first provision attacked as uncertain is that in which, after plaintiff pays \$1,500 five days after the execution of the agreement, Lafayette "will issue instructions to the Title Company to deed seventeen (17) lots" to plaintiff, post bond and start grading. The uncertainty allegedly exists in the failure to specify what "instructions" are to be given. However, the provision is certain enough to bind defendants for an obligation to convey. This they refused to do, and the evidence supports a finding that they refused to convey not because of the lack of instructions but allegedly for late payments by plaintiff. The provision is certain enough for an action for damages for failure to convey although that might not be the case if plaintiff were seeking specific performance of the contract. It has been stated that a greater amount of certainty is required in the terms of an agreement which is to be specifically enforced in equity than is necessary in an action for damages at law; that an action at law is founded upon a mere nonperformance by a defendant, and *this negative conclusion can often be established without determining all the terms of the agreement with exactness*; whereas in equity the mere fact of nonperformance is not enough since

its object is to procure performance, which object demands a clear, definite and precise understanding of all the terms before the performance can be enforced. *Pascoe v. Morrison*, 1933, 219 Cal. 54, 58, 25 P.2d 9; *Stanton v. Singleton*, 1899, 126 Cal. 657, 664, 59 P. 146, 47 L.R.A. 334.

[8] Defendants contend that the contract lacks mutuality because, say they, there is no time limit fixed for payment, the price is not to be paid absolutely and in all events but only "out of escrow" and "[a]s each lot and house is sold" and there is no promise by plaintiff to build any houses, nor is the type of house or its cost expressed.

Clarey v. Security Portland C. Co., Inc., 1929, 99 Cal.App. 783, 786-787, 279 P. 483, 485, states, quoting from *Williston*: "It is often stated as if it were a requisite in the formation of contracts that there must be mutuality. This form of statement is likely to cause confusion, and, however limited, is at best an unnecessary way of stating that there must be a valid consideration. In unilateral contracts there is never mutuality of obligation; and in bilateral agreements, though it is necessary that there shall be such a promise on each side as will furnish valid consideration, to express the idea by saying that mutuality is necessary is sure to cause confusion with the use of the same word by courts of equity * * * The particular error which is traceable to the misleading use of the word as a requirement for the formation of a contract is a tendency observable in some of the cases to hold a contract invalid because the obligation undertaken on one side is not commensurate with that undertaken on the other * * *"

A proper interpretation of the contract would make it reasonable to imply that plaintiff, by agreeing to pay from a certain fund, obligated itself to do those acts which would bring the fund into existence.

[9] It is said in section 1643, Civil Code, that a contract must receive such an interpretation as will make it lawful, operative,

2. The other 12 lots (Unit 3) were to be treated within 24 months on the same terms and conditions as the 17 lots.

definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties. And "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom * * *" (Civ.Code § 1656.) Under these sections courts are not empowered under the guise of construction to depart from the plain meaning of the contract and insert a term or limitation not found therein, but implied covenants are justified when they are not inconsistent with some express term of the contract and, in the absence of such implied terms, the contract could not be effectively performed. *Tanner v. Title Ins. & Trust Co.*, 1942, 20 Cal.2d 814, 824, 129 P.2d 383. And it has also been said that "Each party to a contract has a duty to do everything that the contract presupposes that he will do to accomplish its purpose." *Bewick v. Mechem*, 1945, 26 Cal.2d 92, 99, 156 P.2d 757, 761, 157 A.L.R. 1277. Taking the contract in the instant case as a whole, it involved more than just the transfer of title for a price. It also contemplated the full development of the subdivision. Defendants had subdivided it and had promised to do the grading and sewer work for plaintiff and plaintiff was to build on the lots and sell them using the proceeds to complete the payment of the full price. Therefore in order that the contract could be completely performed it was necessary that plaintiff build houses on the lots and sell them in that improved condition.

[10] It cannot be disputed that the plaintiff was obliged to pay \$2,800 per lot but the promise to pay the balance was out of a fund to be realized a certain way. In such cases there is an implied obligation to use reasonable diligence in performing the act upon which payment was contingent, and in default of due diligence, payment becomes due without performance of the condition. *Van Buskirk v. Kuhns*, 1913, 164 Cal. 472 at page 475, 129 P. 587, 44 L.R.A., N.S., 710, and cases cited; see also 12 Cal. Jur.2d, pp. 372-374. Those cases are not squarely in point but seem to be analogous.

They involve a situation where a debtor promises to make payment out of a fund to be realized in a certain specified manner. In those cases the promisees were seeking to recover on the debts before the funds were realized, and it was held that they could do so since the promisors had not used due diligence. Therefore here, if plaintiff, after receiving a conveyance of the lots, had not used due diligence in building houses on the lots and selling the improved lots, then the defendants would have been able to seek damages from plaintiff for failure to pay as promised.

We are not, as defendants contend, dealing with a modification of the contract sued upon in the complaint. We are interpreting the original contract (as amended on its face) in the light of the understanding of the parties as shown by the evidence found true by the trial court. Hence authorities to the effect that modification of a contract must be pleaded are not in point.

3. Damages.

Defendants contend that the measure of damages used by the trial court was incorrect. It awarded plaintiff the \$6,000 paid by plaintiff plus \$14,500 which it found was the difference between the price agreed to be paid in said agreement for the property, and the value of the property at the time of defendants' refusal to convey.

Section 3306, Civil Code, provides: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach * * *"

[11-13] Plaintiff's right to the \$14,500 assessed by the trial court depends upon whether the evidence supports the implied finding of bad faith. We think it does. Defendants contend that they could not have conveyed the property prior to the time when in November the final map was recorded because of sections 11538 and

11541 of the Business and Professions Code which make it unlawful for a vendor to sell any subdivision until a final map is recorded, and hence there could have been no bad faith up to that time. While the evidence indicates that defendants were dilatory and should have succeeded in getting the map filed much earlier than they did, it may be assumed that there was no bad faith shown prior to the filing of the map. Defendants sought to excuse their failure to perform the contract thereafter upon three grounds: (1) that the parties were joint adventurers (the court expressly found that they were not, and the evidence amply supports such finding); (2) that plaintiff itself breached the contract and that defendants did not (again the court found to the contrary and the finding is well supported); (3) that the contract is void for uncertainty and lack of mutuality. As we have heretofore shown, it is not. The evidence indicates that defendants made no complaint of any alleged default by plaintiff nor did they ever offer to perform or deed the property according to their own view of the contract, although it bound them to deed 17 lots to plaintiff. Thus defendants have offered no sustainable excuse for their failure to perform.

The test of bad faith is merely whether the party deliberately or without just cause or excuse refused to perform the contract. See *Nelson v. Fernando Nelson & Sons*, 1936, 5 Cal.2d 511, 518, 55 P.2d 859; *Johnson v. Goldberg*, 1955, 130 Cal.App.2d 571, 578, 279 P.2d 131, 135, holding that "The question of bad faith is a factual one"; *Pixley v. First Federal Sav. & Loan Ass'n*, 1952, 110 Cal.App.2d 427, 432, 243 P.2d 100.

Defendants offered no excuse for refusing to perform the contract other than those hereinbefore mentioned, all of which have been shown to be not well founded. Thus, the evidence sufficiently supports the finding that they refused to convey without just cause or excuse.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Basli SPEAR and Myrtle Spear,
Plaintiffs and Appellants,

v.

Mildred H. SMITH, Defendant
and Respondent.

Mildred H. SMITH, Cross-Complainant,
v.

**Basli SPEAR, Myrtle Spear, Stephen Ere-
menko, Robert D. Mercer, Jean E. Mercer,
Bertram Victor Sturdivant, Virginia Mc. K.
Smith, Cross-Defendants.**

**Basli Spear and Myrtle Spear, and Bertram
Victor Sturdivant, Appellants.**

Civ. 5817.

District Court of Appeal, Fourth District,
California.

July 1, 1958.

Rehearing Denied July 23, 1958.

Hearing Denied Aug. 28, 1958.

Quiet title action. The Superior Court, San Diego County, William A. Glen, J., rendered judgment for defendant and other parties appealed. The District Court of Appeal, Mussell, Acting P. J., held that evidence as to whether defendant had for many years owned, occupied and used lands and buildings within agreed boundaries without objection was sufficient to sustain judgment establishing boundaries along the line of defendant's actual possession.

Judgment affirmed.

1. Boundaries ⚡37(5)

In action to quiet title, evidence as to whether defendant had for many years owned, occupied and used lands and buildings within agreed boundaries without objection was sufficient to sustain judgment establishing boundaries along the line of defendant's actual possession.

2. Boundaries ⚡48(6)

Where the calls in all deeds began from a point, the location of which was in dispute, the calls of the deeds did not prevail over boundaries established by agreement.

3. Boundaries ⇨32

In action which was litigated on theory of agreed boundaries, it was not necessary that adverse possession also be shown.

4. Boundaries ⇨48(2, 8)

An actual dispute or controversy was not essential to the establishment of boundaries by implied agreement, and agreement could be implied from long acquiescence.

5. Boundaries ⇨37(5)

In action to quiet title, evidence supported finding that traveled road had been established as a boundary by agreement.

6. Trial ⇨395(1)

Where, in quiet title action concerning boundaries, findings found all allegations of cross-complaint to be true, and cross-complaint was amended to conform to proof by leave of court, and proof was sufficient to support judgment for cross-complainant, findings were sufficient to support judgment.

Linley & Doerr, El Cajon, for appellants Spear.

Kenny & Morris, Los Angeles, and Thomas Whelan, San Diego, for appellant Sturdivant.

James B. Abbey, San Diego, for respondent.

MUSSELL, Acting Presiding Justice.

This action was commenced by the filing of a complaint against Mildred H. Smith. In it the plaintiffs sought to quiet their title to real property in the southwest quarter of section 27, township 15 south, range 2 east, S. B. M. Mildred Smith filed her answer to the complaint and by leave of court filed a cross-complaint to quiet title in which she named as cross-defendants the owners of the real property on all four sides of the rectangular parcel which she owned in the southwest quarter of said section 27. Cross-defendant Eremenko, who owned land north of the Smith property, filed an answer but later in effect withdrew all objections and agreed that the trial

court might decide the boundary issues without his participation. Cross-defendants Robert and Jean Mercer, who owned the property joining the Smith parcel on the west, agreed that the trial court might determine their boundary without their active participation. Virginia Mc. K. Smith, who owned the property joining the Mildred Smith parcel on the south, also agreed to permit the court to determine the true north boundary of her property without her actual participation in the trial. Under these circumstances it became necessary for the trial court to determine the true boundary of Mildred Smith's property on all four sides and the controversy herein was principally a boundary line dispute between Mildred Smith and the Spears as to the north boundary of the Smith property and between Mildred Smith and Bertram Sturdivant as to the east boundary of Mildred Smith's property.

The court found from the evidence and its view of the premises that the lines of actual possession of the property of Mildred Smith should be fixed as the true boundary of her property insofar as it was possible to do so, reserving any necessary easements of ingress and egress for the use and benefit of the property of the cross-defendants Virginia Smith, Bertram Sturdivant and the plaintiffs Basil and Myrtle Spear; that Mildred Smith and her predecessors in title and possession of her land have for at least 30 years last past used, occupied, possessed and held the lands now used, occupied and claimed by her; that the said use, occupancy and possession of her lands have been open, notorious, adverse and hostile to any claim of the cross-defendants; that Mildred Smith and her predecessors in title and possession have paid for at least 30 years last past all taxes and easements levied against her land; that the real property now used and occupied by her is bounded on all four sides by fences, fence lines, roads, paths, and other visible physical markers or monuments which have existed for more than 30 years last past and constitute the true boundary between her lands and the lands of cross-defend-

ants; that many years ago the predecessors in title and ownership to Mildred Smith's lands and the predecessors in interest and title of ownership of the lands of cross-defendants, being uncertain of the true position of their common boundaries, agreed upon the true location of their common boundaries and marked them upon the ground by said fences, fence lines, roads, paths and other markers or monuments now existing and enclosing Mildred Smith's property; that Mildred Smith and her predecessors in title and ownership have used and occupied the property within said boundaries, and have built structures and improvements up to said boundaries on all four sides of her property; that Mildred Smith and cross-defendants and their predecessors in title have acquiesced in the location of the present existing boundaries for more than 30 years last past; that substantial loss would be caused to Mildred Smith by any change of the position of said boundaries and that said boundaries have become by operation of law the true boundaries of her property.

The court, with the consent of the parties, appointed Curtis M. Brown, a licensed surveyor, to prepare and submit to the court a survey marking, platting and establishing the true boundary lines of the Mildred Smith property and showing along the most easterly boundary thereof an easement for ingress and egress reserved to Virginia Mc. K. Smith and Bertram Sturdivant. The court further found that said plat so prepared shows and depicts the northerly boundary of the property of Mildred Smith and shows and depicts the established boundary line between the property of Mildred Smith and that of Basil and Myrtle Spear, together with easement for ingress and egress which the court found the Spears were entitled to hold. The plat was adopted by the court as showing and depicting the true boundary of the Mildred Smith property and the easements reserved. It was attached to the findings, made a part thereof, and was also attached to and made a part of the judgment herein.

It appears from the record and the memorandum opinion filed by the court that the judgment herein was based primarily on the finding that the true boundary lines of the property of Mildred Smith were established by agreement of the parties and long acquiescence in the lines so established.

In *Mello v. Weaver*, 36 Cal.2d 456, 460, 224 P.2d 691, it was held that agreement to locate a boundary line need not be express, but it may be implied from long acquiescence; that the implied agreement must have been based on a doubtful boundary line; that a dispute or controversy is not essential but it may be evidence of an existence of a doubt or uncertainty; that it is not required that the uncertainty should appear from the deed or from an attempt to make an accurate survey from the calls in the deed; that a doubt may arise from a believed uncertainty which may be proved by direct evidence or inferred from the circumstances surrounding the parties at the time when the agreement is deemed to have been made, and if in good faith the parties resolve their doubt by the practical location of the common boundary it will be considered the boundary called for in the deed.

In *Shelton v. Malette*, 144 Cal.App.2d 370, 374, 301 P.2d 18, it was held that the true location of the survey of a tract of land is a question of fact and in boundary disputes, monuments control over courses and distances and where the circumstances warrant it, fences have been considered as monuments; that to establish an agreed boundary line there must be an actual designation of the line upon the ground and occupation in accordance therewith; that to make the agreement binding, occupation in accordance with the line so fixed must be acquiesced in by the parties for a period equal to that fixed by the statute of limitations, or for such a length of time that the parties ought not to be allowed to deny its correctness; that such an agreement is conclusive of the correctness of the line and a fence may establish or mark the true boundary line between

adjoining land owners and constitute an agreed boundary, when it is erected or maintained in circumstances rendering the doctrine of agreed boundary applicable.

In *York v. Horn*, 154 Cal.App.2d 209, 211, 315 P.2d 912, it was held that such an agreement and uncertainty in the location of the boundary line may be deduced from the circumstances and may be inferred from the conduct of the parties, particularly from long acquiescence; that the fact that an accurate survey is possible is not conclusive of the question of whether a doubt exists as to the location of the boundary and that in order to invoke the doctrine of agreed boundaries all that need be shown is lack of knowledge by both parties where the fence line should be drawn.

In the instant case the description in the deeds to Mildred Smith, plaintiffs, and Bertram Sturdivant all begin at the southwest corner of section 27, township 15 south, range 2 east, S. B. M. The present controversy arose when Brown surveyed the property in 1946 and fixed the said southwest corner at a point approximately 71.32 feet east of the corner of said section adopted by surveyor Butler in July, 1934. Brown had previously established said corner at the location fixed by Butler. However, in his survey in 1946 he stated he had made a mistake and then fixed the corner in accordance with a survey made by one Ward in 1904.

Mildred Smith obtained a deed to her property on July 31, 1943, and she and her husband on that date entered upon the land and took actual physical possession thereof. Mrs. Smith first went on her property in 1941 and occupied it under a contract of purchase. At that time she first saw an old barbed wire fence along the south line of her property. She testified that this fence was in the same position at the time of trial; that she and her husband occupied their property to the fence line and used it "to keep stock in." The record shows that this fence is approximately on the boundary line between the Mildred Smith property and that of Virginia Mc. K.

Smith on the south as shown by the Butler survey and that it was accepted by the parties as the true boundary line for many years. The record shows that an old fence running north from the southwest corner of section 27, as surveyed by Butler, was considered by the Smiths and Dr. Mercer, who owned the property to the west, to be the true boundary line between their properties and that there has never been any dispute between them as to the true line.

The Smiths purchased their property from Forrest Flegal. The record shows that his brother, Harold, owned the property to the north and that there was no dispute as to the boundary line on the property owned by them. In 1945 Harold Flegal sold his property to Stephen Eremenko and in 1946 Eremenko sold the easterly portion of his property to one Homer Spear, who, in the same year, sold the south half thereof to Basil Spear and his wife, the plaintiffs herein.

For many years prior to the date the Smiths acquired their property there was an old fence extending from the northwest corner of the property easterly along the line of the Butler survey to a point approximately 640 feet east of said corner. There was also an old rock wall to the east end of said fence and buildings have been erected on the Smith property south of the line of the fence extended easterly to the northeast corner of the property. There was testimony that the fence line extended and the rock wall were accepted by Harold Flegal and the Smiths as the true north boundary line of the Smith property. When Mildred Smith bought the property it was shown to her and she was informed that this line was the north line of her property. The buildings south of this line were used and occupied by her and there was no controversy about this line until after the Spears purchased their property in 1946 and started to run a fence south of the Smith garage.

The record shows that there is a road running north from the southeast corner

of the Smith property along a line of the Ward survey of 1904 and in this connection Mildred Smith testified that the center line of this road was considered to be the boundary line between her property and that of Sturdivant to the east; that she had used the road ever since 1941 and that there never had been any dispute about her right to use it.

Bertha Walter testified that she and her husband occupied the Smith property under a lease from 1938 to 1940; that she examined the property involved on the day after the trial herein commenced and that the fences were in the same place as when she formerly occupied the property; that during the time she leased the Smith property she used it up to the road on the east and understood that it formed the east boundary of her property; that she occupied the property up to the old fence line on the west and it was considered to be the west boundary line; that she took it for granted that the fence line on the north was the north boundary line and used and occupied the buildings which were south of the fence line extended easterly; that there was no dispute or controversy concerning the boundaries of the property covered by her lease.

The trial court, after considering the evidence and viewing the premises decreed that the true boundary of the Mildred Smith property on the east should follow the center line of the road; on the south, the barbed wire fence; on the west the barbed wire fence; and on the north the partial barbed wire fence up to the garage building, and to the north of the garage building to a rock wall; along the rock wall to an iron stake, thence to an iron pipe set in the northeast corner of the Smith property, all as shown on the plat attached to the judgment. To prevent future litigation between the parties as to the rights of way over the properties involved and to preserve the status quo as existed for many years, the court reserved an easement of ingress and egress for use by Virginia Mc. K. Smith and the Sturdivants, their successors and assigns, and over and

upon and along the road on the easterly boundary of the Smith property, and between the Smith property and the Sturdivant property. Easements of ingress and egress were reserved for the use of the Spears, their successors and assigns, over the lands of Mildred Smith, as now existing on the ground, and a like easement was reserved to Mildred H. Smith, her successors and assigns, over the lands of the Spears now existing upon the ground, all as shown by the plat attached to the judgment and made a part thereof.

[1] The judgment establishing these boundaries is logical, equitable and in accordance with the rules stated in *Mello v. Weaver*, *Shelton v. Malette* and *York v. Horn*, supra, and is supported by substantial evidence that the Smiths had for many years owned, occupied and used the lands and buildings within agreed boundaries without objection.

[2] Appellants argue that there is no conflict in the evidence as to the location of the properties on the ground and that the deed calls should be recognized as defining the property owned by each party. We do not agree with this contention. As noted, the description in the deeds of Smith, Sturdivant and Spear all start from the southwest quarter of section 27 and there is a conflict in the evidence as to the location of that corner. Hence, the difficulty in locating the property on the ground by reference to the deeds.

[3] It is further argued that adverse possession was not shown by Mildred Smith. However, the cause was decided on the doctrine of agreed boundaries and since we have concluded that there is substantial evidence to establish that this doctrine was applicable herein, the judgment was proper.

[4] It is further argued that there was no dispute nor facts upon which a dispute could be implied upon which to establish an implied agreement as to boundaries. This argument is likewise untenable. It was held in *Mello v. Weaver*, supra, that a dispute or controversy is not essential

and the agreement may be applied from long acquiescence.

[5, 6] Appellant Sturdivant argues that the evidence does not support the judgment and that the findings are erroneous. However, there was substantial evidence that the traveled road between the property of Mildred Smith and Sturdivant was the true boundary line and was recognized as such by Mildred Smith and Sturdivant. The court in its findings found all of the allegations of the cross-complaint to be true and the record shows that it was amended to conform to the proof by leave of court. The findings considered in the light of the amendment are sufficient to support the judgment.

Judgment affirmed.

GRIFFIN, J., and McCABE, J. pro tem., concur.



161 Cal.App.2d 547

Louisa H. FAULKNER, an Incompetent person, by Dwight Christopherson, her guardian, Plaintiff and Respondent,
v.

Evangeline Ruth BEATTY, Defendant and Appellant.
Civ. 22986.

District Court of Appeal, Second District,
Division 2, California.
June 23, 1958.

Action by grantor to cancel joint tenancy deed. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered judgment cancelling deed and grantee appealed. The District Court of Appeal, Fox, P. J., held that evidence sustained finding that grantee, a practical nurse who had cared for grantor's husband as well as grantor, had failed to overcome presumption of

undue influence arising from confidential relationship.

Affirmed.

1. Deeds ⇨72(3)

Mere fact that a relationship is friendly and intimate does not necessarily characterize it as a confidential relationship, but confidential relations may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another.

2. Deeds ⇨211(4)

In action by 81 year old grantor to cancel joint tenancy deed executed by her to herself and practical nurse who had cared for grantor's husband as well as grantor, evidence sustained finding that a confidential relationship existed between the parties.

3. Deeds ⇨196(3), 211(4)

Where it is clear that a confidential relationship existed and transaction resulted in a definite detriment to one party and a substantial benefit to the other, a presumption arose that advantage obtained by grantee of deed was by reason of undue influence upon the grantor and such presumption is evidence which is sufficient to support a finding in accordance therewith.

4. Evidence ⇨589

In a suit to cancel deed because of grantee's alleged undue influence, court was not required to give grantee's testimony full credence in view of her interest in outcome of suit.

5. Deeds ⇨211(4)

In action by 81 year old grantor to cancel joint tenancy deed executed by her to herself and practical nurse who had cared for grantor's husband as well as grantor whose husband had died just a few days prior to execution of deed, evidence sustained finding that practical nurse had failed to overcome presumption of undue influence.

Willedd Andrews, Los Angeles, for appellant.

Riedman, Dalessi & Shelton, Howard W. Shelton, Long Beach, for respondent.

FOX, Presiding Justice.

This is an appeal by defendant from a judgment cancelling a deed executed by plaintiff to herself and defendant as joint tenants, directing defendant to reconvey the property and ordering defendant to return \$100 in a certain trust account to the guardian of the plaintiff.

The only question raised by the defendant is the sufficiency of the evidence to support the findings of fact, conclusions of law and the judgment.

Defendant was employed by plaintiff and her husband as a part-time, practical nurse from January, 1952, to the middle of June, 1953, when Mr. Faulkner died. Defendant thereafter continued to render such services to the plaintiff until May, 1954. The deed to the property in question was executed by plaintiff to herself and defendant as joint tenants on June 25, 1953. This was approximately ten days after Mr. Faulkner had passed away. At that time plaintiff was 81 years of age. It is this deed that the court ordered cancelled.

Mr. Faulkner had been ill for quite some time; he was a very large man; Mrs. Faulkner was a small person and the constant care of Mr. Faulkner had made her very weary and tired. There was testimony that a month or two prior to Mr. Faulkner's death plaintiff "was in very poor" health and could not remember things. Plaintiff told Mrs. Lynch, who was a social case worker in the Los Angeles County Bureau of Public Assistance, that "she was so weary and tired" from caring for her invalid husband "that she just couldn't think any more."

Mrs. Christopherson saw plaintiff about a week after Mr. Faulkner's death. At that time plaintiff "was really hazy and nervous, wringing her hands all the time * * *" and she complained that "she was so tired." In response to a question as to whether plaintiff appeared rational at all times, Mrs. Christopherson testified: "She was on and

off; one time she would tell you one thing and the next time something different."

On January 31, 1953, plaintiff executed a power of attorney in favor of defendant authorizing her to make withdrawals from an account that she and her husband had with a savings and loan association. Also, plaintiff and defendant had a joint checking account in a local bank.

Walter Foster, Esq., testified that he prepared the deed of June 25, 1953, at the behest of defendant; that he did not have any contact with plaintiff in the preparation of this deed; and that he did not give plaintiff any legal advice in the month of June, 1953. The deed was not signed in his office but was taken by defendant and returned at a later time by her, at which time it was fully executed. Mr. Foster had the deed recorded.

In her testimony, defendant admitted that plaintiff "evidently had trust and confidence" in her.

In analyzing the case at the conclusion of the trial the judge observed: "[T]here is not any question in my mind that there was a confidential relationship between the defendant * * * and Louisa H. Faulkner." The court further observed: "The testimony is rather clear that she [defendant] managed not only her [plaintiff's] domestic affairs, but also her financial affairs, as shown by the powers of attorney * * *." The court then commented on the defendant's activity in connection with having the deed prepared and executed, and the fact that Mr. Foster did not give plaintiff any legal advice in connection with this transaction. The court also mentioned the fact that the deed was executed only some ten or twelve days after the death of plaintiff's husband; that she was elderly, tired and bereaved. The court made findings in accordance with this analysis of the testimony, including a finding that a confidential relationship existed between plaintiff and defendant, and that defendant took advantage of such relationship.

[1] Whether there was a confidential relationship between the plaintiff and de-

fendant presented a question of fact. *Kloehn v. Prendiville*, 154 Cal.App.2d 156, 160, 316 P.2d 17, 21; *Steinberger v. Steinberger*, 60 Cal.App.2d 116, 122, 140 P.2d 31. While "it is true that the mere fact that a relationship is 'friendly and intimate' does not necessarily characterize it as a 'confidential' relationship (*Meyer v. Zuber*, 92 Cal.App. 767, 772, 268 P. 954)," nevertheless "it is * * * true that confidential relations 'may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another.'" *Kloehn v. Prendiville*, supra, 154 Cal.App.2d at pages 160-161, 316 P.2d at page 21; see, also, *In re Estate of Cover*, 188 Cal. 133, 143, 204 P. 583.

[2,3] Applying these principles, it is clear that the evidence and the reasonable inferences to be drawn therefrom amply support the finding that a confidential relationship existed between the parties. It is also clear that it was because of defendant's activity that the deed was prepared, executed and recorded. The transaction resulted in a definite detriment to plaintiff and a substantial benefit to the defendant. It is thus apparent that defendant took advantage of the trust and confidence reposed in her by the plaintiff. In such circumstances there is a presumption that the advantage obtained by the grantee was by reason of undue influence upon the grantor. *Cox v. Schnerr*, 172 Cal. 371, 378, 156 P. 509; *Stewart v. Marvin*, 139 Cal.App.2d 769, 775, 294 P.2d 114; *Sparks v. Sparks*, 101 Cal.App.2d 129, 135, 225 P.2d 238. Such a presumption is evidence and is sufficient to support a finding in accordance therewith. *Khoury v. Barham*, 85 Cal.App.2d 202, 212, 192 P.2d 823. The observations of the court in *Stewart v. Marvin*, supra [139 Cal.App.2d 769, 765, 294 P.2d 118], are here apposite:

"As to what constitutes undue influence and what constitutes sufficient proof thereof, as defined in Civil Code Section 1575, it has been said, depends upon the facts and circumstances of each particular case. It

is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded; that where a grantor has trust and confidence in the integrity and fidelity of the grantee and the latter takes advantage of the grantor, relief will be afforded. [Citation.] The fact that the parties stand in such a position toward one another, either by reason of relationship, professional employment, or otherwise, that the grantor is peculiarly susceptible to exertion of influence by the grantee, is a consideration of primary importance in this connection, in cases where the transaction is in itself improvident or disadvantageous to the grantor. And the fact that the grantor is lacking in such mental vigor as to enable him to protect himself against imposition is a reason for the interposition of equity to protect him, although the mental weakness is not such as to justify him in being regarded as totally incapacitated. * * * [W]ith respect to gifts or conveyances *inter vivos*, the extreme age and infirmity of the grantor, together with slight evidence of circumstances from which it may be inferred that the instrument was the product of coercion, will suffice to shift the burden and require the beneficiary to show affirmatively that the transaction was fair and free from influence."

[4,5] It was, of course, for the trial court to determine whether the evidence offered by the defendant outweighed the presumption. *Khoury v. Barham*, supra. In making that determination it was the judge's responsibility to pass upon the credibility of the witnesses and the weight that should be given to their testimony. The court was not required to give to defendant's testimony full credence in view of her interest in the outcome of this suit. *Tidlund v. Seven Up Bottling Co.*, 154 Cal.App.2d 663, 666-667, 316 P.2d 656, and cases cited therein. Since defendant did not overcome the presumption of undue

influence the decision was necessarily in favor of the plaintiff.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.



161 Cal.App.2d 638

In the Matter of the Arbitration between
John A. and Helen J. ECKERT, John A.
Eckert, Jr., Petitioners and Respondents,
v.

Ernest B. DAVIS, Appellant.
Civ. 22549.

District Court of Appeal, Second District,
Division 3, California.
June 25, 1958.

Arbitration proceeding. The Superior Court of Los Angeles County, Vernon W. Hunt, J., confirmed an award in favor of petitioners, and an appeal was taken. The District Court of Appeal, Parker Wood, J., held that where construction contractor was present at arbitration hearing conducted by one arbitrator, presented evidence at such hearing and submitted his case without informing arbitrator that he also had appointed arbitrator, such contractor, who made no complaint about arbitration procedure until after receiving copy of award, approximately 43 days after hearing, would be held to have acquiesced in submitting arbitration matter to one arbitrator, as authorized by contract making decision of single arbitrator binding in event either party should refuse or neglect to appoint an arbitrator.

Affirmed.

1. Arbitration and Award ⇨26

Evidence would sustain finding that construction contractor had refused and neglected to appoint arbitrator.

2. Arbitration and Award ⇨26

Where construction contractor was present at arbitration hearing conducted by one arbitrator, presented evidence at such hearing and submitted his case without informing arbitrator that he also had appointed arbitrator, such contractor, who made no complaint about arbitration procedure until after receiving copy of award, approximately 43 days after hearing, would be held to have acquiesced in submitting arbitration matter to one arbitrator, as authorized by contract making decision of single arbitrator binding in event either party should refuse or neglect to appoint an arbitrator.

Smithers, Good & Potter and Clyde H. Potter, Jr., North Hollywood, for appellant.

Russell W. Bledsoe, Los Angeles, for respondents.

PARKER WOOD, Justice.

John A. Eckert, Helen J. Eckert, and John A. Eckert, Jr., owners of certain land, entered into a contract with Ernest B. Davis, a contractor, whereby the contractor agreed to construct an apartment house on the land. The contractor appeals from a judgment confirming an award that was made in favor of the owners in an arbitration proceeding.

Appellant contends that the award should be set aside for the reason that an arbitrator, who allegedly was appointed by appellant, was not permitted to participate in the arbitration proceeding.

Paragraph 16 of the contract provided, in part: "As between the parties hereto, all questions as to the rights and obligations arising under the terms of the contract, the plans and specifications are subject to arbitration. In case of dispute either party hereto may make a demand for arbitration by filing such demand in writing with the other. One arbitrator may be agreed upon, otherwise there shall be three, one named in writing by each party within five days

after demand is given, and a third chosen by the two appointed. Should either party refuse or neglect to appoint said arbitrator or to furnish the arbitrators with any papers or information demanded he or they are empowered by both parties to proceed ex parte. If there be one arbitrator his decision shall be binding; if there be three the decision of any two shall be binding. Such decision shall be a condition precedent to any right of legal action, and wherever permitted by law it may be filed in Court to carry it into effect."

A dispute arose between the owners and the contractor regarding the alleged failure of the contractor to perform the work according to the terms of the contract. On March 28, 1955, Mr. Bledsoe, attorney for the owners, mailed a letter to the contractor wherein he made a demand for arbitration under the terms of the contract. In the letter, Mr. Bledsoe stated that F. Rodman Woelfle was the arbitrator selected by the owners. On April 8, 1955, Mr. Stoddard, attorney for the contractor, mailed a letter to Mr. Bledsoe wherein he stated: "* * * Mr. Davis [the contractor], having had unsatisfactory experiences with arbitrators in the past, declines to submit the matter to arbitration and intends to pursue his remedy by foreclosure of the lien." On April 19, 1955, Mr. Woelfle mailed notices to the parties and their attorneys, stating therein that an arbitration hearing would be held at Mr. Woelfle's office on May 2, 1955. The contractor did not appear personally or by attorney at the hearing on May 2, and Mr. Woelfle, as the sole arbitrator, held the hearing. On May 16 Mr. Woelfle made an award of \$3,079, and \$150 as costs, in favor of the owners. The owners filed a petition in the superior court for an order confirming the award. The contractor filed objections to the petition, and he stated therein that he and his arbitrator were not permitted to appear at the hearing. The award was not confirmed.

On September 8, 1955, John A. Eckert died. Helen J. Eckert and John A. Eckert, Jr., filed a petition for an order directing

that arbitration of the controversy proceed in the manner provided in the contract. The executrix of the will of John A. Eckert was substituted as a petitioner in the proceeding. The court made an order that the parties proceed to arbitrate in accordance with the terms of the contract.

On March 12, 1956, Mr. Bledsoe, attorney for the owners, mailed a letter to the contractor wherein he made a demand for arbitration under the terms of the contract. In the letter, Mr. Bledsoe stated that F. Rodman Woelfle was the arbitrator selected by the owners. On April 4 Mr. Woelfle mailed notices to the parties and their attorneys, stating therein that an arbitration hearing would be held at Mr. Woelfle's office on April 24, 1956. At the hearing on that date, the contractor Mr. Davis, William C. Atwater, John A. Eckert, Jr., and Mr. Bledsoe were present. Mr. Woelfle, as the arbitrator, held the hearing. Mr. Atwater did not participate in the proceeding. Mr. Eckert and the contractor testified. Documents were received in evidence, and the matter was taken under submission by Mr. Woelfle. On June 6 Mr. Woelfle made an award of \$3,079, and \$150 as costs, in favor of the owners. Also, on June 6 a copy of the award was mailed to the parties and their attorneys. On September 4 the owners filed a petition in the superior court for an order confirming the award. The contractor filed an affidavit of Mr. Stoddard in the court proceeding. That affidavit, dated November 6, 1956, stated: "[O]n or about the 9th day of April, 1956, affiant [Mr. Stoddard] addressed a letter to Russell W. Bledsoe, attorney for John A. and Helen J. Eckert, a copy of which is attached hereto and by reference made a part hereof, advising them that the said Ernest B. Davis [the contractor] had appointed as arbitrator William C. Atwater." The copy of a letter, referred to in the affidavit, was dated April 9, 1956, and it stated: "This is to advise you that Ernest B. Davis has appointed William C. Atwater as his arbitrator in the above entitled matter [Eckert v. Davis]. Kindly advise me of the date

and place of the meeting of the arbitrators." On November 8, 1956, the owners filed an affidavit of Mr. Bledsoe in the court proceeding. That affidavit stated, in part: "Never at any time did Affiant [Mr. Bledsoe] receive the original letter attached to Mr. George E. Stoddard's Affidavit of November 6, 1956. * * * Affiant further states that the only letter received by him from Mr. George E. Stoddard concerning the appointment of arbitrators is a letter dated April 8, 1955. Copy of said letter is attached." Attached to that affidavit is a copy of Mr. Stoddard's letter of November 8, 1955, heretofore referred to, wherein Mr. Stoddard stated that Mr. Davis (the contractor) "declines to submit the matter to arbitration and intends to pursue his remedy by foreclosure of the lien."

The matter of confirmation was heard on December 20, 1956.

Mr. Stoddard testified that on April 9, 1956, he dictated a letter to his secretary, which letter was addressed to Mr. Bledsoe; in the letter he stated that Mr. Davis (the contractor) had appointed Mr. Atwater as arbitrator; a carbon copy of that letter was attached to the affidavit on file. (Apparently Mr. Stoddard was referring to his affidavit of November 6, 1956.)

The contractor testified that he did not name an arbitrator "in writing" within five days after demand was made upon him; he did not inform Mr. Bledsoe "in writing" that Mr. Atwater was his arbitrator; at the arbitration hearing on April 24, 1956, he informed Mr. Woelfle orally that Mr. Atwater was his arbitrator; he submitted all of his evidence at the arbitration hearing and he told Mr. Woelfle that he submitted his case; he did not make any complaint about the procedure in the matter until after he received a copy of the award.

Mr. Atwater testified that he did not recall whether the contractor requested, in writing, that he act as an arbitrator; at the arbitration hearing the contractor stated that Mr. Atwater was his arbitrator; at the hearing Mr. Woelfle said that he (Mr. Woelfle) had received the evidence and that

he would make the decision; Mr. Woelfle did not invite him to participate in the decision and he made no decision in the matter.

Pursuant to stipulation, an affidavit of Mr. Woelfle was received in evidence. In that affidavit, Mr. Woelfle stated that he was never informed by the contractor that an arbitrator had been appointed by him; the persons who were present at the hearing (including Mr. Atwater) sat at a conference table; Mr. Woelfle opened the hearing by stating that he had been selected as arbitrator to hear the dispute, and that after hearing the evidence presented by each side he would make a decision; Mr. Eckert, Jr., presented evidence during a period of approximately ten minutes; Mr. Davis presented evidence during a period of approximately one hour and twenty minutes.

The court found, in part, that the owners appointed Mr. Woelfle as an arbitrator in accordance with the terms of the contract; the contractor refused and neglected to appoint an arbitrator; the contractor was given a full and fair hearing at the arbitration hearing; and the arbitrator heard and considered the evidence and made an award in conformity with the terms of the contract. The judgment provided: that the award of the arbitrator is confirmed; and that the owners should recover, from the contractor, \$3,079, as principal, \$107.81, as interest, and \$150, as arbitration costs.

[1] Appellant contends, as above indicated, that the award should be set aside for the reason that the arbitrator, appointed by appellant, was not permitted to participate in the arbitration proceeding. He argues to the effect that the evidence shows that a notice of appointment of an arbitrator by appellant was mailed to the attorney for the owners within the time specified in the contract. There was evidence that on March 12, 1956, the attorney for the owners mailed a letter to the contractor wherein he made a demand for arbitration. The contract provided that an arbitrator should be named in writing within five days after demand was made. Mr.

Stoddard stated in his affidavit, and in his testimony, that on April 9, 1956, he dictated a letter which was addressed to the attorney for the owners, and in the letter he stated that the contractor had appointed Mr. Atwater as an arbitrator. There was no evidence that the letter was mailed. Mr. Bledsoe, in his affidavit, stated that he never received the letter. Mr. Stoddard stated that he presumed that his secretary mailed it. After the judge said there was no showing that the letter was mailed, Mr. Stoddard said that he could bring his secretary as a witness. He did not call her as a witness. It appears further that the date on which Mr. Stoddard dictated the letter was 28 days after the date the demand for arbitration was made. As above stated, the court found that the contractor refused and neglected to appoint an arbitrator. That finding was supported by substantial evidence. It is implied in that finding that appellant did not mail a notice of appointment of an arbitrator.

[2] As above shown, the contract provided: "Should either party refuse or neglect to appoint said arbitrator or to furnish the arbitrators with any papers or information demanded he or they are empowered by both parties to proceed ex parte. If there be one arbitrator his decision shall be binding * * *." The contractor was present at the arbitration hearing which was conducted by Mr. Woelfle. The evidence before the trial judge, viewed in the light favorable to respondents, was to the effect that after the contractor presented evidence at the hearing for approximately one hour and 20 minutes, he said that he submitted his case; Mr. Woelfle said that he would render the decision; Mr. Woelfle was not informed by the contractor that an arbitrator had been appointed by him; the contractor did not make any complaint about the arbitration procedure until after he had received a copy of the award (which copy was received about June 6—approximately 43 days after the hearing). Under such circumstances, it appears that appellant ac-

quiesced in submitting the arbitration matter to one arbitrator. In *United Farmers Ass'n, of Cal. v. Klein*, 41 Cal.App.2d 766, 107 P.2d 631, the appeal was from a judgment which confirmed an arbitration award. The court, in affirming the judgment therein, said (41 Cal.App.2d at page 770, 107 P.2d at page 633): "It is claimed that E. J. Fleming was named as one of the arbitrators in the contract but that he did not participate in the hearing. Assuming such to be the facts they do not warrant the courts in disturbing the award. Nothing to the contrary appearing in the record, it will be assumed all parties agreed to proceed and did proceed before the other arbitrators who were named in the contract."

The judgment is affirmed.

SHINN, P. J., and VALLEE, J., concur.



161 Cal.App.2d 630

The PEOPLE of The State of California,
Plaintiff and Respondent,

v.

Warren Elwood FLUERY, Defendant
and Appellant.

Cr. 5983.

District Court of Appeal, Second District,
Division 1, California.

June 25, 1958.

Defendant was convicted for second degree burglary. The Superior Court of Los Angeles County, Clement D. Nye, J., entered judgment and an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Lillie, J., held that where defendant moved for a new trial for newly discovered evidence and presented in support thereof, as required by statute, the affidavit of his witness, the prosecution could introduce

impeaching evidence without the laying of a foundation.

Judgment and order affirmed.

1. Criminal Law Ⓒ938(1)

In determining motion for new trial on ground of newly discovered evidence, an enlarged discretionary power is committed to the trial court. West's Ann.Pen.Code, § 1181.

2. Criminal Law Ⓒ1156(3)

Reviewing court will not disturb trial court's ruling on motion for new trial on ground of newly discovered evidence unless a clear and unmistakable abuse of discretion is shown. West's Ann.Pen.Code, § 1181.

3. Criminal Law Ⓒ938(1)

The claim of newly discovered evidence warranting a new trial is looked upon by the courts with distrust and disfavor. West's Ann.Pen.Code, § 1181.

4. Criminal Law Ⓒ958(5)

Since defendant moving for new trial for newly discovered evidence is required by statute to produce at the hearing the affidavits of the witnesses by whom such evidence is expected to be given, the trial court may consider counterevidence by way of affidavit bearing upon the credibility of those whose affidavits are used in support of the motion, notwithstanding the hearsay nature of the counterevidence. West's Ann.Pen.Code, § 1181.

5. Witnesses Ⓒ388(6)

Where defendant moved for new trial for newly discovered evidence and presented in support thereof, as required by statute, the affidavit of his witness, the prosecution could introduce impeaching evidence without the laying of a foundation. West's Ann.Pen.Code, § 1181.

6. Criminal Law Ⓒ781(6)

In second degree burglary prosecution, where there was evidence of certain admissions, it was proper to give cautionary instruction admonishing the jury to view with caution the testimony of any witness

which purported to relate to an oral admission of defendant or an oral confession by him. West's Ann.Pen.Code, § 459.

7. Criminal Law Ⓒ781(4)

In second degree burglary prosecution, where there was evidence of certain admissions, it was not error to give an instruction defining an admission in terms of and as different from a confession, and such instruction did not lead the jury to believe that a confession was involved in the case. West's Ann.Pen.Code, § 459.

Fredric A. Spindell, Los Angeles, under appointment by the District Court of Appeal, for appellant.

Edmund G. Brown, Atty. Gen., Joe J. Yasaki, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Appellant was charged by information with a violation of section 459 of the Penal Code and convicted by a jury of second degree burglary. His motion for new trial was denied and he was sentenced to the state prison. On this appeal from the judgment of conviction and order denying motion for a new trial, appellant submits that the trial court erred in considering certain impeaching evidence on the motion and in giving at the trial two abstract jury instructions dealing with admissions and confessions.

The record discloses that on October 26, 1956, at about 8:30 p. m., appellant entered the Murphy Camera Shop in Whittier where he talked to Mr. Murphy about cameras for approximately one-half hour. When he left he entered a Ford car, bearing license BHV 052, parked in front near the shop and in which a woman was seated. They drank from a bottle, after which appellant got out of the automobile and for three or four minutes stood behind it facing the front window of the camera shop. He returned to the car, drove it forward 15 to 20 feet and stopped. Appellant's car was in this location at approximately 9 p. m. Mr. Murphy secured the shop and left shortly

after 9 p. m. The next morning, police found the shop had been entered and money, equipment and cameras were missing. One of the fingerprints found in the shop matched appellant's right ring finger.

On October 29th, appellant's wife under the name of "Ann Zunt," giving a fictitious address, sold several of Murphy's cameras to various loan companies in San Diego. In attempting to sell one to the Boston Jewelry & Loan company she was arrested. Police waited at a nearby parked car, bearing license BHV 052, and within a few minutes appellant appeared producing an identification card bearing the name "Warren Washington Elwood." He told police he lived in Cypress and that the husband of the woman who sold the cameras had left her and she was selling them for rent money. The officer arrested appellant and searching the car found five cameras and equipment belonging to Murphy.

On November 2, 1956, Officer Rasband had a conversation with appellant at the Whittier police station wherein he stated substantially as follows: On October 26, 1956, at about 6:30 p. m., he took his wife to a Whittier doctor, remaining in the car about one and one-half hours drinking. When she returned to the automobile, he drove seven or eight blocks and parked at the curb. His wife walked around to the driver's seat and drove home. He was not drunk, just "tight," but he did not recall getting out of the car and entering the store. At home he had dinner, watched television and went to bed and did not leave the house until 2 p. m. the following day, October 27th. That afternoon he went to Lloyd's Bar in Whittier where he met Charley Manners and another man, whose name he did not know, who sold him the cameras for \$170 in cash, part of which he removed from a glass jar he had buried in the floor of his garage. Manners told him the cameras were not stolen, although later he suspected that they had been. Around noon on October 29th, appellant and his wife drove to San Diego. He told her to sell the cameras and use the name of "Ann Zunt" and a fictitious address.

Officer Rasband thereafter searched defendant's garage and found no indication of any holes or other excavations in the floor.

Appellant did not testify at the trial. Defense witnesses included his wife and George Mason. Appellant's wife testified that on October 26th appellant drove her to the doctor's office and waited for her in the car, to which she returned around 6:15 p. m. They drove two miles and parked at which time he went into the Murphy Camera Shop, remaining for fifteen or twenty minutes. She thereafter accounted for appellant's whereabouts until 5:30 the next morning. On October 29th they drove to San Diego where she sold several cameras under the name of "Ann Zunt." George Mason testified that at 7:30 p. m. on October 27th, appellant met him and Charles Manning (Manners) at a bar in Whittier called Lloyd's, from whom appellant bought the cameras for \$170.

In rebuttal Officer Merritt testified that George Mason had previously told him he had not been in Whittier until the latter part of December, 1956.

Appellant urges that the trial court erred in considering impeaching evidence, for which no proper foundation was laid, at the hearing on his motion for a new trial. Appellant's motion was made on the ground of newly discovered evidence in support of which appellant produced two affidavits, one executed by George Mason who stated that he alone had committed the burglary, and the other by his counsel alleging due diligence. In addition, appellant testified that at the time of the trial he was unaware of the fact that Mason had committed the crime. George Mason was not present at the hearing and did not testify.

In opposition to the motion for new trial, the prosecution called several witnesses, among whom was Thomas Lawlor, a United States postal inspector, and Arthur Johnson, a district attorney's investigator. Lawlor testified that after the burglary he took a sworn statement from Mason, which was received as People's exhibit No. 2,

wherein Mason in effect denied committing the crime. Johnson testified that after Mason executed the affidavit offered by the defendant on the motion, he talked to Mason about the burglary and, upon being questioned, Mason made certain statements concerning the commission of the crime and the appearance of the premises which were inconsistent and incompatible with known facts. Appellant objected to the testimony of Lawlor and Johnson and the admission of People's exhibit No. 2, on grounds of hearsay and that no proper foundation for impeachment had been laid.

[1-3] Section 1181 of the Penal Code provides that the court may, upon defendant's application, grant a new trial when new evidence is discovered material to the defendant and which he could not with reasonable diligence have discovered and produced at the trial. In determining such a motion, an enlarged discretionary power is committed to the trial court (*People v. Coronado*, 57 Cal.App.2d 805, 135 P.2d 647; *People v. Greenwood*, 47 Cal.2d 819, 306 P.2d 427; *People v. Beard*, 46 Cal.2d 278, 294 P.2d 29) and a reviewing court will not disturb its ruling unless a clear and unmistakable abuse of discretion is shown. *People v. Coronado*, supra; *People v. Greenwood*, supra; *People v. McGarry*, 42 Cal.2d 429, 267 P.2d 254; *People v. Gompertz*, 103 Cal.App.2d 153, 229 P.2d 105. In determining what constitutes an abuse of discretion, it should be borne in mind that the claim of newly discovered evidence warranting a new trial is looked upon by the courts with distrust and disfavor. *People v. Greenwood*, supra; *People v. Yeager*, 194 Cal. 452, 229 P. 40; *People v. Mandell*, 48 Cal.App.2d 806, 120 P.2d 921.

[4] Section 1181 further provides that in support of a motion for new trial on the ground of newly discovered evidence, the defendant must produce at the hearing the affidavits of witnesses by whom such evidence is expected to be given. In line with this requirement, and in spite of the hearsay nature of affidavits, our courts have

always held that in determining such a motion the trial court may consider counterevidence by way of affidavit bearing upon the credibility of those whose affidavits are used in support of the motion. *People v. Byrne*, 160 Cal. 217, 116 P. 521; *People v. Sing Yow*, 145 Cal. 1, 78 P. 235; *People v. Fice*, 97 Cal. 459, 32 P. 531. This is to aid the court in determining the weight to be given to the affidavit offered on the motion, the truth of the matters shown thereby and the materiality and probability of the effect of them if believed to be true. *People v. Byrne*, supra; *People v. Weber*, 149 Cal. 325, 86 P. 671.

[5] Since it is clear that contradictory and impeaching evidence may be presented by way of affidavit, it would appear that the rule of evidence that a witness cannot be impeached for prior inconsistent statements until a proper foundation has been laid is necessarily inapplicable. In the instant case, affiant George Mason, not having been present at the hearing and not subject to cross-examination, there was no way in which a foundation could be laid. We do not believe under these circumstances that the prosecution must find the defendant's affiant, which in some cases would be impossible, bring him to court and call him to the stand in order to lay such a foundation before it can present impeaching evidence. In the case of *People v. Peyton*, 47 Cal.App.2d 214, 117 P.2d 683, the reviewing court affirmed an order denying a motion for a new trial on the ground of newly discovered evidence where the trial court at the hearing considered a counteraffidavit which impeached the affiant in defendant's supporting affidavit. The defendant there produced the affidavit of one Ward who swore he had participated in the robbery charged. In denying the motion, the trial court, as here, considered the counteraffidavit of a police officer wherein he alleged that he interviewed Ward prior to the hearing and denied being involved. Nothing in this opinion indicates a foundation to impeach Ward was laid prior to the introduction of the counteraffidavit. Since the motion appears to

have been heard entirely on affidavits, such foundation obviously could not have been established. Although impeaching counter-affidavits were used in the Peyton case, in the instant case witnesses in opposition to the motion took the stand. The difference does not seem material because in neither case was defendant's affiant present. Since the use of affidavits is required under section 1181 of the Penal Code, the rule of evidence requiring the laying of a foundation for impeachment must be relaxed. A rigid application of the rule would work a hardship on the party opposing the motion as that party would be required to bring affiant into court in order to lay such a foundation. This result is not reasonable.

Appellant's argument that the same rules of evidence, including those relating to hearsay and impeachment which are applicable in the trial of a matter, apply in a hearing on a motion for new trial, completely overlooks the fact that section 1181 of the Penal Code requires the production of affidavits. This obviously contemplates hearsay which the authorities have uniformly held can be considered by the trial court for the purposes of the motion. In fact, the trial judge in the instant case made it clear that although any conversation with Mason was hearsay, it was admissible as going to the credibility of Mason since he had submitted an affidavit. The court, in considering the testimony for

this limited purpose, stated: "That's the purpose of this hearing; one of the purposes of this hearing, to determine the credibility of the maker of that affidavit." Had affiant Mason been present and testified, he could have been examined by the prosecution concerning the manner in which he allegedly perpetrated the burglary, which testimony could have been controverted or impeached by facts showing the burglary had been committed in a different manner. However, since Mason was not present, the only way in which the details could be brought before the court was by affidavit, or testimony of Johnson. The court considered the testimony of Johnson only for the limited purpose of determining the credibility of Mason.

We believe the court below properly considered the testimony of the witnesses and exhibit 2, and that no abuse of discretion is manifest.

Appellant finally urges that the trial court erred in giving two instructions which were abstract in that they had no application to the evidence adduced at the trial. He does not contend that the instructions are erroneous in substance. The two instructions referred to are regular California Jury Instructions Criminal, numbers 29 and 29-D. Number 29 defines a ¹ "confession" and "admission."

The fourth paragraph of instruction 29 instructing the jury what it must decide in

1. Evidence has been received in this case tending to show that on ~~(an occasion)~~ (occasions) other than this trial the defendant himself made ~~(a statement)~~ (statements) tending to prove his guilt of the alleged crime for which he is on trial.

(A statement thus made by a defendant may be either a confession or an admission.)

A confession is a statement that was made by one who is a defendant in a criminal trial, at a time when he was not testifying in that trial, by which he acknowledged certain conduct of his own that constituted a crime for which he is on trial, a statement which, if true, discloses his guilt of that crime and excludes the possibility of a reasonable inference to the contrary.

(An admission is something less than a confession in that it does not concede so much pointing toward defendant's guilt, and does not alone, even if true, support a deduction of guilt. It may consist of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledged a fact that contributes in some degree to the proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial.)

(If you should find that a confession or an admission was false in any particular, it remains, nevertheless evidence for your consideration in connection with all other evidence in the case, to be given such significance and weight as your judgment may determine.)

the event it finds that a confession was made was stricken and was not read.

Instruction 29-D admonished the jury to "view with caution the testimony of any witness which purported to relate an oral admission of the defendant or an oral confession by him."

It is clear that although certain admissions were made by appellant which became part of the evidence, no confession was offered. It is appellant's claim that the giving of instructions 29 and 29-D led the jury to believe a confession existed and was part of the evidence.

Considering the entire record, we do not think that the giving of the two instructions could reasonably have lead the jury to believe that evidence of a confession existed. Apart from instruction 29 defining the terms "confession" and "admission," and cautionary instruction 29-D, no other instruction was given relating to confessions. In striking the fourth paragraph of instruction 29, the trial court was most careful not to inject an issue that did not exist.

[6] Referring first to the cautionary instruction relating to an oral admission or confession of defendant, it was not only proper, but should have been given, since there was evidence of certain admissions. *People v. Southack*, 39 Cal.2d 578, 248 P.2d 12.

[7] Instruction 29, as given, does no more than define the terms "confession" and "admission." A reading of the entire instruction discloses that the definition of a confession was included only in order to properly define an admission. An admission is defined therein in terms of, and as differing from, a confession as is evidenced from the first paragraph of the instruction which begins: "An admission is something less than a confession in that. * * *" Nothing in the instruction advises the jury that a confession is in any way involved in the evidence at bar, or what the jury is to do in the event it finds one to exist; nor does it infer that the jury could find one from the evidence. This is not an instruc-

tion covering a "confession" as such. No instruction governing "confessions" exclusively was given, and the objectionable portion of instruction 29 referring to a confession in the evidence was deleted. The two instructions read were not abstract; nor do we believe that the jury could have reasonably implied that a confession was involved. They injected no issue unwarranted by the evidence, and did not unduly emphasize a confession as against an admission. We find no error in the giving of these two instructions.

The judgment and order denying motion for new trial affirmed.

WHITE, P. J., and FOURT, J., concur.



161 Cal.App.2d 490

Demetrios PALESTIS and Frieda Palestis,
Plaintiffs and Appellants,

v.

WEBER & MILLER, a partnership, Lawrence H. Weber, Glenn H. Miller, Builders' Control Service, Inc., a corporation, Bank of America N T & S Association, a corporation, Defendants and Respondents.

Civ. 5811.

District Court of Appeal, Fourth District,
California.

June 19, 1958.

Rehearing Denied July 15, 1958.

Hearing Denied Aug. 13, 1958.

Action for declaratory relief under agreements providing for construction of a house and the financing thereof and the controls to be placed on the construction money. The Superior Court of San Diego County, Joe L. Shell, J., entered judgment after arbitration, and the plaintiffs appealed. The District Court of Appeal, McCabe, J. pro. tem., held that where the plaintiffs and defendants, in open court on the date set for trial, entered into stipulations

to refer the matter of any defects and deficiencies in respect to the agreements to a specifically designated arbitrator, for determination by him, and to be bound by any report and findings made by arbitrator, and arbitrator made his report to the court and the parties, the trial judge had the right and duty to accept the report, and the plaintiffs could not complain that trial judge did so.

Affirmed.

1. Arbitration and Award ⇨72

Where plaintiffs and defendants, in open court on the date set for trial, entered into stipulations to refer the matter of any defects and deficiencies in respect to agreements for construction of house and financing thereof and controls to be placed on the construction money, to a specifically designated arbitrator, for determination by him, and to be bound by any report and findings made by arbitrator, and arbitrator made his report to the court and the parties, the trial judge had the right and duty to accept the report, and the plaintiffs could not complain that the trial judge did so.

2. Arbitration and Award ⇨7

Stipulation to refer matter to designated arbitrator for determination by him and to be bound by his report and findings was binding on trial and appellate courts.

3. Arbitration and Award ⇨2

The provisions in Code of Civil Procedure relating to arbitration were inapplicable where the parties entered into stipulation to refer matter to designated arbitrator for determination by him and to be bound by his report and findings. West's Ann.Code Civ.Proc. § 1280 et seq.

4. Arbitration and Award ⇨73

Where plaintiffs, on their appeal from judgment entered after arbitration pursuant to stipulation of plaintiffs and defendants to refer the matter to designated arbitrator for determination by him and to be bound by his report and findings, asserted that they had been deprived of due process, plaintiffs should have supplied the District

Court of Appeal with all the necessary filings and record. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

T. T. Crittenden, San Diego, for appellants.

No appearance for respondents.

McCABE, Justice pro. tem.

Plaintiffs appeal from a judgment entered after arbitration.

Plaintiffs brought an action for declaratory relief under certain agreements which existed between themselves and defendants. Plaintiffs had contracted with defendants Weber & Miller for the construction of a house. Further, plaintiffs had entered into certain agreements with defendants Weber & Miller and the other defendants regarding financing and the controls to be placed on the construction money involved in the building of the house.

On the date set for trial all parties, through their respective counsel, entered into a stipulation in open court with plaintiffs present to refer the matter of any deficiencies and defaults to a specifically designated arbitrator, for determination by him and to be bound by any report and findings made by the arbitrator. The arbitrator made his report to the court and parties. Upon a hearing and over the objections of plaintiffs the court accepted the arbitrator's report. Findings of fact and conclusions of law based thereon were duly drawn, filed, noticed and signed by the trial court. Judgment was entered accordingly.

Although the judgment entered was entitled "interlocutory", this court has previously denied a motion to dismiss this appeal on the ground that it was an interlocutory judgment.

Plaintiffs make no contention that their attorney did not have authority to enter into the stipulation or that it was not properly entered in the minutes, but do contend that the stipulation was not as the trial court stated it. This contention is easily resolved since the transcript of the

proceedings is before the court. In part, the stipulation is as follows:

"The Court: * * * Let the record show that the parties have stipulated to the appointment by the Court of Mr. Paderewski * * * architect for the investigation of the contentions of the parties as to deficiencies and defaults on the part of either of the parties and to make this report in writing to the court concerning the matters so investigated * * * that the parties will be bound by the findings of the architect * * *. Now do these parties so stipulate?"

"Mr. Wilson: Stipulated by the defendants Weber & Miller.

"Mr. Folsom: Yes.

"Mr. Jones: Yes.

"The Court: Did you Mr. Crittenden?"

"Mr. Crittenden: Yes. When you say all parties, you mean all parties hereto?"

"The Court: Yes. * * *"

By the stipulation, plaintiffs agreed to be bound by the report of the arbitrator. When the report was filed in the trial court plaintiffs attempted to remove themselves from the effects of the stipulation on the grounds the arbitrator had not acted or decided in accordance with their desires.

[1,2] Pursuant to the stipulation the trial court accepted the report. This the trial judge had the right and duty to do. See *Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co.*, 11 Cal.2d 634, 662, 82 P.2d 3, 118 A.L.R. 486. Appellants by entering into the stipulation cannot complain of what they caused the court to do. See *People v. Kobey*, 105 Cal.App.2d 548, 560, 234 P.2d 251; *Jackson v. Superior Court*, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422. The same arguments presented on the point by plaintiffs to the trial court are now urged on this appeal. The stipulation being a form of an agreement or contract the trial court and the appellate court are bound by it. See 50 Am.Jur.,

Stipulations, Sec. 3; *Hackfeld & Co. v. United States*, 197 U.S. 442, 25 S.Ct. 456, 49 L.Ed. 826; *Rickenberg v. Capitol Garage*, 68 Utah 30, 249 P. 121, 50 A.L.R. 1303.

[3] Plaintiffs raise other issues regarding the arbitration report, claiming the trial court did not apply the sections of the Code of Civil Procedure definitive of arbitration and arbitration proceedings, section 1280 et seq. These issues will not be taken up seriatim because, contrary to customary arbitrary and arbitration proceedings and agreements, here the plaintiffs specifically and definitely agreed to be bound by the findings and report of the arbitrator. Thus, by their own act, they took this arbitration from the operative effect of the sections of the Code of Civil Procedure. Obviously, they had the right to do so. They must accept the report, the findings of fact, conclusion of law and judgment based thereon.

[4] Another contention of plaintiffs is that a reading of the original complaint, together with the records, will disclose that they have been deprived of "due process" guaranteed by the Constitutions of the United States (Amend. 14) and the State of California (art. 1, § 13). If plaintiffs were serious in this contention, they could have supplied this court with all the necessary filings and record. All such filings and record are not before this court and no motion or proceedings have been taken by plaintiffs to augment the records or to otherwise get these matters before this court. The portion of the record which is before this court reflects the plaintiffs never intended to have these records before this court. In the "Notice to Prepare Clerk's Transcript and Designation of Papers to be Copied" some of the papers plaintiffs now refer to were stricken by the plaintiffs from the notice, and thus were never prepared.

The judgment is affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.

161 Cal.App.2d 614

**Thomas FINLEY and Veatrice E. Finley,
Plaintiffs and Appellants,**
v.

**Daniel L. BOTTO and Tillie Botto, Defend-
ants and Respondents.**
Civ. 9286.

District Court of Appeal, Third District,
California.
June 24, 1958.

Action by owners of apartment house to quiet title to alleged easement in walkway lying between their apartment house and apartment house of defendants who constructed fence denying plaintiffs full use of walkway in April, 1955, two months before plaintiffs filed their action. The Superior Court, Yuba County, E. T. Manwell, J., rendered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Schottky, J., held that evidence sustained findings that defendants' predecessors permitted use of walkway as gesture of good will and neighborly accommodation, that no claim of right was asserted by plaintiffs' predecessors or plaintiffs until defendant constructed fence and that continued use of walkway by plaintiffs after 1949, when they bought their apartment house, and 1950, when defendants bought their apartment house, was permissive and under no claim of right and that evidence did not establish right claimed by plaintiffs by prescription or adverse possession.

Affirmed.

1. Easements ☞37

In action to quiet title to alleged easement in walkway lying between two apartment houses owned by plaintiffs and defendants, whether use of walkway was under a claim of right or as a mere matter of neighborly accommodation was question of fact to be determined by trial court in light of relation of parties, their conduct, the situation of the property, and all surrounding circumstances.

2. Appeal and Error ☞1012(1)

In action to quiet title to alleged easement in walkway lying between two apart-

ment houses owned by plaintiffs and defendants, it was for trial judge, who, under stipulation of counsel, viewed premises, to weigh evidence.

3. Easements ☞36(3)

In action by owners of apartment house to quiet title to alleged easement in walkway lying between their apartment house and apartment house of defendants who constructed fence denying plaintiffs full use of walkway in April, 1955, two months before plaintiffs filed their action, evidence sustained finding that defendants' predecessors permitted use of walkway as gesture of good will and neighborly accommodation, that no claim of right was asserted by plaintiffs' predecessors or plaintiffs until defendants constructed fence, and that continued use of walkway by plaintiffs after 1949, when they bought their apartment house, and 1950, when defendants bought their apartment house, was permissive and under no claim of right, and evidence did not establish right claimed by plaintiffs by prescription or adverse possession.

Steel & Arostegui, Marysville, for appellants.

Weis & Weis, Yuba City, for respondents.

SCHOTTKY, Justice.

Plaintiffs commenced an action against defendants in which plaintiffs alleged that they owned an easement in a certain walkway lying between two apartment houses owned by the respective parties. Plaintiffs prayed for judgment quieting their title to said alleged easement and for an injunction compelling defendants to remove a fence constructed by defendants upon said walkway. Defendants in their answer denied that plaintiffs had any right to any easement. Following a trial the court entered judgment denying plaintiffs' right to an easement and to an injunction, one of the findings of the court reading as follows:

"That the predecessors in interest of the parties to this action who owned

the respective properties involved in this case when the space between the houses began to be used for walkway purposes by plaintiffs' predecessors were congenial, cooperative neighbors, and such use was permitted by defendants' predecessors as a gesture of good will and neighborly accommodation. That no claim of right was asserted by plaintiffs' predecessors, nor was any indication ever brought to the notice of defendants or their predecessors that such a claim would or might be asserted, until defendants constructed a fence on their north property line in 1955, thus denying to plaintiffs the full use of the walkway, at which time plaintiff, Thomas Finley, did to and in the presence of defendant, Daniel L. Botto, assert such a claim for the first time. This was approximately two months prior to the filing of this action, and therefore the Court concludes and finds that plaintiffs' showing is lacking in essential factors that are necessary to establish by prescription or adverse possession the right claimed by them."

Plaintiffs have appealed from the judgment and contend most earnestly that "on the facts and as a matter of law, plaintiffs are entitled to a boundary line easement." Before discussing the specific contentions of appellants we shall summarize the evidence which is not in substantial dispute.

The appellants and the respondents are adjoining landowners. Appellants' property lies to the north of that of the respondents. Each lot extends from E Street in the city of Marysville to a rear alley, and each contains an apartment building which is constructed close to the common boundary line. On appellants' property, in addition to the apartment house, are three cottages which are in the rear of the apartment house. At the rear of the apartment building is a laundry room which is used by all the tenants of appellants. The distance between the two apartment buildings is four feet. The areaway between the two buildings was used by appellants' tenants to

reach the laundry room, and for the tenants of the cottages to reach E Street. In 1955, respondents erected a fence on their side of the boundary line. This fence is one foot south of appellants' building and prevents easy access to the rear of the building. When the fence was constructed appellants voiced an objection and thereafter this suit was brought. It appears that at one time there was a brick wall dividing the properties at the boundary line and when the wall was in place it was impossible to walk from E Street to the rear of appellants' property. The wall disintegrated and by 1939 was in bad shape. In 1941 there was no actual wall between the buildings but evidence remained that there had been one. After 1944 the then owner of respondents' property completed the demolition of the wall and made the brick walkway between the two apartment houses. The then owner of respondents' property testified:

"[Mr. Weis] Q. Did anything occur which would indicate or convey to you any knowledge or impression that the Ertmodes were making or asserting a claim to an easement across your property?

"A. Of course not, no. It was a matter of we were just being neighborly and we wouldn't have thought of anyone trying to make a legal claim to it. That would have been the last thing we would have expected."

Appellants acquired the legal title to their property in 1949 and respondents acquired the title to theirs in 1950. Appellant Thomas Finley testified that his relations with respondents have always been friendly and that the first indication he gave to respondents that he claimed any easement over respondents' part of the property was when respondents started to build the fence. Respondent Daniel L. Botto testified that the relationship between appellants and respondents after respondents acquired their property have been neighborly and friendly, and that appellants' son had married respondents' daughter.

Appellants first cite the following from a note in 27 A.L.R.2d at page 341:

"In the great majority of instances in which a lane, private road, alley, driveway, or passageway lying over and along the boundary between lots or tracts has been used without interruption by the adjoining owners for the full prescriptive period, and for a common purpose, and without any oral agreement therefor being shown, the user of each owner has been regarded as adverse to the other and the claim of prescriptive easement upheld as against any attempt to restrict or deny the use."

Appellants then state that in the case at bar the vital factors thus recognized in the great majority of American jurisdictions as creating an easement are present: (1) There is a passageway lying over and along the boundary between lots; (2) the passageway has been used without interruption between adjoining owners for the full prescriptive period, for a common purpose; and (3) no oral agreement for such use was shown on trial.

Appellants then argue that the user of each owner should be regarded as adverse to the other, and that plaintiff Finley's claim to a prescriptive easement should be upheld as against any attempt to restrict or deny his use.

Appellants rely strongly on the case of *Bernstein v. Dodik*, 129 Cal.App. 454, 18 P.2d 983, in which plaintiffs sought to quiet title to an easement and to enjoin defendants from interfering therewith. Plaintiffs and defendants owned adjoining lots in a Los Angeles subdivision. A driveway had been constructed between the two lots, over and along the dividing line; a strip of 4.6 feet of the driveway was on one lot and a strip of 3.1 feet of driveway was on the other lot. Plaintiffs, and their predecessors, had made use of the way without oral agreement for more than five years. Defendants claimed that plaintiffs' use was permissive; that there had not been communicated to defendants any knowledge

that plaintiffs' use was under claim of right. The trial court gave judgment in favor of plaintiffs, and appellants quote from the opinion affirming the judgment, 129 Cal.App. at page 458, 18 P.2d at page 985 as follows:

"* * * While it is a well-established principle that the use must be adverse, yet it is an equally well-established principle that where the use of the easement is continuous or openly and notoriously adverse to the owner, it creates the presumptive knowledge in him that the person using the easement is doing so under a claim of right."

However, the appellate court also said, 129 Cal.App. at page 457, 18 P.2d at page 984:

"* * * The question as to whether or not the use of the driveway was under a claim of right or as a mere matter of neighborly accommodation was a question of fact to be determined by the trial court in the light of the relation of the parties, their conduct, the situation of the property, and all the surrounding circumstances. *Abbott v. Pond*, 142 Cal. 393, 76 P. 60; *Humphreys v. Blasingame*, 104 Cal. 40, 37 P. 804."

Appellants also cite *Murray v. Fuller*, 82 Cal.App.2d 400, 186 P.2d 157, in which defendants appealed from a judgment declaring that the plaintiffs were the owners of an easement for right of way over a strip of land approximately 7 feet wide along the west boundary of defendants' lots. A strip had been used as a driveway for ingress to and egress from the rear of plaintiffs' property to the street on which said property fronted. The use had been made for more than five years. The use was made by plaintiffs and their predecessors, without asking or receiving permission of any person and without opposition from defendants or defendants' predecessors. The use had been open, continuous and notorious. In affirming the judgment the appellate court said, 82 Cal.App.2d at page 406, 186 P.2d at page 160:

"The use of the driveway by plaintiffs and their predecessors and their tenants without express permission amounted to trespass and afforded grounds for legal redress in favor of defendants' predecessors, and it was therefore sufficient to initiate a prescriptive title."

Respondents in reply point out that the decisions relied upon by appellants are cases in which judgments that an easement had been established were affirmed upon appeal. Respondents argue that the evidence is sufficient to support the finding that the use of the walkway by appellants and their predecessors in interest was permissive and not adverse. Respondents cite *O'Banion v. Borba*, 32 Cal.2d 145, at page 147, 195 P.2d 10, 12, in which the court said:

* * * * In this connection it is pertinent to observe that whether the use of the easement is adverse and under a claim of right, or permissive and with the owner's consent, and the nature of the user is sufficient to put the owner on notice, are questions of fact. * * * Also, if there is any substantial evidence to support the judgment, it must be affirmed. All conflicts must be resolved in favor of the prevailing party and the evidence viewed in a light most favorable to him.

* * * * *

"There has been considerable confusion in the cases involving the acquisition of easements by prescription, concerning the presence or absence of a presumption that the use is under a claim of right adverse to the owner of the servient tenement, and of which he has constructive notice, upon the showing of an open, continuous, notorious and peaceable use for the prescriptive period. Some cases hold that from that showing a presumption arises that the use is under a claim of right adverse to the owner. [Citing cases.] It has been intimated that the presumption does not arise when the easement is over unenclosed and unim-

proved land. See, 28 C.J.S. Easements § 68, p. 736; 4 Tiffany, Real Property (3d ed.), sec. 1196a. Other cases hold that there must be specific direct evidence of an adverse claim of right, and in its absence, a presumption of permissive use is indulged. [Citing cases.] The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner. There seems to be no apparent reason for discussing the matter from the standpoint of presumptions. For the trial court the question is whether the circumstances proven do or do not justify an inference showing the required elements. In the appellate court the issue is merely whether there is sufficient evidence to support the judgment of the trial court. This view has been implicitly followed. [Citing cases, including *Conaway v. Toogood*, 172 Cal. 706, 158 P. 200.] In *Conaway v. Toogood*, supra, the rule is succinctly stated: "The question as to whether or not the use of a right of way has been adverse and under a claim of legal right so to do, or a mere matter of neighborly accommodation, is a question of fact to be determined by the jury, or the court sitting without a jury, from all the facts and circumstances of the case."

[1] We are unable to agree with appellants that the evidence in the instant case compelled a finding that they were entitled to a boundary line easement. If the judgment had been in favor of appellants we would, as was done in the cases cited by appellants, hold that it was supported by the evidence. But as stated in *Bernstein v. Dodik*, supra, the principal case relied upon by appellants [129 Cal.App. 454, 18 P.2d 984], "The question

as to whether or not the use of the driveway was under a claim of right or as a mere matter of neighborly accommodation was a question of fact to be determined by the trial court in the light of the relation of the parties, their conduct, the situation of the property and all the surrounding circumstances."

[2,3] It was for the trial judge, who not only heard the evidence but also, under stipulation of counsel, viewed the premises, to weigh the evidence, and we are convinced that the evidence hereinbefore set forth, together with the inferences that may reasonably be drawn therefrom, support the findings and judgment. We believe that the record supports the following statement in the court's memorandum opinion:

"The Court cannot help but feel that this so-called walkway was originally constructed to avoid a muddy condition caused by dripping of eaves which in themselves were very close to the actual property line, and entirely as a neighborly gesture of good will. The Court further feels that this construction was so regarded by the families using it and that until the denial of its full and free use became an inconvenience, no claim of right was made."

Appellants in their closing brief make the further contention that assuming that the record supports the finding of use permitted by the predecessor, this is not sufficient to establish permissive use or neighborly accommodation for the prescriptive period between 1949, when appellants bought, or even January, 1950, when respondents purchased their property, and April, 1955, when the fence was erected.

Appellants rely on *Plaza v. Flak*, 7 N.J. 215, 81 A.2d 137, 141, 27 A.L.R.2d 324, 331, in which the court said: "If a license to the occupants of either dwelling had been given by the former owners, such would have been revoked by the conveyance of title to others and the continued use by the occupants of either dwelling

would thereafter have been adverse to the owner of the fee of the other lands." While the quoted statement may indicate that a permissive license terminates when the owner of the subservient tenement conveys his interest or the licensee conveys his interest, we do not regard it as determinative of the instant case. The relationship between the parties and the surrounding circumstances as shown by the record entitled the trial court to draw the inference that the continued use of the walkway by appellants was permissive and not under claim of right.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J.
pro tem., concur.



161 Cal.App.2d 566

HOLMESTAKE MINING COMPANY, a corporation, Plaintiff and Respondent,

v.

W. S. TALCOTT, Floyd R. Bekins, and Walter W. Patrick, co-partners doing business under the firm name and style of Santo Nino Mines, a co-partnership, Defendants and Appellants.

Civ. 5810.

District Court of Appeal, Fourth District,
California.

June 23, 1958.

Rehearing Denied July 15, 1958.

Hearing Denied Aug. 21, 1958.

Action for damages for breach of contract by which plaintiff agreed to mill for defendants molybdenum and copper ore to be produced by defendants from their mining claims. The Superior Court of Imperial County, Elmer W. Heald, J., rendered judgment in favor of plaintiff, and the defendants appealed. The District Court of Appeal, Mussell, J., held that the evidence warranted award of \$24,777

to plaintiff for damages for loss of future profits.

Affirmed.

1. Contracts ⇨322(3)

In action for damages for breach of contract by which plaintiffs agreed to mill for defendants molybdenum and copper ore to be produced by defendants from their mining claims, evidence supported finding of due performance of contract by plaintiff.

2. Damages ⇨140

In action for damages for breach of ore milling contract, evidence warranted award of \$8,250 for costs to plaintiff in maintaining the mill in operating condition for the remainder of the contract.

3. Appeal and Error ⇨996, 1010(1), 1012(1)

The weight and sufficiency of the evidence and the inferences to be drawn therefrom are matters for the trier of fact.

4. Appeal and Error ⇨1010(1)

Where there is substantial evidence to support the findings of fact, such findings will not be disturbed on appeal.

5. Contracts ⇨322(3)

In action for damages for breach of ore milling contract by which plaintiff agreed to mill for defendants molybdenum and copper ore to be produced by defendants from their mining claims, evidence failed to show that plaintiff breached the contract by failing to deliver the molybdenum concentrates as agreed.

6. Damages ⇨140

In action for damages for breach of contract by which plaintiff agreed to mill for defendants molybdenum and copper ore to be produced by defendants from their mining claims, evidence warranted award of \$24,777 as damages for loss of future profits.

7. Damages ⇨40(2)

Damages may be recovered for loss of future prospective profits where they may fairly be supposed to have entered into the contemplation of the parties when they

made the contract and are reasonably certain.

Chase, Rotchford, Downen & Drukker, Los Angeles, for appellants.

Brandt & Baker, Yuma, Ariz., and Charles F. Sturdevant, Jr., El Centro, for respondent.

MUSSELL, Justice.

This is an action for damages for breach of an ore milling contract. Defendants appeal from a judgment in favor of plaintiff and contend that the findings of the trial court are not supported by the evidence.

Plaintiff corporation owned and operated an ore treatment mill in Winterhaven, Imperial county, California, and the defendant partnership owned mineral leases to an ore deposit in Arizona, containing molybdenite and chalcopyrite. On July 16, 1954, plaintiff and defendants entered into a contract in writing in which plaintiff agreed to mill for defendants molybdenum and copper ore to be produced by defendants from their mining claim. Defendants agreed to produce and ship the ore to be milled to plaintiff's mill at their sole cost and expense. Plaintiff agreed to mill the ore in good workmanlike manner and to deliver the concentrates therefrom in bins at the millsite. Defendants agreed to pay plaintiff the actual cost of milling plus 50% thereof and to furnish plaintiff sufficient ore for the milling of a minimum of 50 tons per day, commencing not later than the first week in August, 1954. They agreed to maintain sufficient ore in the bins and stockpiles to permit such operations. Defendants agreed to mill not less than 9,000 tons of ore under the agreement and that the 50 tons per day might be increased to 100 tons per day at their option. It was also agreed that additions to the mill equipment might be necessary to handle the ore, in which event the cost of such additional equipment was agreed to be borne exclusively by the defendants. Accurate records were to be kept by plain-

tiff of the milling operations and it was estimated by plaintiff that the milling operation, plus 50% thereof, would not exceed \$7 per ton. However, it was distinctly stipulated that said sum was an estimate only and not a guarantee as to the cost of such milling operations. It was further agreed that plaintiff was entitled to recover from defendants the sum of \$1 per ton on the ores milled as depreciation costs. It was further stipulated that the general manager of plaintiff corporation should be in exclusive control and management of the milling operations.

Prior to the execution of this agreement, Mr. Holmes, president of plaintiff corporation, had a discussion with the defendants in which they agreed to ship plaintiff a sample of the ore which defendants could supply for milling so that plaintiff might ascertain the mineral content of the ore and determine whether it could be economically processed. During the early part of July, 1954, defendants shipped to plaintiff a 200-pound sample of this ore for test purposes. Plaintiff ran tests on the submitted sample and found that the ore contained 15.3 per cent molybdenum sulfite and approximately 5% copper. Plaintiff then advised defendants of the results of these tests and that plaintiff could make a good separation of the molybdenum sulfide and the copper ore.

Defendants failed to furnish ore for the commencement of milling operations on August 1, 1954, as specified in the contract, and the first shipment consisting of three carloads did not arrive in Yuma until August 10, 1954. The record shows that to operate the mill properly and to make a good recovery of the mill concentrates it was necessary that the mill be operated continuously 24 hours per day. The defendants did not supply ore in sufficient quantities to maintain a sustaining milling rate of 50 tons per day, the minimum specified in the contract. Therefore, plaintiffs could only operate the mill spasmodically because of the lack of ore.

Defendants did not ship ore which conformed to the test sample submitted but

shipped ore which was highly oxidized, thereby making it difficult to recover the concentrates therefrom. However, the ore shipped was milled to the specifications furnished by the defendants.

On September 9, 1954, defendants sent a letter to plaintiff instructing the plaintiff to complete the milling of a car of ore then in transit and all ore then on hand as soon as possible and to immediately thereafter reduce expenses and retain a skeleton crew of not more than three persons who would re-run the molybdenum concentrates and that "After the molybdenum concentrates have been re-run, you are to cease all operations under the contract." In accordance with these instructions plaintiff milled all of the ore shipped and the mill was closed down on September 15, 1954. Plaintiff then retained a skeleton crew, Mr. Holmes, president of the plaintiff corporation, and two men who had been employed by plaintiff under a six months' contract in contemplation of the milling contract with the defendants. No further ore was shipped subsequent to the receipt of this letter from the defendants and the record shows that the defendants shipped only 741 tons of ore under the contract.

[1,2] The first contention of defendants is that the findings of the trial court "That plaintiff duly performed all the conditions of the said contract to be by it performed and was for the duration of said contract ready, willing and able to perform said contract", and "That after September 15, 1954, plaintiff, pursuant to said contract, maintained said mill in operating condition for the remainder of the contract at a cost to plaintiff of \$8,250", are contrary to the evidence. In this connection it is argued that plaintiff failed to make adequate assays or tests and otherwise failed to operate in a good and workmanlike manner. However, the testimony of A. W. Jeffers, an expert in flotation mining process who aided plaintiff in establishing an efficient recovery procedure, testified that the milling procedure used was an efficient one in contemplation of the low grade of ore shipped and that the resulting 75% of ore shipped was

considered a good recovery. The evidence further shows that out of each shipment samples were taken by plaintiff and assays made to determine the molybdenum and copper content of the ore. The record further shows that a public accountant was employed by plaintiff from July, 1954, to February, 1955, during which period he kept accurate and complete account of all transactions between plaintiff and the defendants under the contract here involved and made periodic audits of the account. We are unable to find any evidence in the record that plaintiff refused to furnish defendants with the information therein contained.

The award of \$8,250 for costs to plaintiff in maintaining the mill in operating condition for the remainder of the contract was based on the fact that defendants agreed to mill not less than 9,000 tons of ore under the agreement at 50 tons per day and the further evidence that the salaries of the three men composing the skeleton crew required by defendants amounted to the sum of \$8,250 for the time they were engaged by plaintiff under the contract.

[3, 4] The weight and sufficiency of the evidence and the inferences to be drawn therefrom were matters for the trial court and where, as here, there is substantial evidence to support the foregoing findings, they cannot be disturbed on appeal. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Dillard v. McKnight, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835.

It is claimed that plaintiff did not operate in an economical manner. There was direct and substantial evidence to the contrary and the record shows that the costs of milling were greatly increased by the failure of defendants to deliver the quantity and quality of ore promised by them in the contract and shown by the test sample submitted. Under the circumstances shown by the record, the finding of due performance of the contract by plaintiff must stand.

[5] Defendants claim that plaintiff breached the contract by failing to deliver the molybdenum concentrates as agreed. However, the testimony shows that plaintiff withheld delivery for a time because of bills which were unpaid by the defendants and that at a later date plaintiff shipped the concentrates and received \$3,907.30 therefor, which was applied to payment of said bills by arrangement with Mr. Patrick, one of the defendant partners.

[6, 7] Finally, defendants argue that the damages awarded by the court were excessive. However, the record shows that the court found that from the first week in August, 1954, until September 15, 1954, plaintiff expended the sum of \$14,470.64 in milling ore under the contract and awarded plaintiff profit thereon in the amount of \$7,369.12, as provided in the contract, together with depreciation on its equipment in the amount of \$750. The court further found that defendants failed and refused to deliver to plaintiff 8,259 tons of ore, all in violation of the contract and that by reason of such failure, plaintiff sustained damages in the further sum of \$24,777 for loss of future profits. The evidence indicates that plaintiff could have reasonably expected to make said profits if defendants had delivered the 9,000 tons of ore specified in the contract rather than 741 tons actually shipped. Damages may be recovered for loss of future prospective profits where, as here, they may fairly be supposed to have entered into the contemplation of the parties when they made the contract and are reasonably certain. Grupe v. Glick, 26 Cal.2d 680, 688, 160 P.2d 832; Hoag v. Jenan, 86 Cal.App.2d 556, 563, 195 P.2d 451.

Judgment affirmed.

GRIFFIN, Acting P. J., and McCABE, J. pro tem., concur.

Hearing denied; TRAYNOR, J., dissenting.

161 Cal.App.2d 355

Clarence H. ZIRKER and Agnes Jean
Zirker, Plaintiffs and Appellants,
v.

Joseph BABER, Jr., Joan Baber, La Jolla
Garage, a California Corporation, James
L. Dallas, et al., Defendants,

James L. Dallas, Respondent.
Civ. 5497.

District Court of Appeal, Fourth District,
California.
June 17, 1958.

Action, for money had and received, wherein plaintiffs based their claim to recovery on assumption that money they had advanced to third person had still been owned by plaintiffs when it was paid to and received by defendant. From a judgment of the Superior Court of San Diego County, Gerald Thomas, J., in favor of defendant, an appeal was taken. The District Court of Appeal, Mussell, J., held that evidence would sustain finding that money had been loaned to third person by plaintiffs for his own use as well as implied finding that there was no privity of contract between defendant and plaintiffs and implied finding that there was no trust relationship between plaintiffs and defendant.

Affirmed.

Money Received ☞18(3)

Trusts ☞110

In action, for money had and received, wherein plaintiffs based their claim to recovery on assumption that money they had advanced to third person had still been owned by plaintiffs when it was paid to and received by defendant, evidence would sustain finding that money had been loaned to third person by plaintiffs for his own use, as well as implied finding that there was no privity of contract between defendant and plaintiffs and implied finding that there was no trust relationship between plaintiffs and defendant.

Hillyer & Crake and Oscar F. Irwin, San Diego, for appellants.

Luce, Forward, Kunzel & Scripps, San Diego, for respondent.

MUSSELL, Justice.

This is an appeal by plaintiffs from a judgment in favor of defendant James Dallas in an action on a common count for money had and received.

In July, 1954, defendant James L. Dallas owned a 70% interest in the Waldman Motor Company, a partnership in La Jolla, and the remaining interest therein was owned by H. Stephen King. The La Jolla Garage, Inc. was formed by an amendment of the articles of incorporation of the Community Broadcasting Company in order to take over the assets and business of the Waldman Motor Company. Application was made to the Division of Corporations of the State of California for a permit to issue securities for the assets of the Waldman Motor Company. A permit was issued by the corporations commissioner conditioned on the issuance of shares of stock only to the extent of the net worth of the assets transferred to the La Jolla Garage Corporation.

On November 30, 1954, the La Jolla Garage Corporation issued 1,400 shares of its class A stock, par value \$10 per share, to Dallas for his 70% interest in the Waldman Motor Company partnership and 600 shares were issued to H. Stephen King for his 30% interest therein. However, this stock was issued prior to a determination of the net worth of the assets transferred and an accountant was subsequently employed to determine the net worth as of November 30, 1954, the date of the transfer. The balance sheet showed that the net worth of the assets was \$4.87 per share instead of \$10 per share as required by the permit. Shortly after receiving the accountant's statement, the secretary of the corporation, who was also its attorney, advised King, Dallas and Joseph Baber that the net worth as shown on the balance sheet was too low for the amount of stock that had been is-

sued and that something had to be done about it, that "it was one of two things, either the statement that was prepared was incorrect and had to be corrected, or else the stock that was outstanding would have to be transferred back and a lesser number of shares in the same percentage would have to be issued." The 1,400 shares issued to Dallas were never delivered to him because of conditions imposed by the corporations commissioner.

Defendant Joseph Baber, who was an employee of the La Jolla Garage, entered into an agreement in writing with Dallas on January 14, 1955, in which Dallas agreed to sell and Baber agreed to buy 50% of the net worth of the La Jolla Garage Corporation for the sum of \$10,000 and Dallas agreed to execute any and all necessary documents necessary to transfer said interest to Baber. Baber obtained the sum of \$10,000 from the plaintiffs Clarence H. Zirker and Agnes Jean Zirker and Baber paid said sum to Howard Clayton, the attorney and secretary of the corporation. The money was placed in the trustee account of the law firm of Luce, Forward, Kunzel & Scripps. On January 27, 1955, Clayton paid said sum to Dallas upon obtaining a written authorization so to do from Baber.

On March 15, 1955, Dallas and Baber petitioned the corporations commissioner for permission to issue 1,000 shares of corporate stock to Baber, and pursuant to an order of the commissioner, 1,000 shares were transferred in escrow to Baber. Joseph Baber was president of the defendant La Jolla Garage Corporation at all times after February 15, 1955, and James L. Dallas resigned and severed all connection with that company effective February 15, 1955.

The original complaint in the instant action for money had and received, rescission of contract, breach of contract and conversion named Joseph Baber, Jr., Joan Baber, La Jolla Garage, a California corporation, and John Does One to Five as defendants. The cause came on regularly for trial on February 14, 1956. The La Jolla Garage

defaulted and the matter was partially heard by the court. By consent of counsel, a continuance was had to June 26, 1956, for further proceedings. On that date counsel for the Babers informed the court that they would not appear for further proceedings and desired to default in said matter. On motion, judgment was then entered against the Babers and the La Jolla Garage for \$16,094.08, and costs, on the ground that the defendants Baber obtained moneys from plaintiffs by false pretenses and false representations. There was no appeal from this judgment and it has become final.

Subsequent to February 15 and prior to June 26, 1956, the Babers filed a cross-complaint against Dallas and Dallas was served with summons in the original action as John Doe One. He appeared by answer to the complaint and cross-complaint. On June 26th he appeared at the trial and, upon being advised that the Babers would not prosecute their cross-complaint against Dallas, the court granted judgment for Dallas on the cross-complaint and commenced further trial of the proceedings on the complaint of plaintiffs versus Dallas by which the plaintiffs sought to recover the sum of \$10,000 from Dallas on the basis of a common count for money had and received. Plaintiffs contended that Dallas had received said sum under circumstances which made it his duty to surrender the money to the rightful owners, the plaintiffs in the action.

The trial court found that Dallas was not indebted to plaintiffs in the sum of \$10,000 or any other sum; that plaintiffs did not lend Dallas said sum or enter into any agreement to lend him said sum for the purchase of stock in the La Jolla Garage Corporation; that Dallas made no false or fraudulent representations to plaintiffs or to the Babers in connection with the certificates of stock of said corporation or the business connected therewith; that plaintiffs did not enter into any agreement nor were they induced to enter into any agreement regarding the purchase of stock in said corporation by any acts or conduct on the part of Dallas; that Dallas does not

hold stock certificates of said corporation or assets of said corporation that belong to the plaintiffs. Judgment was entered that plaintiffs take nothing against defendant James L. Dallas and plaintiffs appeal from the judgment.

Appellants base their claim to recovery from Dallas on a common count on the assumption that the money they advanced to Baber was still owned by them when it was paid to and received by Dallas. However, there is substantial evidence that the money was advanced to Baber for his own use and loaned to him by the plaintiffs. Dallas was not a party to the agreement between Baber and the plaintiffs and did not know Baber had obtained the money involved from them. The agreement between Baber and the plaintiffs was not introduced in evidence in the instant case and the record clearly shows that the \$10,000 involved was paid to Dallas pursuant to his agreement with Baber and not with the plaintiffs. Under the terms of this agreement it appears that if Dallas failed or refused to execute all necessary documents to transfer the 50% of the net worth of the La Jolla Garage to Baber, he, Baber, would then have a right of action against Dallas for a breach of said agreement. However, the Babers abandoned their cross-complaint against Dallas in the instant action and it was dismissed by the trial court on motion of Dallas. There was no fraud alleged or proved in the instant action on the common count against Dallas and it does not appear that he obtained any money from the plaintiffs. His obligation was to the Babers and not to plaintiffs.

The record shows that plaintiffs recovered a partial judgment against the Babers and the La Jolla Garage in the instant action on the ground that the Babers, as agents for the La Jolla Garage Corporation, obtained the \$10,000 involved by falsely and fraudulently representing that the La Jolla Garage had been making a profit and was a good business venture. As noted, this judgment has become final.

Appellants devote the major portion of their briefs to the question of whether the

stock transferred to Baber was void. However, that was an issue between the Babers and Dallas and Dallas did not agree to deliver any stock to plaintiffs. The evidence supports the implied finding that there was no privity of contract between Dallas and the plaintiffs. The evidence further supports the implied finding that there was no trust relationship between plaintiffs and Dallas.

There is substantial evidence in the record before us to support the findings of the trial court and the judgment entered in conformance therewith.

Judgment affirmed.

GRIFFIN, Acting P. J., and McCABE, J. pro tem., concur.



161 Cal.App.2d 381

Winifred BOLING and Warren Boling,
Plaintiffs and Appellants,

v.

Earl WOOD and John Wood, Defendants and
Respondents.

Civ. 9279.

District Court of Appeal, Third District,
California.

June 18, 1958.

Action for injuries sustained by wife of tenant when allegedly struck by roll of roofing dropped through skylight of the tenant's living room by the landlord while repairing the roof. Verdict for plaintiffs and from order in the Superior Court, Butte County, J. F. Good, J., granting the defendant's motion for a new trial, the plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that in view of the charge of defendant that the testimony of the tenants was a fabrication, sufficient foundation was laid for receiving

in evidence the rehabilitating testimony of a witness as to the conversation he held with the tenant shortly after the accident in which the tenant made statements to the witness consistent with the testimony the tenant gave on trial.

Order reversed.

1. Witnesses ☞395

Where the opposition has assailed the testimony of a witness as being of recent fabrication, an exception to the hearsay rule allows the admission of evidence of statements or conduct prior to the claimed fabrication and consistent with the testimony of the witness at trial, not to prove the facts, but as tending to show that the witness has not been controlled by motives of interest and that he has not fabricated.

2. Witnesses ☞395

In action for injuries sustained by wife of tenant who was allegedly injured when landlord allegedly dropped a roll of roofing through a skylight into the living room of the tenants, where defendant sought to impeach the testimony of the tenants by introducing testimony that they had long after the accident and prior to the trial, acting in collusion, invented the story about the fall of the paper, the tenants were entitled to introduce evidence tending to rebut the charge of recent fabrication.

3. Witnesses ☞395

In action for injuries sustained by wife of tenant when allegedly struck by roll of roofing dropped through a skylight of the living room of the tenants by the landlord, where landlord sought to impeach the testimony of tenants by establishing that the claim of fall of the paper was a recent fabrication, tenants laid sufficient foundation for receiving in evidence the rehabilitating testimony of the witness as to the conversation he held with the tenant shortly after the accident in which the tenant made statements to him consistent with the testimony he gave on the trial.

4. Appeal and Error ☞1169(9)

Where ground upon which new trial was granted was not sustainable in law, and

no other ground for granting a new trial appeared in the order, the order appealed from must be reversed.

P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for appellants.

Rich, Fuidge & Dawson, Marysville, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from an order granting defendants' motion for a new trial in a personal injury action wherein a jury had, by its verdict in favor of plaintiffs, awarded the sum of \$3,000 in damages.

Appellants are former tenants of respondents. The apartment which they occupied had a skylight in the ceiling of the living room, directly above which there was a skylight in the roof. The two skylights broke when respondent Earl Wood slipped while repairing the roof. Appellants contended that at the time he was carrying a roll of roofing paper and that when he slipped the roll came through both skylights and struck Winifred Boling a glancing blow on the head, resulting in a neck injury. Respondents conceded that Earl Wood slipped while near the skylight in such manner that his elbow broke the glass; that the broken glass in turn fell upon and broke the glass in the second skylight, precipitating shattered glass into the living room where Winifred Boling was standing; and that she suffered minor cuts from glass. But respondents contended throughout the trial that no roll of roofing paper had fallen. The evidence upon this issue was sharply conflicting, and, as aptly stated by respondents herein, the conflict was of such nature that one side or the other necessarily presented false testimony.

Winifred Boling testified in detail as to the happening of the accident, including the fall of the roofing paper. Warren Boling was not present in the home when the accident happened. He testified that, when he arrived he found his wife and the two respondents, Earl Wood and John Wood,

his son, all gathered at the residence and that there then ensued a conversation among the four, wherein respondents both admitted that the roll of roofing paper had fallen through the skylights when Earl Wood slipped on the roof. At the trial both respondents denied the roll fell and both denied that they had held the conversation with Mr. and Mrs. Boling in which, according to both Mr. and Mrs. Boling, they admitted the roofing paper did, in fact, fall through the skylights. Thereafter, respondents attacked the credibility of both Mr. and Mrs. Boling in respect of the fall of the roofing paper. This attack was made first during cross-examination of Mrs. Boling. The cross-examination was searching and extensive and must have indicated to the jury that the cross-examining counsel was seeking to establish that upon the issue of the fall of the roofing paper and with respect to the four-party conversation she was fabricating her testimony. The same type of cross-examination was directed to Warren Boling after he had testified as to the conversation. Thereafter, the respondents testified in support of their case in chief. They categorically denied all of the evidence of the Bolings with respect to the roofing paper falling through the skylights and with respect to the conversation containing the admissions. Having made these denials, Earl Wood was asked if he had had any indication at all that Mrs. Boling was claiming she had been struck on the head with a roll of roofing paper until the day he had been served with process in the action. He replied that the first information he had as to such a claim was when he read the assertions in the newspapers two days before he was served, some nine months after the accident. On cross-examination Earl Wood repeated these assertions. Respondent John Wood also testified that Mrs. Boling made no claim immediately after the accident to having been struck on the head by a roll of roofing paper. He was then asked when was the first time that he had heard any claim concerning the roofing paper and he replied

that some neighbors had said to him that they had read in the paper that such a claim was being made. Thereafter, respondents put three witnesses on the stand who testified in such a way as to support a conclusion by the jury that the roofing paper had not fallen into the room, and, therefore, that the Bolings had fabricated that part of their testimony. These witnesses also testified that Mrs. Boling made no such complaints when they came to the house shortly after the accident. One witness, a daughter of Earl Wood, testified that, although Mrs. Boling lived in the same apartment from August until the following March, after the accident, she never at any time during that period told the witness that she had been struck on the head by a roll of paper. She further said that the first time she had heard of the claim was when she heard her father and her brother talking about it about the time that the news was reported in the paper. A sister of Earl Wood also testified that she had been in the Boling home the afternoon of the accident and that Mrs. Boling had not told her then she had been hit on the head by a piece of roofing paper coming through the skylight. In rebuttal, appellants called two witnesses to rebut the inference of fabrication. The issue on appeal revolves around the receipt in evidence of the testimony of one of them. A Mr. Ludy testified, over objection, that a day or so after the accident he met with his fellow worker, Warren Boling, and in a conversation that ensued had been told by him that his wife had suffered an accident in which a roll of roofing paper had fallen on her through the skylights over their living room. Another witness testified that shortly after the accident she had received a letter from Mrs. Boling stating that she had been hit on the head with a roll of roofing paper, and that her landlord, while roofing the house, had let it drop through two skylights.

A motion for a new trial was made and was granted. We quote the Memorandum and Order Granting New Trial: "In my opinion there was not sufficient foundation

for the admission of the statement by Mr. Boling to the witness Ludy. The only party as to whom the direct charge of fabrication could be leveled was not shown to be present and did not participate in the conversation. We assume the court referred to Mrs. Boling as the only party to whom the direct charge of fabrication could be leveled. It was, therefore, pure hearsay and not competent under the rehabilitation rule. * * * The motion for new trial should be granted and it is so ordered."

[1-4] We think that, under applicable law, the trial court erred in granting a motion for a new trial upon the grounds stated. In *People v. Walsh*, 47 Cal.2d 36, 301 P.2d 247, it was held that where the opposition has assailed the testimony of a witness as being of recent fabrication, an exception to the hearsay rule allows the admission of evidence of statements or conduct prior to the claimed fabrication and consistent with the testimony of the witness at the trial, not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest and that he has not fabricated something for the purpose of the case; that the charge of recent fabrication need not have been made expressly but it is sufficient if the record indicates this was the purpose of the opposing party. We think the rules declared in the cited case dispose of the appeal herein. There can be no doubt that because of the sharp conflict as to the fall of the roll counsel for respondents made every effort available to him to impeach the testimony of Mr. and Mrs. Boling by introducing testimony that they had, long after the accident, and prior to the trial, and acting in collusion, invented the story they told about the fall of the paper. Therefore, they were entitled to introduce the evidence which the court at the trial received and which tended to rebut the charge of recent fabrication. The court, therefore, was in error in holding that a sufficient foundation had not been laid for receiving in evidence the rehabilitating testimony of the witness Ludy as to

the conversation he held with Mr. Boling shortly after the accident, in which Mr. Boling made statements to him consistent with the testimony he gave on the trial. The attempted distinction between the status of Mr. and Mrs. Boling will not stand analysis. Both stood directly charged with recent fabrication. No other ground for the granting of a new trial appearing in the order, the order appealed from must be reversed. See *In re Estate of Baird*, 198 Cal. 490, 507, 246 P. 324, and *Conner v. Southern Pacific Company*, 38 Cal.2d 633, 637, 241 P.2d 535.

The order is reversed.

SCHOTTKY and PEEK, JJ., concur.



161 Cal.App.2d 513

Opal Coewith SCHINDLER, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY OF MADERA, Respondent.

Claude William SCHINDLER, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY OF MADERA, Respondent.

Civ. 9479, 9481.

District Court of Appeal, Third District, California.

June 20, 1958.

Consolidated original proceedings on petitions by husband and wife, who were jointly charged by information with murder of their four year old daughter, for writs of mandate to compel trial court to order pretrial inspection of certain statements made by each to district attorney or his representatives, of certain medical specimens, and of reports made by autopsy

surgeon concerning his findings pertaining to autopsy performed on body of child and for authorization to engage pathologist and to have the child's body exhumed for further autopsy examination. The District Court of Appeal, Warne, J. pro tem., held that where petitioners allegedly could not remember what statements were made to district attorney or his representatives because of his or her emotional disturbance at time of death of child, statements were given without benefits of counsel and knowledge of contents of such statements was necessary in order that petitioners could prepare for their respective defenses to charge of murder, petitioners were entitled to inspect and make copies of his or her own statements.

Writs issued accordingly.

1. Mandamus ☞155(2)

Where no counteraffidavits were filed to petition for writs of mandate, the matters averred in each petition were admitted factually.

2. Criminal Law ☞627½

Where petitioners for writs of mandate to compel court to order pretrial inspection of certain statements made by petitioners, who were jointly accused of murder, to district attorney or his representative allegedly could not remember what statements were made because of his or her emotional disturbance at time of death of child, statements were given without benefits of counsel, and knowledge of contents of such statements was necessary in order that petitioners could prepare for their respective defenses, petitioners were entitled to inspect and make copies of his or her own statements.

3. Criminal Law ☞627½

Where husband and wife were accused of murder of their child and were represented by separate counsel, wife was not entitled to inspect statements made by husband to district attorney or his representative based on allegation that she was informed and believed that her husband made

certain statements to district attorney and his representatives which implicated her in the killing since presumably statements made by husband were outside of wife's presence and would not be admissible against her.

4. Criminal Law ☞627½

Where husband and wife were accused of murder of their child and each employed separate counsel, husband moved for permission to inspect wife's statements, which were given to district attorney or his representative, but neither his motion nor affidavit in support thereof revealed that he requested trial court to make an order permitting inspection of wife's statements, husband was not entitled to inspect statements.

5. Criminal Law ☞627½

Where father, who was jointly charged with wife with murder of four year old daughter, failed to make demand upon coroner that he be allowed to inspect coroner's report with respect to autopsy performed on child, father's motion to inspect autopsy report was properly denied since presumably, if such request had been made, request would have been granted.

6. Criminal Law ☞627½

Husband and wife, who were charged jointly with murder of their four year old daughter, were entitled to inspect samples and specimens taken by autopsy surgeon from body of child.

7. Criminal Law ☞627½, 666½

Husband and wife, who were jointly charged with murder of their child, were entitled to discuss findings of autopsy with the autopsy pathologist and to examine any reports and other data that he had in his possession, notwithstanding district attorney allegedly instructed autopsy pathologist not to discuss autopsy findings and district attorney had improperly interfered with right of husband and wife to interview witnesses.

8. Criminal Law ☞633(1)

The question of appointment of experts at county expense in connection with crim-

inal matters is a matter solely within discretion of trial court. West's Ann.Pen.Code, § 987a.

9. Constitutional Law ☞257

Denial by trial court of an appointment of an expert at county expense on behalf of defendants does not constitute denial of due process of law. West's Ann.Pen.Code, § 987a.

10. Criminal Law ☞633(1)

Dead Bodies ☞1

In proceedings by husband and wife, who were jointly accused of murder of child, for authorization to engage pathologist at county expense and to have body of child exhumed for further autopsy examination, trial court did not abuse its discretion in refusing to grant authorization. West's Ann.Pen.Code, § 987a.

Roy E. Wolfe, Madera, for Opal Schindler.

Mayes & Courtney, Merced, for Claude Schindler.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Lloyd Hinkelman, Deputies Atty. Gen., for respondent.

WARNE, Justice pro tem.

Petitioners in each of the above-entitled matters apply for writs of mandate to compel the respondent court to order the pre-trial inspection of certain statements made by each to the district attorney or his representatives, also of certain medical specimens, and of the reports made by the autopsy surgeon concerning his findings as the result of an autopsy performed on the body of their deceased daughter. They also seek authorization to engage a pathologist of their own choice at county expense and to have the body of the child exhumed for further autopsy examination.

The petitioners are husband and wife and by information have been jointly charged with the murder of their four-year-old daughter, Sandra. As the facts and the law applicable in each matter are practically the same and are contemporaneously

before this court, the two petitions have been consolidated for the purpose of this opinion.

Petition of Opal Coewith Schindler

The petitioner sought an order from the respondent court to permit her or her attorney to examine any statements made by her to the district attorney or his representatives with respect to the death of her daughter, Sandra Marie Schindler, on the ground that she cannot remember her previous statements because of emotional disturbance at the time of the death of the child. Her counsel, although he is not representing petitioner's husband, at the same time demanded that the district attorney also permit him to examine the statements made by petitioner's husband concerning the death of said child, based upon petitioner's allegations on information and belief that such statements implicated the petitioner, that they were untrue, and that petitioner needed the statements to prepare for trial for the purpose of impeachment. The district attorney refused both demands. She also petitioned the respondent court for authorization to engage the services of a pathologist at county expense to examine the medical material concerning the death of said child. (Respecting this latter matter, the court " * * * ordered that the post-mortem doctor may be employed as a witness at this trial at the expense of the County of Madera provided such charge is legal.")

Counsel for petitioner further alleges that when he attempted to discuss the pathological findings with the autopsy surgeon he was informed by said autopsy surgeon that the district attorney had instructed him (the autopsy surgeon) not to discuss such evidence with petitioner or her counsel.

It was also alleged that counsel for petitioner filed a motion for a court order permitting him to engage the services of a pathologist to examine the body of the child and for an order that the body of the child be exhumed for the purpose of permitting said pathologist to perform an au-

topsy. All of said motions were supported by affidavits, and though opposed by the district attorney, no counter-affidavits were filed.

Petition of Claude William Schindler

Counsel for the petitioner alleges that he demanded that the district attorney permit him to examine the petitioner's statements given to the district attorney or his representatives with respect to the death of his daughter, Sandra Marie Schindler. These statements were demanded because petitioner could not remember what statements were made due to his emotional disturbance at the time of the death of the child. Counsel for petitioner at the same time demanded that the district attorney also permit him to examine the statements made by Opal Coewith Schindler based upon petitioner's allegations on information and belief that such statements implicated petitioner, that they were untrue, and that he could not impeach them at the trial unless he knew their contents. The district attorney refused both demands. Counsel further alleges that when he attempted to discuss pathological findings with the autopsy surgeon, he was informed by said autopsy surgeon that he could not do so unless and until he was so instructed by the district attorney.

It is also alleged that he moved the respondent court for an order permitting him to join in the motions made by Opal Coewith Schindler for an examination of the statements made by each of them to the prosecution or its representatives and for a court order for authorization to incur necessary expenses in engaging the services of a pathologist, which costs could be charged to the county. Both of said motions were supported by the affidavit and though opposed by the district attorney, no counter-affidavits were filed. All of said motions were denied.

[1] Since no counter-affidavits were filed, factually the matters averred in each petition were admitted. *Walker v. Superior Court*, 155 Cal.App.2d 134, 136, 317 P.2d 130.

[2] We have concluded that both petitioners have made out a case entitling each to mandamus to compel the pretrial inspection of his or her own statements made to the district attorney and his representatives.

In *Powell v. Superior Court*, 48 Cal.2d 704, 312 P.2d 698, it was said: "As grounds for relief, petitioner alleges the denial by the trial court of his motion for an order authorizing petitioner and his attorney to inspect and make copies of a signed statement of petitioner made in the office of a chief of police and 'also for the typewritten transcript of the tape recording made' some five days later in the same police office. It is further alleged in the petition for the writ that the motion 'was supported by affidavits of your petitioner and his attorney, which contained allegations that the defendant was not able to recall, nor was he able to relate to his attorney the things contained in the aforesaid statements. That such documents may be necessary for the defendant [petitioner] to refresh his recollection; that the evidence contained in the statements is material to the issues of liability, if any, of the defendant, and that the statements * * * would be admissible at the time of trial, and that no copies of the above statements have been given to the defendant. * * * No affidavits were filed on behalf of the District Attorney or the Chief of Police * * *.' Petitioner further alleges, and respondents admit, that the motion was denied on the ground, among others, that in a criminal proceeding the accused is not entitled to a pretrial inspection of his written confession."

Upon the above facts, the court issued a writ of mandamus requiring the respondent court to set aside its order denying the petitioner an inspection of the documents in question and ordered that it issue an appropriate order of inspection with the right to take copies as sought.

In the instant cases, the facts upon which petitioners base their right to a pretrial inspection of the statements they made to the district attorney or his representatives

are as persuasive as the facts in the Powell case. Here it is alleged that the demand was made upon the district attorney to examine the petitioners' statements given to him or his representatives with respect to the death of their child. The statements were demanded because the petitioners could not remember what statements were made and because of his or her emotional disturbance at the time of the death of the child. It further appears that these statements were taken at the time when the petitioners were without the benefit of counsel; that knowledge of the contents of said statements is necessary in order that they may prepare their respective defenses to the charge of murder. Under such circumstances, we believe that each petitioner is entitled to inspect and make copies of his or her own statements made to the district attorney or his representatives.

As was held in the Powell case, "* * *" to deny inspection of defendant's statements would likewise be to lose sight of the objective of ascertainment of the facts, and would be out of harmony with the policy of this state that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, however, odious, but rather, only through establishing the truth upon a public trial fair to defendant and the state alike. In the recent case of *Dowell v. Superior Court* (1956), 47 Cal.2d 483, 304 P.2d 1009, this court granted mandamus to compel inspection prior to trial of a personal injury action, of a statement taken from plaintiff in the hospital by defendant company's claims investigator the day after plaintiff had been injured. There, as here, plaintiff averred that he had forgotten what he had said in the statement. In holding that he was entitled to inspect and take a copy of the statement this court noted that the "trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings of which the inspection of documents is one method * * *" [Citations], and commented further 'that the principles of equity enter into the determination of an application

for discovery and also in a mandamus proceeding to compel appropriate action.'" While the court held that section 1000 of the Code of Civil Procedure has been held inapplicable to criminal proceedings (and cited cases), it further said: "* * * it nevertheless is a widely recognized rule that application for pretrial inspection of a signed confession or admission or transcript of statements of an accused may be made by the latter and is addressed to the sound judicial discretion of the trial court, which has inherent power to order such an inspection in the interest of justice. (See *State v. Cicienia* (1951), 6 N.J. 296, 78 A.2d 568, 570-571 [6]; *Shores v. United States*, 8 Cir., 1949, 174 F.2d 838, 844, 11 A.L.R. 2d 635.) In the *Cicienia* case the court quoted and adopted the rule and the reasoning, with respect to the confession and statements of defendant himself, expressed in *State v. Haas* (1947), 188 Md. 63, 51 A.2d 647, 653, as follows: 'There can be no doubt that the recognition of the right in a trial court to permit the defendant to examine his confession in advance of the trial was not recognized at common law. But law is a growth and a great many matters, commonplace to us now, were not thought of many years ago. * * * [T]he tendency in the courts of this country is to permit discretion in the trial judge. The argument made against any such discretion is based upon a fear that the State, which is charged with the prosecution of crime, may be hampered in its duty by the disclosure of its evidence to those charged with offenses. Whatever merit that argument has as applied to a situation where it is contended that the accused has a *right* to inspect the evidence, it has no application, we think, to a situation where the trial judge in each case and on each application, determines what should be done in the interest of justice. There are cases in which it would be clearly unjust to deny such an application and, on the other hand, cases are conceivable in which it might improperly hamper the prosecution to grant such an application.' [Citing cases.]" 48 Cal.2d at pages 707-708, 312 P.2d at page

700. In the instant case we feel that the petitioners are entitled to inspect the statements which they made and also to make copies thereof.

[3,4] We have concluded that petitioners are not entitled to inspect and copy statements made by each other to the district attorney. In her affidavit petitioner Opal Coewith Schindler alleges that she is informed and believes that her husband made certain statements to the district attorney and his representatives and that such statements implicated her in the killing and that the statements are material. She then alleges that she cannot properly prepare for trial without knowledge of the contents of these statements. Since the petitioner's affidavit is based on information and belief, presumably any statements made by him to the district attorney were made outside her presence and would not be admissible against her. *People v. Curtis*, 106 Cal.App. 2d 321, 235 P.2d 51. The petitioner, Claude William Schindler, in his petition alleges that he moved the trial court for permission to inspect the statements made by his wife, Opal, to the district attorney. However neither his motion nor the affidavit in support thereof reveals that he requested the trial court to make an order permitting inspection of Opal's statements. Further, Opal's statements, having been made out of his presence, would not be admissible against him. The respondent court did not abuse its discretion in not permitting inspection of the other party's statements.

[5] The petitioner, Claude William Schindler, seeks a copy of the autopsy report on the ground that this report is necessary to prepare his defense, and it appears that he has not been furnished with a copy thereof. In *Walker v. Superior Court*, supra, this court determined that an autopsy report is a public record which a citizen may inspect. However, in the *Walker* case the petitioner had made a demand upon the coroner that he be allowed to inspect the report, which demand was refused. Here the petitioner failed to make such a request of

the coroner. Presumably if such request had been made, it would have been granted. Without first making such a request, petitioner's motion to inspect was properly denied.

[6,7] Both petitioners have requested that specimens and samples taken by the autopsy surgeon be made available to the defense. It appears that these specimens have been preserved and are in the possession of the autopsy surgeon. It also appears that the body had been embalmed and had been buried for two months at the time of the hearing on petitioners' motions. Apparently these specimens and samples of tissue taken from the body of the deceased tend to show the cause of death. At the preliminary examination the autopsy surgeon testified that death was due to shock as the result of a whipping or beating of the child. It may be that an independent examination of these specimens by another qualified pathologist may indicate that the death of the child was not due to the blows received, or at least may tend to refute that conclusion reached by the autopsy surgeon. These samples and specimens therefore should be made available to the petitioners. *Walker v. Superior Court*, supra. Both petitioners have alleged that they have attempted to discuss the findings of the autopsy with the autopsy pathologist and to examine any reports and other data which he has in his possession, but that he has refused to discuss the autopsy findings on the ground that he has been instructed by the district attorney not to do so. This court, in *Walker v. Superior Court*, supra, ruling on a similar question, stated, 155 Cal.App.2d at page 140, 317 P.2d at page 134: " * * * we do not think that the prosecution or the sheriff may order a witness not to talk to the defendant or his counsel. Diaz has refused to talk only because the sheriff ordered him not to and we are of the opinion that it would be proper for the court to entertain a motion to compel the sheriff to annul his order to Diaz. Of course, Diaz did not have to obey the order of the sheriff but as a practical matter such an order can be,

and was here shown to be, an effective way of keeping a witness's mouth closed. Since the order came from a person connected with the state, we are of the opinion that a court can and should order that person to cease interfering with defense counsel's right to interview a witness." The language there is applicable in the instant cases and the court should have ordered the district attorney to cease interfering with the defense counsels' right to interview witnesses.

[8-10] Lastly we have concluded that the court did not abuse its discretion in refusing to grant petitioners authority to employ a pathologist at the county's expense. The question of the appointment of experts at county expense is a matter solely within the discretion of the trial court. Section 987a, Penal Code; *People v. McCracken*, 39 Cal.2d 336, 246 P.2d 913; *People v. Rickson*, 112 Cal.App.2d 475, 246 P.2d 700; *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469. The denial by the trial court of the appointment of such experts does not constitute denial of due process of law. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 73 S.Ct. 391, 97 L.Ed. 549; *McGarty v. O'Brien*, 1 Cir., 188 F.2d 151. However, as previously noted, the court did order that the post-mortem doctor may be employed as a witness at the trial at the expense of the county, providing such charge is legal.

We conclude that peremptory writs of mandate should be issued requiring the respondent court to set aside its orders denying petitioners the right to inspect and make copies of their own statements made to the district attorney and his representatives; that the district attorney be ordered to cease interfering with defense counsels' right to interview witnesses, and in particular the autopsy surgeon, and that the medical specimens obtained from the body of the deceased child as a result of the autopsy be made available for examination by a pathologist of petitioners' own choice.

Let the writs issue.

VAN DYKE, P. J., and PEEK, J., concur.

161 Cal.App.2d 481

Carl C. CALLENDER, Petitioner and Appellant,

v.

COUNTY OF SAN DIEGO, Board of Supervisors, San Diego County, and Frank A. Gibson, David W. Bird, James A. Robbins, Dean E. Howell and De Graff Austin, Members thereof; Civil Service Commission of San Diego County, John W. Quimby, Paul W. Brown and Miriam J. Smithers, Members thereof, Respondents.

Civ. 5498.

District Court of Appeal, Fourth District, California.

June 19, 1958.

Hearing Denied Aug. 13, 1958.

Mandamus proceeding brought to procure reinstatement as a permanent civil service employee of county. The Superior Court of San Diego County, C. M. Monroe, J., rendered judgment for respondents, and petitioner appealed. The District Court of Appeal, McCabe, J. pro tem., held that evidence, on laches issue, would sustain finding that there had been no agreement between petitioner's attorney and respondents' attorney to hold in abeyance any further proceedings on matter until there had been a final determination in a case which had been pending in court at time of petitioner's hearing before commission.

Affirmed.

1. Appeal and Error ⇨1010(1)

When there is substantial evidence to sustain finding of trial court, such finding will not be disturbed on appeal.

2. Mandamus ⇨168(4)

In mandamus proceeding brought to procure reinstatement as a permanent civil service employee of county, evidence, on laches issue, would sustain finding that there had been no agreement between petitioner's attorney and respondents' attorney to hold in abeyance any further proceedings on matter until there had been a final determination in a case which had been pending in court at time of petitioner's

hearing before commission. West's Ann. Gov.Code, § 1028.1.

3. Equity ☞72(1)

Defense of laches involves more than element of delay in pursuing such rights as law gives, and it is not so much lapse of time as it is consequences of delay which goes to make up defense of laches.

4. Equity ☞72(1)

Unless prejudice results from delay, defense of laches is not available, but if such prejudice has resulted, one whose prompt action would have forestalled it can avoid responsibility only by showing that he sought his remedy promptly.

5. Evidence ☞83(1)

It is to be presumed that where one has been dismissed from active position in public service someone else has been chosen to take his place and that work has been done and paid for.

6. Mandamus ☞143(2)

In mandamus proceeding brought to procure reinstatement as a permanent civil service employee of county, laches would preclude granting relief to the petitioner, who had taken no legal action until more than two years after commission had affirmed order removing petitioner from his position. West's Ann.Gov.Code, § 1028.1.



A. L. Wirin, Fred Okrand, Los Angeles, Byron F. Lindsley, San Diego, for appellant.

James Don Keller, Dist. Atty., and County Counsel, Robert G. Berrey, Deputy Dist. Atty., San Diego, for respondents.

McCABE, Justice pro tem.

Petitioner Callender appeals from a judgment denying a writ of mandate whereby he seeks reinstatement as a permanent civil service employee of the respondent County of San Diego.

Petitioner was employed intermittently by respondent County during the period March 11, 1940 to November 31, 1940, and from January 16, 1941 to May 11, 1954 was em-

ployed continuously as a laborer or tree surgeon and later as a Park Warden in the Classified Civil Service. Having been subpoenaed to appear before a subcommittee of the Committee on un-American Activities of the House of Representatives, United States Congress, petitioner appeared before that subcommittee about April 20, 1954. At this hearing questions were asked of petitioner. Certain of these questions he refused to answer, basing his refusal on his rights under the First and Fifth Amendments to the Constitution of the United States. Some of the questions petitioner refused to answer pertained to alleged membership in the Communist Party.

On May 11, 1954, petitioner was removed by the Director of Public Works from his position as Park Warden at Live Oak for insubordination in that petitioner on April 20, 1954 had refused to comply with an order made April 13, 1954 by the respondent Board of Supervisors of the County of San Diego, and in refusing to perform a duty imposed upon him by Section 1028.1, Government Code of the State of California. Petitioner, on May 13, 1954, appealed to the respondent Civil Service Commission, which appeal was heard May 22 and August 12, 1954. Petitioner and his attorney were present at the hearing. Petitioner's evidence was submitted to the respondent Commission by way of stipulation. Essentially, the stipulation contained the facts as set forth above but in addition thereto the efficiency ratings of the petitioner were received into evidence. At the hearing before the respondent Commission, petitioner was not questioned concerning his political affiliations or whether he was or had been a member of the Communist Party, and no questions were asked which were within the purview of the order of the Board of Supervisors adopted April 13, 1954 or of Section 1028.1 of the Government Code. At the hearing before the respondent Commission petitioner expressed his willingness to answer any and all questions which might be addressed to him, but no questions were so addressed. Upon the completion of the hearing and on August 23,

1954, the respondent Commission entered its findings and made its decision affirming the order of the Director of Public Works removing petitioner from his position in the classified service of the respondent County. So far as the record is concerned, petitioner took no legal action until November 13, 1956, when he filed his petition for writ of mandate.

Petitioner on this appeal contends that a discharge of an employee under Section 1028.1, Government Code, is not justified where the employee has refused on the basis of the First and Fifth Amendments to the United States Constitution to answer questions before a Congressional Committee but is willing to answer the same questions to his employer. Further, it is contended that if there is such a discharge, there is a violation of due process of law under the Fourteenth Amendment to the United States Constitution and Article 1, Section 13 of the California Constitution.

Respondents' return and answer to the petition for writ of mandate in addition to general denials sets forth an affirmative defense of laches.

The evidence is in conflict on the point as to whether or not there was an agreement between petitioner's attorney and respondents' attorney to hold in abeyance any further proceedings on this matter until there was a final determination in *Steinmetz v. California State Board of Education*, 44 Cal.2d 816, 285 P.2d 617. The *Steinmetz* case was pending in the courts of California at the time of the petitioner's hearing before respondent Commission. The *Steinmetz* case was finally determined by the California Supreme Court on July 5, 1955, and *certiorari* was denied by the Supreme Court of the United States on April 23, 1956.

[1,2] When there is substantial evidence to sustain the finding of the trial court, such finding will not be disturbed on appeal. In *re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689; *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557. There is substantial evidence to sustain the

finding of the trial court that no agreement existed.

At the trial petitioner introduced in evidence a letter dated October 11, 1954, which was addressed to Retirement Board, County of San Diego and, in part, reads as follows: " * * * In so doing I also want to reaffirm my belief that the reason for my dismissal was illegal, and would like it understood that in electing to take deferred retirement I am not prejudicing my right to contest my separation from the County or to seek reinstatement if at a later date the law under which this action was taken is proven unconstitutional." This letter was prepared by his attorney and signed by petitioner.

On May 11, 1956, petitioner requested respondent County to be reinstated. On July 5, 1956, respondent Civil Service Commission advised petitioner that it was without authority to reinstate petitioner. His petition for writ of mandate was filed November 13, 1956, after a lapsed period of over two years.

[3-5] The defense of laches involves more than the element of delay in pursuing such rights as the law gives. As the court, in *Hayman v. City of Los Angeles*, 17 Cal. App.2d 674, 680, 62 P.2d 1047, 1050, said:

"But the defense of laches involves much more than the element of delay. It is not the lapse of time so much as it is the consequences of the delay which goes to make up the defense of laches. Unless prejudice results from the delay the defense is not established, but, if prejudice has resulted, the one whose prompt action would have forestalled it can avoid the responsibility only by showing that he sought his remedy promptly. It is to be presumed that, where one has been dismissed from an active position in the public service, someone else has been chosen to take his place. The work has to be done and it has to be paid for."

It appears from the date of petitioner's removal an employee of respondent County was assigned to fill the position and did

occupy the position until December 6, 1955. By ordinance enacted prior to December 6, 1955, respondent County changed the title of the position formerly held by petitioner from "Park Warden" to "Park Warden I". Since December 6, 1955 another employee (permanent Park Warden since August 3, 1953) has been assigned to the position of Park Warden I at Live Oak. Since that date the employee has performed all of the required duties.

[6] Not only was the respondent County required to and did fill the position left open by petitioner's removal and discharge, but respondent County may be required to pay the salary of petitioner which he would have earned except for his discharge. Petitioner is seeking this compensation in his petition for writ of mandate. The rule as to the compensation which the respondent County might be required to pay is set forth in *Stockton v. Department of Employment*, 25 Cal.2d 264, 153 P.2d 741. In addition to the detriments which respondent County must face by reason of the delay of petitioner, it would have to make such contributions as is required by the County Employees' Retirement Law of

1937 (Sec. 31450 et seq., Government Code.) Thus, by reason of the delay of petitioner in asserting his rights the respondent County has had to pay the salary of others who performed the duties, and would have to pay such compensation as is found to be due to petitioner and such amounts as the respondent County would have to contribute under the County Employees' Retirement Law of 1937. The respondents would thereby be prejudiced. The rule of laches is founded in sound policy and its application prevents inequity and injustice. In the instant case, the delay was long, unnecessary and unexcused, and the respondents have been prejudiced by the delay and inactivity of the petitioner.

It is not necessary to resolve the remaining contentions since petitioner has been guilty of laches to the detriment of respondents.

The judgment is affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

161 Cal.App.2d 431

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, Plaintiff
and Cross-Defendant,

v.

CLAUDE FISHER COMPANY, Ltd., a corporation, Defendant, Cross-Complainant
and Appellant.

State of California, Cross-Defendant and
Respondent.

Civ. 22941.

District Court of Appeal, Second District,
Division 1, California.

June 19, 1958.

Rehearing Denied July 14, 1958.

Hearing Denied Aug. 13, 1958.

Surety's action on contractor's bond to recover from contractor amount paid thereunder after state required contractor to cease performance because of unsatisfactory work. Contractor filed cross-claim against state for declaratory relief and damages and state moved to dismiss. The Superior Court, Los Angeles County, Kenneth N. Chantry, J., entered order dismissing cross-complaint against state and contractor appealed. The District Court of Appeal, Lillie, J., held that where surety brought action to collect on amount paid under bond more than four years after state had originally stopped work on contract, statute requiring claims against state to be presented to State Board of Control within two years after claim first arose or accrued, prevented contractor who failed to so present claim from cross-claiming against state for damages based on its alleged breach of contract.

Affirmed.

1. Appeal and Error ⇨1042(1)

Where basis of state's motion to dismiss cross-complaint against it was that no claim against the state was presented to State Board of Control until more than two years after cause of action pleaded in cross-complaint arose, even assuming that motion to dismiss without filing answer was technically improper, any error was nonprejudicial, since it was clear that result would have been same had matter been presented in some other manner. West's Ann.Code Civ.Proc. § 437c.

2. Appeal and Error ⇨1030

Proper procedure is always to be desired and encouraged, but dereliction in this respect is not necessarily fatal.

3. States ⇨195

Conditions imposed by state as a prerequisite to an action against it are jurisdictional in nature and must be strictly complied with.

4. Limitation of Actions ⇨1

Statutes of limitation and the like, prescribing definite periods of time within which actions may be brought or certain steps taken, are, of necessity, adamant rather than flexible in nature, and such statutes are upheld and enforced regardless of personal hardship, and are favored by the courts.

5. Estoppel ⇨52

Elements of estoppel are that party estopped must know the facts, that party must intend that conduct be acted on or must so act that party asserting estoppel has right to believe it is so intended, that party asserting estoppel must be ignorant of the true facts, and that he must rely on former's conduct to his injury.

6. States ⇨199

Where state contracted with road contractor but subsequently stopped contract because of unsatisfactory work and had another contractor finish the same, upon bringing of action by surety against contractor to collect amount it paid under bond, more than four years after state had originally stopped work, statute requiring that claim against state be presented to State Board of Control within two years after claim first arose or accrued barred contractor's cross-complaint against state for damages based on its alleged breach of contract. West's Ann.Gov.Code, §§ 14, 14399, 16044.

7. Contracts 143

Pleading 34(1)

Statutes 205

Pleadings are to be construed as a whole, and same is true of contracts and statutes.

Leon J. Garrie, Los Angeles, for appellant.

Robert E. Reed, Harry S. Fenton, Robert F. Carlson, Sacramento, William S. Ashton, Jr., Salinas, for respondent.

LILLIE, Justice.

The action herein arises out of a highway construction contract between appellant Claude Fisher Company and the State of California entered into on February 5, 1951. On April 8, 1952, appellant's work was terminated by the state and the balance of the project was completed by another contractor. The Fidelity and Deposit Company, surety on Fisher's construction bond, paid the state the sum of \$163,421.79 on the bond and thereafter instituted the present action against the Claude Fisher Company to recover the amount paid. The Claude Fisher Company then filed a cross-complaint against the Fidelity and Deposit Company and the State of California, which is denominated: "Cross-Complaint For Declaratory Relief, Monies Due On Contract, And Damages For Breach Of Contract." Thereafter the state made a motion to dismiss on the ground that the court lacked jurisdiction because the claim upon which the action was brought was not presented to the State Board of Control within two years after the claim first arose or accrued, as required by section 16044 of the Government Code. There is no dispute as to the various steps taken or their respective dates.

The gist of appellant's cross-complaint is that the state had failed to facilitate the work involved in the construction contract, delayed work thereon and prevented the contractor from diligently prosecuting the same. It is particularly alleged that the contract required the state to furnish all

necessary rights of way; adequate working room and a proper site in which to work; that it was obligated to remove obstructions and obstacles from the right of way, including certain utility transmission towers, prior to March 15, 1951, and that it was required to have the route and right of way adequately surveyed and marked at all times. Appellant further alleged that the state failed to perform such obligations and that it unreasonably delayed the work through the spring months, as a result of which the Claude Fisher Company was forced to perform grading work in the wet, winter months at increased costs resulting in damages. Appellant charged that as a result of such breaches of contract, its "financial resources and credit were seriously depleted, whereupon on or about the last week in March, 1952 cross-complainant did treat said construction contract as terminated as a result of the aforementioned acts on the part of the cross-defendant State of California"; and that thereafter the state terminated cross-complainant's work and relet the contract to another contractor.

The cross-complaint then averred a contract provision to the effect that within 30 days after completion of the work and its acceptance by the Director of Public Works, the state engineer should make and submit to the contractor a proposed final estimate of work done under the contract and the value thereof; that 30 days thereafter cross-complainant should submit to the engineer its written approval of such estimate, or a written statement of all claims for additional compensation under the contract, after which a semifinal estimate should be made and submitted by the engineer and that the amount found due should be paid within 30 days. It is further alleged that the state engineer failed to submit a final estimate within the required 30-day period, but that on May 18, 1953, the state notified Fisher to submit its claim to the engineer, which it did on June 22, 1953. The claim was denied by the engineer on August 10, 1955, except as to the sum of \$9,607.69, which amount cross-complainant

refused to accept. It did not file its claim with the State Board of Control until February 21, 1956. This claim was denied on July 27, 1956.

No answer to the cross-complaint was filed but the state made the motion to dismiss here under discussion. In opposition thereto, the Claude Fisher Company maintained that the claim did not accrue until August 10, 1955, when the state engineer made his valuation of the amount purportedly due it and denied its demand for the damages subsequently set forth in the claim. Using this date appellant's claim, filed with the State Board of Control on February 21, 1956, would be within the statutory two-year period.

[1] Appellant's first contention is that the lower court had no authority to dismiss the cross-complaint and that the filing of an answer by the state was a prerequisite to the filing and granting of such motion under section 437c of the Code of Civil Procedure, as it existed prior to September 11, 1957, the effective date of an amendment which allows the filing of a motion to dismiss prior to the filing of an answer.

The respondent's answer to this argument is that by virtue of its inherent power to prevent abuse of judicial process, a court has authority to grant a (speaking) motion to dismiss based upon uncontroverted facts showing that the action has no merit. Apropos this same matter, respondent further maintains that even though there may have been a procedural error in the court's dismissal of the action on motion rather than by demurrer, such an error cannot be deemed reversible if a general demurrer would have been sustained without leave to amend.

In reference to the so-called "speaking motions," referred to by respondent as precedents for the motion to dismiss in the present case, the Supreme Court has this to say in *Pianka v. State of California*, 46 Cal.2d 208, 211, 293 P.2d 458, 461: "However, non-statutory speaking motions have now been superseded by the procedure governing motions for summary judgment contained in

section 437c of the Code of Civil Procedure. This section was originally very limited in scope, but it has been broadened by a series of amendments and now applies 'in any kind of action' and * * * all types of proceedings. * * * The remedy afforded by this section is broad enough to cover all situations in which speaking motions have been employed, and there is therefore no longer any need for the nonstatutory procedure. In the interests of orderly and efficient administration of justice the litigant should be required to employ the statutory remedy, and a speaking motion to dismiss should be treated as a motion for summary judgment in order to preserve the safeguards provided by the statute."

[2] Assuming, without deciding, that the respondent's motion to dismiss was not strictly or technically proper, such error, if any, must be considered nonprejudicial since it is clear from the record that the same result would have ensued had the matter been presented in some other manner. The very fact utilized as the basis for the motion to dismiss, that the claim against the state was presented to the State Board of Control on February 21, 1956, more than two years after the cause of action arose, is definitely pleaded in appellant's cross-complaint and hence was a matter appearing on the face of the cross-complaint. Proper procedure is always to be desired and encouraged but dereliction in this respect is not necessarily fatal.

The language of the reviewing court in *Stafford v. People ex rel. Dept. of Public Works*, 144 Cal.App.2d 79, 81, 300 P.2d 231, 233, is applicable to the instant controversy: "But regardless of any questions of procedure in the trial court they are of no moment on the appeal if they did not prevent a full and fair disposition of matters in issue or result in harm to plaintiff, Code of Civ.Proc., § 475; Const. art. 6, § 4½; 4 Cal. Jur.2d 499." In this connection it is interesting to note that, in the lower court, appellant did not see fit to raise any question about the propriety of respondent's use of the motion to dismiss. Apparently the entire matter was duly argued and considered

upon its merits. Regardless of the fact that no answer to the cross-complaint had been filed by respondent, all claims of the respective parties were clearly before the court.

Actually, the real question is: Was appellant entitled to successfully wage its claim against the state, or was such claim barred by its failure to present it to the State Board of Control within two years after the claim arose or accrued, as required by section 16044 of the Government Code? This section expressly provides that "A claim not arising under Section 400 of the Vehicle Code *shall* be presented to the board within two years after the claim first arose or accrued." (Emphasis added.) Section 14 of the Government Code declares that the word "shall" is mandatory.

The chronology of the successive steps taken in the instant case is not in dispute. The contract between the Claude Fisher Company and the state was entered into on February 5, 1951; on April 8, 1952, appellant's work was terminated by the state and the project completed by another contractor. The completed work was accepted by the state on February 26, 1953. On May 18, 1953, the state notified appellant to file its claim with the state engineer, which was done on June 22, 1953, and amplified by appellant on February 26, 1954. Appellant's claim was denied by the engineer on August 10, 1955, except as to the sum of \$9,607.69 which appellant refused to accept. Not until February 21, 1956, did the Claude Fisher Company file its claim with the State Board of Control, which claim was denied by the board on July 27, 1956.

Appellant's contention is that it was not at fault in failing to file its claim with the board of control at an earlier date and that under the contract submission of its claim to the state engineer was a condition precedent to filing the claim with the board. Under this theory, appellant's actual claim would not accrue until the engineer had made his decision on August 10, 1955. In this connection, appellant argues that since the state directed it to submit the claim to

the state engineer, "both parties construed the contractual provision regarding determination by the engineer as applying; and that such construction being a reasonable one should be so construed by the Court."

The appellant urges that by reason of the facts the state is estopped from asserting that the contract provisions in question are not applicable because appellant did not complete the contract and that the appellant is now barred from legal redress because of the delay which ensued. Appellant insists that the motion to dismiss its cross-complaint is an improper attempt to repudiate the state's own interpretation of the contract and to benefit by its own delay.

[3,4] Although superficially, appellant's argument might seem to suggest plausible merit, a consideration of the entire situation dispels any such view. Basically, the attempt is to excuse its own failure to comply with a definite statutory provision and to lay any or all fault at the feet of the state. Conditions imposed by a state as a prerequisite to an action against it are jurisdictional in nature and must be strictly complied with. *State of California v. Superior Court*, 14 Cal.App.2d 718, 58 P.2d 1322. Statutes of limitation and the like, prescribing definite periods of time within which actions may be brought or certain steps taken are, of necessity, adamant rather than flexible in nature. Such statutes are upheld and enforced regardless of personal hardship (*Beck v. Ransome-Crummey Co.*, 42 Cal.App. 674, 680, 184 P. 431), and they are favored by the courts (*Seid Pak Sing v. Barker*, 122 Cal. App. 93, 10 P.2d 92). These are elementary propositions but their application to the instant litigation makes plain the fundamental weakness of appellant's case.

It must be assumed that the Claude Fisher Company was, from the beginning, fully informed with respect to the mandatory provisions of section 16044 of the Government Code requiring the filing of a claim within two years after it first arose or accrued, and that an action on such claim shall be brought within six months after rejection. Appellant was likewise fully

informed as to the facts. If appellant, with this knowledge, elects to ignore the plain provisions of the law and to take a chance at some ultimate settlement or other happy determination, it must, like all litigants, accept the consequences of its action.

The appellant's cross-complaint alleges certain breaches of contract on the part of the state in not removing utility transmission towers prior to March 15, 1951, etc., and affirms that "on or about the last week in March, 1952 cross-complainant did treat said construction contract as terminated as a result of aforementioned act on the part of the cross-defendant State of California." (Emphasis added.) Since the appellant's cross-complaint alleges breach of contract on the part of the state, allegations indicating that appellant at that time considered the contract at an end for all purposes can hardly be overlooked in considering when its claim arose.

Or, if the date of completion of the job and acceptance by the state be taken as the crucial date, it appears that appellant's claim was not presented to the board of control until nearly three years later. Again, if appellant's allegations of fraud on the part of the state be considered as a basis for the cause of action, appellant must have had knowledge of any false representations at least by the last week in March, 1952. In whatever light the matter be considered, there seems to have been no proper compliance with the statutory provisions prescribing the time for filing appellant's claim.

[5, 6] The argued suggestion that any default on appellant's part stems from the respondent's misleading conduct is not persuasive. The principles of estoppel, appropriately applied to certain inequitable situations, may sometimes furnish a proper excuse for dilatory action and it is certainly true that a governmental body should not be permitted to lead another party into a trap and then benefit from its own misconduct. But the doctrine of estoppel is not an omnibus defense, nor is it one which will automatically afford relief where an unfortunate situation is but the result of a party's own dereliction. As set forth in 18 Cal.

Jur.2d, pages 406-407, "four things are essential to the application of the doctrine: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." To reiterate these well-established essentials is to refute any claim of estoppel in this case. Certainly the appellant was never in ignorance of the true facts, nor are the other elements of the doctrine here established. Of importance is the pronouncement of the court in *Pacheco v. Clark*, 44 Cal.App.2d 147, 153, 112 P.2d 67, 70: "The doctrine of estoppel where the state is involved should not be lightly invoked."

Section 16044 of the Government Code definitely prescribes the period for presentation of claims to the board of control; it contains no exceptions applicable to the present situation, nor is it elastic in nature. Such being the case, it is pointless to speak of some contemporaneous interpretation of the contract which would serve to nullify or extend its provisions. Likewise, the right of a contractor to payment where such contractor's control over the work has been terminated, as was the case in the instant controversy, is fully and definitely covered by section 14399 of the Government Code.

Incidentally, it may be noted that insofar as appellant's allegations of breach of contract are concerned, any such cause of action must have come into being, if ever, long before, and independent of any determination of the cost of completing the job by the state. There should be no confusion between these two matters. Nor is the situation made more favorable to appellant's cause by the prayer for declaratory relief.

[7] It is fundamental and elementary that pleadings are to be construed as a whole. The same is true of contracts and of statutes. Likewise, in many cases, an over-all consideration of the entire picture viewed from a reasonable distance is helpful. In the present case, viewed from any

angle and regardless of the specific legal theory invoked, appellant's contentions must be deemed without merit. The matters now urged by appellant seem to have been quite fully canvassed on the motion to dismiss and there is nothing in the record to indicate that the decision violated any of the established principles of either law or equity.

The order is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SCHAUER, J., dissenting.



161 Cal.App.2d 360

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Flanola PLAYER, Defendant and
Appellant.

Cr. 3382.

District Court of Appeal, First District,
Division 1, California.

June 18, 1958.

As Modified on Denial of Rehearing
July 18, 1958.

Prosecution for rape. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., rendered judgment, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that trial judge's comments to jury on prosecutrix' testimony were not subject to objection of misconstruing testimony nor, in view of other instructions, of taking issue of credibility from jury, but were within the scope of sanction granted by constitution.

Judgment affirmed.

1. Criminal Law §404(4)

A positive identification is not necessary when an object is introduced for the purpose of illustration.

2. Criminal Law §824(8)

A party desiring an instruction as to the limitation of purpose for which evidence is introduced must request an instruction thereon, or be foreclosed from later objecting.

3. Criminal Law §404(4)

In rape prosecution, wherein testatrix testified that knife which was found on defendant's person was similar to one used by defendant, knife was admissible at least for a purpose of illustration, even though not positively identified as the one used. West's Ann.Pen.Code, § 261, subd. 3.

4. Criminal Law §351(2)

Inconsistent statements relevant to the crime charged are not limited to use for impeachment purposes, but have substantive effect as tending to show a consciousness of guilt.

5. Criminal Law §413(2)

In rape prosecution, wherein there was admitted defendant's statement that he had had intercourse with prosecutrix by consent, his earlier statement wherein he denied all knowledge of the transaction was admissible as indicating consciousness of guilt.

6. Criminal Law §1166½(12)

Trial judge's comments that verdict would show whether courts were doing their duty, and whether the law should be enforced and how such cases should be handled did not take from the jury the determination of any of the facts, in light of prior comments and repeated instructions that the jury was the sole judge of the facts.

7. Criminal Law §656(5)

In rape prosecution, trial judge's comments to jury on prosecutrix' testimony were not subject to objection of misconstruing testimony nor, in view of other instructions, of taking issue of credibility from jury, but were within the scope of sanction granted by constitution. West's Ann.Const. art. 6, § 19.

Moerdyke, Anderson, Evans & Rhodes,
Stanley R. Evans, Palo Alto, for appellant.

Edmund G. Brown, Atty. Gen., Clarence
A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of committing forcible rape
(Pen.Code, § 261, subdivision (3)), de-

fendant asserts error in the admission of evidence and in the judge's comments made after instructing the jury.

(1) A small pearl-handled knife was introduced in evidence, predicated upon the prosecutrix' testimony that this knife "looks very similar to" the knife with which she testified he cut her on the cheek and threatened to use again.

Defendant objected upon the ground of lack of proof that this was the very knife which the defendant used upon that occasion.

[1-3] A positive identification is not necessary when an object is introduced for the purpose of illustration. A party desiring the jury instructed as to such a limitation of purpose must request an instruction thereon or be foreclosed from later objecting. *People v. Sampsell*, 104 Cal.App. 431, 441, 286 P. 434; *People v. Ferdinand*, 194 Cal. 555, 563, 229 P. 341; *People v. Aguirre*, 158 Cal.App.2d 304, 322 P.2d 478. One of the officers later testified that this knife was found upon defendant's person at the time of his arrest.

(2) Defendant made three out-of-court statements. Informed by the arresting officer that the prosecutrix had accused him of raping her, defendant said he knew nothing about it.¹ Later he gave two statements to the district attorney, one on October 10, the other on October 15, 1956. Each was taken down and transcribed; that of October 15 was signed by the defendant, the other was not.

His October 10 statement was substantially the same as his oral statement to the arresting officer.

In his October 15 statement defendant said that he met the prosecutrix about two or three weeks before the date of the alleged crime (October 9) and gave her \$5, which she accepted, for sexual intercourse; and that on the 9th he asked her again and she accepted another \$5 and

willingly had intercourse with him. Defendant says it was error to admit the October 10 statement into evidence, asserting it was not against his interest nor did it serve the function of impeachment. He did not testify until later during the trial.

[4] Inconsistent statements relevant to the crime charged are not limited to use for impeachment purposes. They have substantive effect as tending to show a consciousness of guilt, much the same as is evidence of flight. In *People v. Moran*, 144 Cal. 48, 60, 77 P. 777, 782, the defendant first denied being at the scene of the crime, and then admitted being there, although continuing to deny participation in the murder. The court held the first statement admissible: "But Moran finally admitted that he was at the scene of the murder, and this made his previous denials of that fact evidence against him, on the same principle that his flight was evidence against him." In *People v. Goldstein*, 136 Cal.App.2d 778, 792, 289 P.2d 581, the defendant first denied knowing one of the conspirators, who was the chief prosecution witness, and then admitted that he did know him. The court held the first statement admissible as showing, together with the second statement, a consciousness of guilt.

[5] Defendant distinguishes the *Moran* case on the ground that the facts do not show whether the statement was introduced before or after the defendant there testified, and "we would therefore assume that it was used in a proper way rather than being introduced as a part of [the] prosecution's case, as in the case at bar." There is no indication in the *Moran* opinion that the defendant testified. Had this been important, it would be equally reasonable to assume that the court would have mentioned it. Defendant would distinguish the *Goldstein* case on the ground that elsewhere in the opinion the court made refer-

1. Defendant, represented by other counsel than upon this appeal, moved that the witness' answer be stricken because the

statement was not an admission. The motion was overruled.

ence to admissions against interest (language which we do not find). Defendant appears to be confused about the purpose of admitting such statements; i. e., to show a consciousness of guilt, not as exceptions to the hearsay rule to show the truth of what was therein stated.

(3) Do the trial court's comments to the jury furnish a basis for reversal?

After instructing the jury the court commented upon some of the evidence in the case, with reference particularly to the bearing thereof upon the credibility of the prosecutrix and the defendant, respectively, as witnesses. Upon this appeal, defendant criticizes portions of those comments, claiming they exceeded the bounds of permissible comment as sanctioned by section 19 of article VI of our state Constitution. This section, as amended in 1934, declares that the "court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

In one of the questioned passages the trial judge brought to the attention of the jury certain facts which he deemed significant in determining the credibility of the prosecutrix: "Well, for that reason, you should consider the conduct of the prosecuting witness after the alleged occurrence. What did she do after this thing happened? If it happened the way the defendant told you it happened, then the natural conduct of a person—of a woman—would be to go home and forget it, put the money away, if she did accept the money, and forget about it. But, in this case, what did she do? She called the Sheriff. That's the first thing she did. Now, if she had been paid and if she had consented to the act of sexual intercourse, would she have called the Sheriff?"

Defendant suggests that here the judge misconstrued the testimony when he said "She called the Sheriff. That's the first thing she did." We find it a reasonably accurate statement. Concerning the time when the prosecutrix called the sheriff, her own counsel said, "I believe she said, 'The first thing I did when I got home.'"

Nor do we believe that by the words used in this portion of the comment the court intended to or did take from the jury the determination of any question of fact. This portion was immediately preceded by a cautionary instruction to view with caution the testimony of a prosecuting witness in a case of this kind, stating adequately the reasons for such caution. Also, this portion of the comment was immediately followed by the following instruction: "That it is up to you to determine. After all, you are the sole judges of the facts. Any opinion that I may express to you in this comment that I am making now is not stating my own views. I am merely pointing out some of the highlights of the case in order to help you in arriving at a verdict. But, after all, you are the ones who have the responsibility of deciding whether this defendant is guilty or not guilty."

This instruction in turn was immediately followed by the other questioned portion of the trial court's comments: "Another thing you should consider, in my opinion, is whether or not a woman undergoing an ordeal of this kind—if she did undergo any ordeal—could she remember every single detail that took place? Now, if what she told you is true, that she had a knife pointing at her, that she only weighs 101 or 102 pounds, and this defendant is much bigger, much stronger than she is—if it is true what she told you, could she remember every single detail that took place? Suppose any of you would be walking down the street some night and a man or woman pointed a gun at you and took your money. You would be so frightened that, afterwards, could you describe the color of the man's eyes? Could you describe his hair? Could you describe his clothing, whether the gun that he pointed was a revolver or pistol

or some other kind of a gun? Those are all things you have to consider, ladies and gentlemen, in arriving at a verdict.

"I don't know what experiences a woman goes through out in a place of this kind such as has been described—I don't know, if she undergoes an experience such as this woman says she did, if you can expect a woman to remember all the particular details.

"She did remember, according to her testimony, that this man had a white knife and the point was missing. Now, the only other time she saw that knife was here in Court. If she was not telling the truth, would she be telling us that she saw a white knife? And the white knife was found on the person of this defendant.

"Now, this defendant tells you that he was out on the highway, standing there, which, to ordinary people, would prove that he did not manifest a consciousness of guilt. If he thought in his own mind that he had done something wrong, he wouldn't be standing there on the highway. But you must remember that he told you he had been drinking and sometimes it is very difficult to explain why people act the way they do after they have been drinking. It is very difficult to explain.

"Now, you can ask yourselves who has more to gain in this case by your verdict. What will this woman gain if you find the defendant guilty? Nothing. What will the defendant gain if you find him not guilty? He will gain his freedom. So who has more at stake here? The complaining witness or the defendant?

"Those are things that you have to consider."

[6] The judge's comments continued along similar lines, concluding with the following statement to which defendant's counsel especially excepts: "Ladies and gentlemen, I am leaving the case in your hands. You have a grave responsibility. By your verdict you will let us know whether the Courts are doing their duty, whether the law should be enforced and

how these cases should be handled." This statement, in the light of the prior comments and repeated instructions that the jury was the sole judge of the facts, should not be viewed as taking from the jury the determination of any of the facts.

[7] It seems to us that the questioned portions of the trial court's comments were within the scope of the sanctions granted by section 19 of article VI of the Constitution as expounded by our Supreme Court in *People v. Ottey*, 5 Cal.2d 714, 722-730, 56 P.2d 193, and followed in such cases as *People v. Robinson*, 73 Cal.App.2d 233, 236-240, 166 P.2d 17; *People v. Rupp*, 41 Cal.2d 371, 260 P.2d 1, and *People v. Sakerlaris*, 154 Cal.App.2d 244, 248, 315 P.2d 902.

The questioned comments are not in the category of those that were involved in *People v. Hooper*, 92 Cal.App.2d 524, 207 P.2d 117, characterized by the reviewing court as "oral comments on the evidence, which we must assume were delivered to the jury in an impassioned and argumentative manner of an advocate, by means of undue emphasis, intonation and gesticulations" and held to be "prejudicial and [to prevent] an impartial trial or due process." 92 Cal.App.2d at page 530, 207 P.2d at page 121. Nor do the portions of the comments questioned upon this appeal include an incorrect or inaccurate instruction upon the law as did the comments involved in *People v. Dail*, 22 Cal.2d 642, 656, 140 P.2d 828. Nor were they tantamount to a direction to find in a certain fashion as was the case in *People v. Graham*, 156 Cal.App.2d 525, 319 P.2d 677.

It is true that *People v. Talkington*, 8 Cal.App.2d 75, 95, 97, 47 P.2d 368, lends support to defendant's contention that if the testimony is reviewed the court must include the testimony offered in favor of as well as that offered against the defendant. However, that doctrine was rejected by our Supreme Court in *People v. Ottey*, supra, 5 Cal.2d 714, 728, 56 P.2d 193, 200: "There is no merit to the contention that the court, if it venture to comment on the

evidence or the testimony of witnesses or of any witness, must sum up all the evidence and the testimony both favorable and unfavorable. There is no such injunction, express or implied, in the language of the Constitution, and none that would compel it under established rules in other jurisdictions. The provision in the Constitution expressly permits the court to 'make *such* comment on the evidence and the testimony and credibility of any witness *as in its opinion is necessary for the proper determination of the case.*' The court may therefore exercise its own discretion in respect to what comment it will make, so long as it does not withdraw any material evidence from the consideration of the jury (and it does not appear to have done so in the present case), and does not attempt to control the verdict by a direction."

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



161 Cal.App.2d 399

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joseph Bernard NORTON, Defendant and
Appellant.

Cr. 1347.

District Court of Appeal, Fourth District,
California.

June 18, 1958.

Prosecution resulting in judgment of conviction for burglary, second degree. The Superior Court of San Diego County, William A. Glen, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, McCabe, J. pro tem., held that evidence of activities of codefendants with respect to knowledge of defendant's purchase of gloves and other activities of codefendants prior to burglary was admissible and was relevant for all purposes and evidence was not to be excluded because, incidental to its admission,

the questionable character of defendant's companions was shown.

Judgment affirmed.

1. Criminal Law §338(7)

In prosecution resulting in judgment of conviction of burglary, evidence of activities of codefendants with respect to knowledge of defendant's purchase of gloves and other activities of codefendants prior to burglary was admissible and was relevant for all purposes and evidence was not to be excluded because, incidental to its admission, the questionable character of defendant's companions was shown. West's Ann.Pen.Code, § 459.

2. Criminal Law §792(3)

Instruction to effect that responsibility of a person who has knowingly and with criminal intent aided and abetted commission of crime does not cease unless, within time to prevent the commission of contemplated act, that person has done everything practicable to prevent its consummation and to effect that if that person changes his mind, he must do everything practicable to prevent the crime from being committed was proper. West's Ann. Pen.Code, § 459.

John F. O'Laughlin, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

McCABE, Justice pro tem.

Defendant appeals from a judgment of conviction of burglary, second degree, violation of section 459, Penal Code, and from a denial of his motion for a new trial.

By Count One of the information Hauser and Williams were charged with a violation of section 459, Penal Code. To this count Hauser and Williams entered a plea of guilty. In Count Two, Williams and defendant Norton were charged with a violation of the same section. Later, Count

Two was dismissed as to Williams and defendant entered a plea of not guilty. Upon the trial the jury returned a verdict of guilty.

Defendant raises two contentions (1) certain evidence concerning the activities of Hauser and Williams was erroneously admitted, and (2) an instruction concerning a change of mind and withdrawal was improper and should not have been given.

[1] Hauser, Williams and defendant had known and associated with each other for over a year. Defendant frequently dated Williams' sister. About a week before June 20, 1957, some gloves were purchased by defendant, which fact was known by Williams since Williams and defendant had talked about committing a burglary. These gloves were placed in the glove compartment of defendant's car, to which Williams had access at all times. On June 20 these gloves were taken by Williams from Norton's car and placed in Williams' vehicle where Hauser saw them on June 20, 1957. There was an understanding between Williams and Hauser to burglarize the Polar Ice Cream Company store. Inadvertently, Hauser took two left-handed gloves and went into the store but for some reason committed no criminal act while there. Williams waited for him outside. After coming from the store Hauser hid the gloves in a hedge. Later Hauser was picked up by Williams. They then proceeded to pick up Williams' girl, and then Hauser was "dropped off" at the Naval Station. Williams and his girl then went to defendant's trailer where defendant and his girl were present. Williams told defendant what had happened with Hauser at the store. The two girls were taken home by Williams and defendant. They used defendant's car. Williams and defendant then proceeded to the same store under an agreement to burglarize it. Upon arriving at the store Williams took the remaining two gloves. Finding both were right-handed, he used one and left one in defendant's car. Williams taped his left hand. All of these events occurred in the presence of

defendant. Williams then proceeded into the store and burglarized it of some rolls of pennies and a cigarette lighter. Prior to going into the store, defendant told Williams he "wasn't going to have anything to do with the burglary." Defendant did not wait for Williams. After leaving the store Williams dropped the pennies, cigarette lighter and the one glove in some bushes, returned to defendant's trailer, informed defendant he had entered the store, taken some pennies and where they were hidden. This occurred in the early morning hours of June 21. At about 4:30 or 5:00 o'clock A.M., Williams took defendant's car and returned to the place where he had dropped the articles. The record is not clear as to what there occurred. Later a police officer, with the permission of defendant, searched defendant's car and found one right-handed glove in the glove compartment. All the gloves were of identical make, size and description. The glove, pennies and lighter were later recovered from the bushes and were identified in the record. At the police station, defendant told conflicting stories of the recited events and at one time told the police he had committed the burglary. At the trial, defendant did not take the witness stand and did not present any defensive evidence. Hauser and Williams, over the objections of defendant, testified to the events happening in the late afternoon or early evening of June 20 when they were at the store.

The contention of defendant that the evidence of the activities of Williams and Hauser was erroneously admitted is without merit. In order to prove the complicity of defendant it was necessary to show the chain of events leading up to the actual commission. The gloves were highly relevant evidence in the case. To follow the gloves from one location to another and their use it was necessary to introduce the evidence through Hauser and Williams. To show defendant's knowledge of the purchase of the gloves, the purpose for which they were purchased and the actual use to which they were put required the intro-

duction of such evidence. The evidence was relevant for all of these purposes. The evidence is not to be excluded because incidental to its admission the questionable character of defendant's companions is shown.

The rule of admissibility of evidence as set forth in *People v. Dabb*, 32 Cal.2d 491, 499, 197 P.2d 1, 5, is in part:

"A defendant in a criminal action cannot be required to defend himself against the charge of any crime other than that for which he is on trial, but this rule does not exclude evidence which incidentally discloses the commission of another offense. Evidence which is relevant in establishing guilt of the crime charged is admissible notwithstanding the fact that it tends to connect the accused with an offense not included in the charge. (Citations.) As stated in *People v. Peete*, supra, 28 Cal.2d [306] at page 315, 169 P.2d [924] at page 930, quoting from *People v. Walters*, 98 Cal. 138, 141, 32 P. 864, 'whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion.'

"The general test of relevancy is whether the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense. If it does, then the evidence is admissible whether or not it embraces the commission of another offense and whether the other crime be similar or dissimilar. *People v. Peete*, 28 Cal.2d 306, 315, 169 P.2d 924."

To apply a different rule to the evidence in this case would have restricted

the evidence to a point where the jury or trier of facts would have been unable to view the essential facts in their true light. The jury or trier of facts could not properly evaluate the weight of the evidence. No error occurred by the admission of this evidence. See *People v. Dabb*, 32 Cal.2d 491, 197 P.2d 1; *People v. Simeone*, 26 Cal.2d 795, 161 P.2d 369; *People v. Nakis*, 184 Cal. 105, 193 P. 92; *People v. McGilver*, 67 Cal. 55, 7 P. 49; *People v. Cato*, 13 Cal.App.2d 391, 56 P.2d 1245.

[2] The instruction given to the jury and to which defendant objects, reads as follows:

"The responsibility of one who has knowingly and with criminal intent aided and abetted the commission of a crime does not cease, that is, his liability for the crime does not cease unless within time to prevent the commission of the contemplated act, he has done everything practicable to prevent its consummation. If he changes his mind, he must do everything practicable to prevent the crime from being committed. It is not enough that he may have changed his mind, and tries when too late to avoid responsibility. He will be liable if he fails within time to let the other party know of his withdrawal, and does everything in his power to prevent the commission of the crime."

This instruction cannot be successfully challenged since it accurately and correctly recites the law delineated in *People v. King*, 30 Cal.App.2d 185, 204, 85 P.2d 928 and *People v. Ortiz*, 63 Cal.App. 662, 219 P. 1024.

The judgment of conviction, and the order appealed from, are and each of them is, affirmed.

GRIFFIN, Acting P. J., and MUSSELL, J., concur.

50 Cal.2d 570

The PEOPLE of the State of California,
Respondent,

v.

Wilbert Felix FRIEND, Appellant.
Cr. 6146.

Supreme Court of California,
In Bank.

June 30, 1958.

Rehearing Denied July 30, 1958.

Prosecution for murder. From adverse judgment of the Superior Court, San Diego County, John A. Hewicker, J., the defendant appealed. The Supreme Court, Gibson, C. J., held that comments made on the evidence by the judge, who at beginning of his comments pointed out to jurors that they were free to reject anything which did not coincide with their views and that they were judges of the evidence and that it was up to them to decide what was to be done with defendant and that the penalty was entirely up to them, did not deprive defendant of a fair trial.

Judgment and order denying a new trial affirmed.

Schauer, McComb and Carter, JJ., dissented.

1. Criminal Law $\S$ 755½

Under constitutional provision authorizing court to make such comment on evidence and testimony and credibility of any witness as in its opinion is necessary for proper determination of case, trial judge is empowered to do more than merely summarize evidence and he may analyze testimony critically, giving his opinions for guidance of jury. West's Ann.Const. art. 6, $\S$ 19; West's Ann.Pen.Code, $\S$ 1093, subd. 6; $\S$ 1127.

2. Criminal Law $\S$ 755½

A judge's power to comment on evidence is not unlimited and he may not withdraw material evidence from jury's consideration or distort the testimony, and his comments should be temperately and fairly made, rather than being argumentative or contentious to a degree amounting to

partisan advocacy. West's Ann.Const. art. 6, $\S$ 19; West's Ann.Pen.Code, $\S$ 1093, subd. 6; $\S$ 1127.

3. Criminal Law $\S$ 762(5)

Under provision of Constitution authorizing court to make comment on evidence and testimony and credibility of any witness necessary for proper determination of case and requiring court to inform jury that they are exclusive judges of questions of fact submitted to them and of credibility of witnesses, a judge may express his opinion as to guilt or innocence of defendant, so long as province of jury as defined by constitutional section is not invaded. West's Ann.Const. art. 6, $\S$ 19.

4. Criminal Law $\S$ 756

Under power conferred upon judge to comment on evidence, a judge may restrict his comments to portions of evidence or to the credibility of a single witness and he need not sum up all the testimony, both favorable and unfavorable. West's Ann. Const. art. 6, $\S$ 19; West's Ann.Pen.Code, $\S$ 1093, subd. 6; $\S$ 1127.

5. Criminal Law $\S$ 755½

A judge has as much right to comment on evidence where punishment is involved as where matters relating to guilt are in issue, and the same principles are applicable in determining whether power of judge to comment on the evidence has been properly exercised. West's Ann.Const. art. 6, $\S$ 19.

6. Criminal Law $\S$ 755½

In prosecution for murder, comments made on the evidence by the judge, who at beginning of his comments pointed out to jurors that they were free to reject anything which did not coincide with their views and that they were judges of the evidence and that it was up to them to decide what was to be done with defendant and that penalty was entirely up to them, did not deprive defendant of a fair trial.

John R. Sorbo, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant previously appealed from a judgment which imposed the death penalty in accordance with a jury verdict. We upheld his conviction of murder of the first degree, but, because of errors relating to the issue of punishment, we remanded the cause for the sole purpose of redetermining that issue. *People v. Friend*, 47 Cal.2d 749, 772, 306 P.2d 463. On retrial, the jury fixed the penalty at death, and the case is again before us automatically. Pen.Code, § 1239, subd. (b). The only question presented is whether defendant was deprived of a fair trial by the judge's comments on the evidence.

One morning in 1936, Ruth Muir's body was found on the beach in La Jolla about a block from the home of her parents. Her face was covered with blood, and a bench leg which had been used as a club lay nearby. An autopsy surgeon discovered numerous bruises, abrasions and lacerations on the body and head and determined that death had been caused by fracture of the skull and multiple injuries. Defendant was living in a tent on the beach, and, when the police questioned him, he denied knowing anything about the killing and was released. The crime remained unsolved until 1955, when defendant, an ex-convict who was 44 years of age, confessed to having committed it.

In the five years following the killing, defendant was convicted of burglary, contributing to the delinquency of a minor,¹ and rape. In connection with his conviction of rape, defendant was placed on probation for 25 years on condition that he serve six months in jail and undergo an orchiectomy. This operation was performed in 1941. Thereafter, until 1955, defendant's record was clear with the exception of a \$20 fine for stealing a relative's dog in 1946 and an arrest in 1952 for causing a disturbance while drunk in a bar.

In 1955 defendant went to Detroit for two months in violation of the terms of his

probation. About a week after he returned to California, his probation officer telephoned him, arranged to meet him in a few days, and told him that he had violated his probation and that there was a warrant for his arrest. According to defendant's sister-in-law, when he hung up the telephone, he said, "Well, murder will out," mentioned the existence of a warrant, and stated that he thought that he would take his suitcases and "start traveling." The following evening, after spending several hours in a bar, defendant telephoned a newspaper reporter and said that he had killed Miss Muir. The record does not disclose the other circumstances leading to defendant's arrest.

Upon being taken into custody, defendant told the police that he had committed the crime but that he had not molested the victim or taken any valuables from her. In subsequent interviews he stated that he had been drinking and had lost his money playing pool and that, about 9:00 or 10:00 p. m., he went to the beach looking for someone to rob because he wanted money to buy more drinks. After removing a leg from a picnic bench to use as a club, he saw a woman who was seated facing the ocean, walked up behind her, and struck her a heavy blow on the head, knocking her to the ground. He then dragged her to a nearby gully, where he struck her several times about the face with his fists. He cut the laces of her corset with a knife and raped her, or tried to rape her. In explanation of his delay of 19 years in confessing the crime, he said that he wished to avoid hurting his parents and his wife, who were now dead.

Defendant did not take the witness stand at the first trial. At the second trial he testified that he had not been troubled by an excessive sex urge after undergoing the orchiectomy. He denied that, when he received the telephone call from his probation officer, he made the statements which his sister-in-law attributed to him or that

1. Defendant was charged with misconduct of a sexual nature with two little girls

and pleaded guilty to one count of contributing to the delinquency of a minor.

he confessed because he thought the arrest warrant mentioned by the officer related to the killing. According to defendant, he decided to confess two weeks earlier in Detroit. He testified, "One reason I was tired, that is why I turned myself in. Seemed like I was running all these years, trying to get something settled in my mind. That was one way, to come out with the truth, because I had read once or twice in the Bible where the truth would set you free, and after I confessed to this last, this murder, this error in my life, well, I was free in my mind, although not in my body.

* * * It seemed to me there was only one way out and that was to tell the truth about it. At least you can't go wrong by telling the truth. I could see that. I can't see where I have lost anything by telling the truth, although I did sit up there close to the gas chamber for eighteen or nineteen months. That kind of opened my eyes up to what I had done."

Before giving formal instructions to the jury, the trial judge made the following remarks: "Under the law, ladies and gentlemen of the jury, and under the Constitution, I am entitled to comment on the evidence in this case. I am going to make a few comments and tell you certain things you can consider, and, of course, anything I say is not binding on you; you can disregard it. I will just point out various things and if it coincides with your views, accept it; if it doesn't, why reject it.

"The argument of counsel in this case is not evidence. Neither is anything I tell you evidence in this case. Of course, both sides in this case put forward their best foot to try to get you to see their side of the case. Now you have heard all the evidence. You are the judges of the evidence and it is up to you to decide what should be done with the defendant in this case.

"Now, of course, this was a brutal murder. You heard all the facts, the testimony here of the People, and the defendant took the witness stand. Now it is true that he called the newspapers and said he had com-

mitted this crime. He did say that the second time he called the newspapers he had no recollection of his call. How intoxicated he was the night he called the newspaper I do not know.

"You saw the defendant on the witness stand on two different occasions when he wouldn't answer the questions on cross-examination. Now it has been stated here he made a confession. When certain questions were asked him why he didn't want to answer them. When I ordered him to answer them he said, 'I don't remember,' or 'I don't know.' Those were questions relative to the rape and relative to the molesting of the minor children several years later and the rape on the elderly woman on which he was on probation at the time he was picked up for this offense.

"Now you can consider, of course, the various items of his confession, his history throughout his life, both before and after this event here, the fact that he had this operation. Now it has been said he wasn't in any trouble since the operation, no serious trouble. Well, when we put people on probation—he was on 25 years probation—we expect them to comply with the law and if they violate it in any serious degree probation is revoked and the defendant is sentenced to the State Prison or County Jail, depending upon the character of the offense. Probation is a deterrent; at least I have always considered it such. You put a man on probation and you figure he is going to behave himself to a certain extent. Whether or not his behavior was the result of being on probation or the result of the operation, or a combination of both, is up to you to determine.

"You saw the defendant on the stand. You may consider whether he had any remorse for this crime. I heard his testimony. I seemed to feel as I heard it that Mr. Friend was concerned mostly about his own plight and not what he had done. He didn't want to go to Capistrano on the day he went up there, according to his own statements. He made the statement that the dead would

take care of themselves.² So I suppose they do. But that was his statement. It is up to you to determine whether he showed any remorse or whether he has told you everything from the witness stand that he knew.

"He was the only one there at the scene that survived and the only one that could give you the full details, if he saw fit so to do, but he said he didn't remember much about the rape, didn't remember much about this or about that.

"Now you may take all those things into consideration. As I said, the penalty is entirely up to you and let the evidence and your conscience be your guide."

The question to be determined is whether the judge exceeded his authority in making the foregoing comments.

[1] Section 19 of article VI of the Constitution, as amended in 1934, provides: "The court * * * may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses." Similar provisions are contained in statutes. Pen.Code, § 1093, subd. 6; § 1127.

It seems clear from the use of the word "comment" in section 19 of article VI that

a trial judge is empowered to do more than merely summarize the evidence and that he may analyze the testimony critically, giving his opinions for the guidance of the jury.³ If there can be any doubt in this respect, it is put to rest by resort to the history of the section and to the decisions which have considered the scope of the power conferred.

Prior to its amendment in 1934, section 19 of article VI provided that a judge could "state the testimony," as well as declare the law, so that the change in language would be meaningless if viewed as permitting only such action. The purpose of the amendment is disclosed by the ballot argument in its favor, which stated, "This measure * * * enables the trial judge to comment to the jury on the facts of the case; to give the jurors his analysis of the evidence and to express his opinion on the merits of the case, but informing them at the same time, that his views are advisory only. * * *"⁴

By three cases which this court decided shortly after 1934, it was established that the intent of the voters was to make the judge the real factor in the administration of justice, rather than a mere referee, that the constitutional amendment removed the prior prohibition against his power to comment, and that he is no longer confined to a colorless recital of the evidence but may analyze the testimony and express his views with respect to its credibility. *People v.*

2. This comment apparently refers to testimony by defendant that on the day following the telephone call from his probation officer he agreed to go with his brother and sister-in-law to decorate his mother's grave, although he did not want to go, and at that time stated that he "kind of more or less believed that when a person was buried you forget about them, let the dead take care of the dead. * * *"

3. The noun "comment" is defined by Webster's New International Dictionary, 2d ed. unabridged, 1942, as follows: "2. A note or observation intended to explain, illustrate, or criticize the meaning of a writing. * * * 3. Act or instance of commenting; remark or criticism. * * *" Further explanation is given in Webster's Dictionary of Syn-

onyms, 1942, p. 695, under the general heading of "remark," where it is said: "Comment stresses interpretation, as by bringing out what is not apparent or by adding details that help to clarify. * * * Very frequently, in modern use, the word implies unfavorable interpretation. * * * Comment applies to a remark, or an observation made in criticism, in interpretation, or in elucidation of something. * * *"

4. It should be noted in this connection that the amendment was submitted to the voters together with another proposal, which was also adopted, namely, an amendment to section 13 of article I giving the judge the right to comment on a criminal defendant's failure to testify.

De Moss, 4 Cal.2d 469, 50 P.2d 1031 [upholding the narration of circumstances tending to militate against the defendant's claim that he loved the victim and that the shooting was accidental]; *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193 [upholding, among other remarks relating to the defendant's testimony, the comment that "things don't happen that way"]; *People v. Gosden*, 6 Cal.2d 14, 56 P.2d 211 [upholding various remarks including the judge's opinion that the defendant's innocent purpose in signing the victim's name to an insurance application had "not to my mind been satisfactorily explained" and that the defendant's explanation for purchasing strychnine did not "appeal to my mind as reasonably consistent with an honest mind"]. There is a statement in *People v. O'Donnell*, 11 Cal.2d 666, 671, 81 P.2d 939, 942, that a "trial judge is rigorously prohibited from action or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence." The opinion in the O'Donnell case does not mention section 19 of Article VI. The quoted statement, which was made without the citation of any authority, is in conflict with the constitutional language expressly authorizing a judge to comment on the "credibility of any witness," and it is disapproved.

[2] A judge's power to comment on the evidence, of course, is not unlimited. *People v. Dail*, 22 Cal.2d 642, 658, 140 P.2d 828; *People v. Patubo*, 9 Cal.2d 537, 543, 71 P.2d 270, 113 A.L.R. 1303; *People v. Ottey*, 5 Cal.2d 714, 722 et seq., 56 P.2d 193; *People v. Robinson*, 73 Cal.App.2d 233, 237, 166 P.2d 17; *People v. Ramos*, 66 Cal.App.2d 731, 735, 152 P.2d 758; *Kahn v. Commercial Union Fire Ins. Co.*, 16 Cal.

App.2d 42, 45-47, 60 P.2d 177. He may not withdraw material evidence from the jury's consideration or distort the testimony, and his comments should be temperately and fairly made, rather than being argumentative or contentious to a degree amounting to partisan advocacy. The jury, as required by the constitutional provision, must remain as the exclusive arbiter of questions of fact and the credibility of witnesses, and the judge should make clear that his views are not binding but advisory only.

[3] The extent to which a judge is free to comment on the evidence is shown by the fact that it has frequently been recognized that a judge may express his opinion as to the guilt or innocence of the defendant, so long as the province of the jury as defined by the constitutional section is not invaded. *People v. Rupp*, 41 Cal.2d 371, 383, 260 P.2d 1; *People v. Daugherty*, 40 Cal.2d 876, 893, 256 P.2d 911; *People v. Dail*, 22 Cal.2d 642, 658-659, 140 P.2d 828; *People v. Warren*, 16 Cal.2d 103, 114, 104 P.2d 1024; *People v. Eudy*, 12 Cal.2d 41, 47, 82 P.2d 359; *People v. Ottey*, 5 Cal.2d 714, 729, 56 P.2d 193; *People v. Yokum*, 145 Cal.App.2d 245, 258, 302 P.2d 406; *People v. Huff*, 134 Cal.App.2d 182, 187, 285 P.2d 17; *Pomerantz v. Bryan Motors, Inc.*, 92 Cal.App.2d 114, 119, 206 P.2d 440; *People v. Busby*, 40 Cal.App.2d 193, 202, 104 P.2d 531.⁵

[4] It is also settled that a judge may restrict his comments to portions of the evidence or to the credibility of a single witness and need not sum up all the testimony, both favorable and unfavorable. *People v. Gosden*, 6 Cal.2d 14, 27-28, 56 P.2d 211; *People v. Ottey*, 5 Cal.2d 714, 728, 56 P.2d 193; *People v. De Moss*, 4

5. The cited decisions do not always use the same language to describe the limitation on a judge's power to express his opinion regarding guilt or innocence. For example, instead of saying, "so long as the province of the jury as defined by the constitutional section is not invaded," some courts have used the qualification "in proper cases," but it seems clear that nothing substantially different

is meant. *People v. Ottey*, 5 Cal.2d 714, 729, 56 P.2d 193, 200, which is the leading case on the point, employed the phrase, "so long as the province of the jury as defined by the constitutional section is not invaded," and it has usually been cited as authority in the subsequent decisions, including those which use different qualifying language.

Cal.2d 469, 476-477, 50 P.2d 1031; *People v. Wellman*, 141 Cal.App.2d 101, 106, 296 P.2d 82; *People v. Garcia*, 124 Cal.App.2d 822, 830, 269 P.2d 673; *People v. Robinson*, 73 Cal.App.2d 233, 238, 166 P.2d 17; *People v. Keys*, 62 Cal.App.2d 903, 914, 145 P.2d 589; *People v. King*, 30 Cal.App.2d 185, 205, 85 P.2d 928; see *People v. Dail*, 22 Cal.2d 642, 657-658, 140 P.2d 828; *People v. Ernst*, 121 Cal.App.2d 287, 295, 263 P.2d 114; *Kahn v. Commercial Union Fire Ins. Co.*, 16 Cal.App.2d 42, 47, 60 P.2d 177. Any statements to the contrary in *People v. Hooper*, 92 Cal.App.2d 524, 531, 207 P.2d 117, *People v. Mason*, 72 Cal. App.2d 699, 711, 165 P.2d 481, and *People v. Talkington*, 8 Cal.App.2d 75, 99, 47 P.2d 368, are disapproved.

Sanguinetti v. Moore Dry Dock Co., 36 Cal.2d 812, 228 P.2d 557, did not involve the power to comment on the evidence but the making and granting, in the presence of the jury, of a motion to amend the complaint so as to increase the prayer for damages. None of the language there used was intended to limit the commenting power, as the opinion made clear by pointing out that there was no contention that section 19 of article VI was applicable. 36 Cal.2d at page 823, 228 P.2d 557.

[5] There is no justification for holding that a judge has a lesser right to comment on the evidence where punishment is involved than where matters relating to guilt are in issue, and the same principles should be applied in determining whether the power has been properly exercised. Section 19 of article VI refers to "the evidence" generally, without setting forth any distinction or qualification as to the issue upon which the evidence bears. The evidence is, of course, important in fixing the punishment, and on the prior appeal in this case it was pointed out that "the trend is toward the more liberal admission of evidence pertinent only to the selection of penalty." *People v. Friend*, 47 Cal.2d 749, 764, 306 P.2d 463. Obviously, the judge's analysis of evidence relating to punishment may be as necessary to assist

the jury as his remarks on testimony touching upon guilt, so that the power to comment promotes the purpose of the constitutional amendment as much in one situation as in the other. It is true that the jury has exclusive discretion as to the punishment to be imposed, but no distinction can be made on this ground since the jury is also the exclusive judge of all questions of fact relating to guilt. In short, regardless of which issue is being tried, the respective functions of judge and jury as to factual questions are the same, and neither the language of the constitutional amendment nor the purpose underlying its adoption permits the imposition of different limitations on the power to comment on the evidence.

[6] In the present case the judge fully complied with the requirement that the jury be informed that his comments were not binding upon them. As we have seen, he pointed out at the beginning of his comment that the jurors were free to reject anything which did not coincide with their views, that they were the "judges of the evidence," and that it was up to them to decide what was to be done with defendant. At the conclusion of his remarks the judge said, "The penalty is entirely up to you and let the evidence and your conscience be your guide."

Moreover, in the course of the formal instructions which were subsequently given upon the law, the jurors were told: "In fixing the penalty, you are entirely free to act according to your own judgment. Your discretion in the selection of penalty is in no way circumscribed or limited by law. It is an absolute discretion. For example, there is no rule of law which calls for a sentence of death simply because you find that there are no mitigating or extenuating circumstances. Similarly, there is no rule of law which calls for a sentence of life imprisonment simply because you find that there are no aggravating circumstances." The jury was also instructed that the choice must be a meaningful one, fundamentally based on the evidence, but that weight could be given

to "any consideration whatever" which in the light of the evidence seemed important to the jury, and the judge, stressing that he was not attempting to indicate all of the matters which might be taken into account, listed examples of what might be considered, including many of the factors mentioned in *People v. Friend*, 47 Cal.2d 749, 768, 306 P.2d 463. These instructions sufficiently set forth the principles declared on the earlier appeal, and no claim is made that any of them was incorrect.

It is urged that the judge misstated the evidence in the comment to the effect that defendant had on two occasions refused to answer questions "relative to the rape and relative to the molesting of the minor children several years later and the rape on the elderly woman" and that defendant was ordered to answer by the court and said, "I don't remember" or "I don't know." The record discloses that the two questions which the court directed defendant to answer did not relate to rape or to molestation of children. The first of the two questions pertained to the location of two of defendant's suitcases at about the time of the telephone conversation with his probation officer, and, after being directed to answer by the court, defendant stated that he did not recall. The second question, which referred to the night of the murder, was "Did you go down to the La Jolla Park?" and, upon the court's direction, defendant replied, "I think I did." The record also shows, however, that, in response to a number of questions relating to the details of his sexual misconduct, defendant answered that he did not remember. The comment of the judge, therefore, was correct with respect to the general types of questions as to which defendant testified he could not remember. It was inaccurate as to which questions defendant at first refused to answer and was then directed to answer, but this constitutes no more than a minor inaccuracy which could not have prejudiced defendant.

There was no error in the comment, "It is up to you to determine whether he

showed any remorse or whether he has told you everything from the witness stand that he knew." It was preceded by the direction that the jury "may consider" whether defendant had any remorse and was followed by the remark that "you may take all those things into consideration." These are correct statements of the law, in accord with the principles discussed in *People v. Friend*, 47 Cal.2d 749, 306 P.2d 463. The jury was thus informed that these matters could properly be considered; it was not told that a determination of them, one way or the other, was required in order to select the penalty; and, as stated above, the court subsequently instructed that a finding of either mitigating or aggravating circumstances was not necessary in choosing between death or life imprisonment as the punishment.

It is not true, as asserted by defendant, that the comments were limited to evidence which was unfavorable to him. The judge pointed out that defendant had made a confession, that he had undergone the orchiectomy, that the jury could consider his history after the operation, and that it did not appear that he had been in any serious trouble since then. It may also be noted that the judge did not comment on some evidence which was very unfavorable to defendant. For example, no reference was made to the testimony of defendant's sister-in-law or to the extremely damaging inference permitted by it. Moreover, even if the comments as a whole are regarded as placing the greater stress on matters adverse to defendant, it is settled, as we have seen, that a judge need not sum up all the evidence, both favorable and unfavorable.

The judge at no time expressed an opinion as to the penalty which should be imposed, and none of his statements could be reasonably regarded as contentious to a degree amounting to partisan advocacy. He not only mentioned factors favorable to defendant and pointed out that the jury could consider them but, in addition, expressed his views with respect to ad-

verse considerations in temperate language. Finally, it should again be emphasized that he made clear that the comments were advisory only and that the question of penalty was entirely within the absolute discretion of the jury.

Under the circumstances, to hold that the judge's comments warrant a reversal would require a determination that a judge has a lesser right to comment on evidence relating to punishment than on evidence affecting guilt, and, as previously discussed, no such distinction can be made without ignoring the authorization contained in section 19 of Article VI of the Constitution. With the exception of the minor inaccuracy noted above, which could not have been harmful, the comments of the judge were in keeping with the Constitution and the established limitations on his power, and there is no sound basis for concluding that the question of penalty was not fairly tried.

The judgment and the order denying a new trial are affirmed.

SHENK, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

It is my view that the trial judge's comments to the jury in the case at bar go far afield from the court's proper function, exceed the court's power to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case" (Cal.Const., art. VI, § 19) *as that power relates to the selection of penalty for first degree murder*, and invade a province which by law is solely that of the jury.

The most serious departure by the trial judge (and by the majority) from the law as spelled out in our previous decisions (see *People v. Friend* (1957), 47 Cal.2d 749, 766

[13], 306 P.2d 463; *People v. Green* (1956), 47 Cal.2d 209, 218-232 [7-10], 302 P.2d 307; see also *People v. Hall* (1926), 199 Cal. 451, 456-458, 249 P. 859; *People v. Bollinger* (1925), 196 Cal. 191, 207, 237 P. 25; *People v. Leary* (1895), 105 Cal. 486, 496, 39 P. 24) is that here the trial judge made unmistakably clear to the jury the fact that in his opinion they should fix the punishment at death. The majority purport to meet this issue by holding that "The extent to which a judge is free to comment on the evidence is shown by the fact that it has frequently been recognized that a judge may express his opinion as to the guilt or innocence of the defendant * * * There is no justification for holding that a judge has a lesser right to comment on the evidence where punishment is involved than where matters relating to guilt are in issue, and the same principles should be applied in determining whether the power has been properly exercised." Contrary to the majority's quoted declaration, there is justification—indeed, not only justification but necessity, if we are to abide by the law previously enunciated—for holding that "a judge has a lesser right to comment on the evidence where punishment is involved than where matters relating to guilt are in issue." The difference is an obvious one. Guilt must always *depend on evidence and only on evidence*, and the judge may comment on evidence; hence, he may indicate an opinion as to the fact which depends on evidence. But where punishment (in a first degree murder case) is involved the selection of the penalty need not depend in any degree whatsoever on the evidence and, under the legislative plan as we have construed it, must always include exercise of an "absolute" or unfettered discretion.

As we unqualifiedly enunciated in *People v. Friend* (1957), *supra*, 47 Cal.2d 749, 764-765 [11], 306 P.2d 463, the discretion of the jury as to penalty in a first degree murder case is absolute¹ and may be resolved on

1. This holding was by no means new to the law. In *People v. Green* (1956), *supra*, 47 Cal.2d 209, 218[5], 302 P.2d 307, we declared: "There has never been

any suggestion or intimation within the language of the statute since its 1874 amendment [section 190 of the Penal Code as amended in 1874 provided that

considerations of pure conjecture, sympathy, apprehension, etc.; it is the law (pp. 767-768 of 47 Cal.2d, 306 P.2d 463) "that insofar as selecting the penalty is concerned (as between the two alternatives [of life imprisonment or death]) the law does not itself prescribe, nor authorize the court to innovate, any rule circumscribing the exercise of their discretion, but, rather, commits the whole matter of its exercise to the judgment and the consciences of the jury; that in deciding the question whether the accused should be put to death or sentenced to imprisonment for life it is within their discretion alone to determine, each for himself, how far he will accord weight to the considerations of the several objectives of punishment, of the deterrence of crime, of the protection of society, of the desirability of stern retribution, or of sympathy or clemency, of age, sex, human passion, ignorance or weakness, or (if appropriate under the evidence, of illness or intoxication or provocation not sufficient to reduce the degree or class of the crime), of the presumptions concerning, or possible uncertainties attaching to, life imprisonment, or of the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other con-

sideration whatever which in the light of the evidence, the duty they owe to the accused and to the state, and the law as explained to them by the judge, appears to them to be important."

Although the trial judge gave lip service to the rule that "the penalty is entirely up to you [the jury]," and "anything I say is not binding on you," his comments as a whole, even if they were an accurate review of such of the evidence as he commented upon, would constitute a partisan plea for the more extreme penalty. The judge not only indicated in a general way his view that the penalty should be death; he went on to particularize his reasons for his view. He made it clear that in his opinion defendant showed no remorse ("I seemed to feel as I heard it that Mr. Friend was concerned mostly about his own plight and not what he had done") and that defendant had not fully disclosed details of the crime known to him ("He was the only one * * * that could give you the full details, if he saw fit so to do, but he said he didn't remember much about the rape, didn't remember much about this or about that"). Furthermore, in giving his reasons, the trial judge did not merely comment on the evidence; he misstated evidence unfavorably to defendant. The judge said, "You saw the

"Every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury trying the same * * *"] that the discretion of the jury was conditional on, or had to be guided by, any particular circumstances * * * (See also *id.*, pp. 218-219 [7] of 47 Cal.2d, 302 P.2d 307.) And in *People v. Bollinger* (1925), *supra*, 196 Cal. 191, 207, 237 P. 25, on the authority of *People v. Leary* (1895), *supra*, 105 Cal. 486, 39 P. 24 we held: "It is clear beyond question that by the language of the amended section [Pen.Code, § 190, as amended by Stats.1873-1874, p. 457] * * * two changes were made in the law as to the punishment for murder in the first degree—first, that the punishment may be *either* death or life imprisonment; and, second, that the discretion of determining which punishment shall be imposed was vested in the jury alone. For * * * the law places

no restriction upon the jury's exercise of such discretion, nor does it attempt to confine its exercise to cases presenting palliating or mitigating circumstances. * * * The legislature has 'confided the power to affix the punishment within these two alternatives to the absolute discretion of the jury. * * *' (*People v. Leary* [1895, *supra*], 105 Cal. 486, 496 [39 P. 24].)" And as we stated in the *Green* case (pp. 225-226 of 47 Cal.2d, 302 P.2d 307), "The above quotation from the *Hall* case (199 Cal. 451, 456-458, 249 P.2d 859) [the quotation from the *Hall* case appears at 47 Cal.2d at pp. 224-225, 302 P.2d 307 of the *Green* case], together with that portion of the *Bollinger* case (196 Cal. 191, 207, 237 P. 25) which quotes section 190 of the Penal Code (as amended in 1873-1874) with the declaration that its meaning is 'clear beyond question,' correctly states the law; the decision we make today at last requires compliance with that law."

defendant on the witness stand on two different occasions when he wouldn't answer the questions on cross-examination. * * When certain questions were asked him why he didn't want to answer them. When I ordered him to answer them he said, 'I don't remember', or 'I don't know'. Those were questions relative to the rape and relative to the molesting of the minor children several years later and the rape on the elderly woman on which he was on probation at the time he was picked up for this offense."

The two questions which defendant did not answer directly, and which the judge directed him to answer, had nothing to do with rape or molestation of children. One of the incidents which resulted in the judge's directing defendant to answer on cross-examination was as follows:

"Q. Did you have a couple of suitcases there [at defendant's brother's house when defendant called the newspaper reporter]? A. Yes.

"Q. Where were they in the house? A. I can't say where. That makes no difference. They were in the house.

"The Court: Answer the question.

"A. Well, I don't recall now just exactly where they were in the house."

The second incident which resulted in the judge's directing defendant to answer on cross-examination was as follows:

"Q. Did you go down to the La Jolla Park [on the night defendant killed Miss Muir]? A. I think at this time, I think the story has been told so dog-goned many times I am getting tired of repeating the thing.

"The Court: Mr. Friend, you will answer the questions. You have given your story on direct and you will give it on cross. Now you answer the questions.

"By Mr. Low: Q. Did you go down to the La Jolla Park? A. I think I did."

Manifestly these two incidents did not involve matters as serious as those indicated in the trial judge's comments; they did not concern defendant's offenses of rape and molestation of minor children. The judge's statement that defendant refused to answer questions about those important and damaging matters was seriously prejudicial to defendant.

On the prior appeal in this case (*People v. Friend* (1957), *supra*, 47 Cal.2d 749, 306 P.2d 463) we took cognizance of the sole and absolute discretion of the jury in the selection between the two alternative but equally prescribed punishments, and for the guidance and assistance of trial judges specifically pointed out that (p. 766 of 47 Cal.2d, 306 P.2d 463) "[13] Quite naturally jurors, in the conscientious discharge of their duty, are eager, as were those in this case, to have all the guidance the law can give them. This poses a delicate task for the trial judge but his duty is clear. He must, of course, inform the jurors that they have no concern with punishment unless, under the instructions applicable to the trial of the issue of guilty or not guilty, they shall have found that beyond all reasonable doubt the defendant is guilty of murder of the first degree as charged.² When and if they so find, the duty of selecting the penalty devolves upon them, and on them alone, and they should be instructed as to the absolute nature of their power in the exercise of that function.

"From the discussion of the subject hereinabove and in *People v. Green* (1956), [*supra*, 47 Cal.2d] 209, 217-221, 229-232, 302 P.2d 307, it appears that there need be no error in counsel's advancing arguments as to which penalty will better serve the objectives of punishment, or in contending that the effect of certain evidence is 'mitigating' or 'aggravating,' as may affect their selection of the punishment to be imposed, *provided that the jurors in every case are*

2. Since the 1957 enactment of section 190.1 of the Penal Code, the issue of punishment is separately tried if a per-

son is found guilty of an offense punishable by life imprisonment or death.

clearly and adequately instructed as to the full scope of their function. They should be told (in accord with the law as reviewed in *People v. Green* (1956), *supra*, and herein) that beyond prescribing the two alternative penalties the law itself provides no standard for their guidance in the selection of the punishment; that the law provides equally the two penalties of death or life imprisonment, but that neither penalty attaches automatically or at all until the jury unanimously agree upon their choice of punishment and designate it in their verdict; that the choice as between the two penalties is in every case committed to their absolute discretion." (Italics added.)

Section 190 of the Penal Code "clearly and equally states two alternatives as punishment; it gives preference to neither." (*People v. Green* (1956), *supra*, 47 Cal.2d 209, 218 [7], 302 P.2d 307; *People v. Friend* (1957), *supra*, 47 Cal.2d 749, 751 [5a], 306 P.2d 463; *People v. Brust* (1957), 47 Cal.2d 776, 787 [9], 306 P.2d 480.) Since the law itself suggests no preference for penalty or basis for making the selection, neither should the trial judge, by comment to the jury, suggest preference for either penalty or emphasize factors which would tend to influence the jury toward either penalty. Selection of penalty, as we have repeatedly emphasized, is exclusively and absolutely the province of the jury. Presumptively, a suggestion that the death penalty should not be imposed would not be prejudicial to the defendant, but certainly any suggestion that it should be imposed would be inherently prejudicial.

As to comment on the evidence relating to the issue of guilt or innocence it is aptly said in *People v. Robinson* (1946), 73 Cal. App.2d 233, 237, 166 P.2d 17, that "The right thus conferred to comment on the evidence is a most potent one. Trial judges are not required to comment, but, if they do so, they should be extremely careful to exercise the power with wisdom and restraint. The point need not be labored that the members of the jury are apt to give great weight to any hint from the judge as to his opinion on the weight of the

evidence or the credibility of the witnesses, and, for that reason, care should be taken not to affect unfairly the rights of the defendant." And comment on the evidence relating to the selection of penalty is, as hereinabove indicated, a far more delicate matter than comment on the facts bearing on the issue of guilt or innocence. On the issue of penalty, where so many factors, *including extrajudicial factors*, may properly influence—indeed, alone control—the jury's verdict, comment should be strictly restrained to the scope, nature, and substance we so carefully enunciated in the *Green*, *Brust*, and earlier *Friend* decisions; it should never extend to or encompass any indication by the judge that in his opinion the death penalty should be selected. Such an indication is inherently an invasion of the field which by law is committed exclusively and absolutely to the jury, and is clearly prejudicial to the defendant. Comment which passes the limit of fairness and amounts to advocacy of the more severe penalty is indisputably in contravention of our studied holdings in the *Green*, *Brust*, and previous *Friend* cases as well as of the long established rulings of this court in such cases as *People v. Leary* (1895), *supra*, 105 Cal. 486, 493, 39 P. 24 and *People v. Bollinger* (1925), *supra*, 196 Cal. 191, 207, 237 P. 25. If we are so soon to depart from such certainty and clarity as the *Green*, *Brust*, and *Friend* holdings provided and are to again indulge at least in part the inconsistencies which had plagued us for so many years (from 1874 to 1956; see *People v. Green* (1956), *supra*, 47 Cal.2d 209, 218–232, 302 P.2d 307) we owe it to the bench and bar to specify those holdings which today are intended to be overruled.

Simple intellectual integrity requires us to recall now the miserable mass and mess of irreconcilable inconsistencies which had been growing from (on the one side) the gross errors of *People v. Welch* (1874), 49 Cal. 174, clear down through *People v. Kolez* (1944), 23 Cal.2d 670, 145 P.2d 580, *People v. Williams* (1948), 32 Cal.2d 78, 195 P.2d 393, and *People v. Byrd* (1954),

42 Cal.2d 200, 266 P.2d 505, and (on the other side) the never *heretofore* disputed correctness of the "It is clear beyond question" holdings of *People v. Leary* (1895), 105 Cal. 486, 496, 39 P. 24; *People v. Bolinger* (1925), 196 Cal. 191, 207, 237 P. 25, and *People v. Hall* (1926), 199 Cal. 451, 456-458, 249 P. 859, and many other cases down to *Green* wherein (at p. 226 of 47 Cal. 2d, 302 P.2d 307) we accepted the law which for so many years had been "clear beyond question" and declared that "the decision we make today at last requires compliance with that law." But this is another "today," some two years later than *Green*. And on this "today" the majority implicitly and essentially recant the brave declaration of two years ago. As of today the law that from 1895 to 1956 was "clear beyond question" is either no longer the law or it is no longer clear. Furthermore, the decision today tells the bench and the bar that we no longer require "compliance with that law"; no longer is the discretion of the jury in the selection of penalty absolute or unfettered; no longer is the selection of penalty exclusively the province of the jury. Rather, the majority today hold, even though the selection of penalty (as between the two equally prescribed), unlike the issue of guilt, is not a matter which must be resolved on or controlled by the evidence, that nevertheless the judge may not only comment on the evidence but may intimate that it does not warrant selection of life imprisonment in preference to death; and even though it is (or was) altogether clear that the jury alone has the function of selecting the penalty, the judge may tell them that in his opinion they should fix the penalty at death.

The above indicated changes in the law which are express or implicit in today's majority decision impel me to reiterate some of the principles which, although apparently no longer the law, are, I think, deserving of respect.

A jury of laymen confronted with the difficult task of selecting between the penalty of death and that of life imprisonment will, it may be assumed, look to the trial

judge for such guidance as he may give them, and will be likely to take their cue from any intimation of the trial judge as to what verdict he believes they should return. Instead of attempting to influence the jurors to accept his view the trial judge should inform them in accord with the law stated in *People v. Friend* (1957), *supra*, 47 Cal.2d 749, 767, 306 P.2d 463, "that beyond prescribing the two alternative penalties the law itself provides no standard for their guidance in the selection of the punishment; that the law provides equally the two penalties of death or life imprisonment, but that neither penalty attaches automatically or at all until the jury unanimously agree upon their choice of punishment and designate it in their verdict; that the choice as between the two penalties is in every case committed to their absolute discretion," etc. It would be a rare case, if any, in which it would be proper for a trial judge to make any other comment on the law or the facts pertaining to the selection of penalty than comment of the scope and substance of that set forth in the *Friend* case, *supra*, pp. 766-768 of 47 Cal.2d, 306 P.2d 463, and quoted in large part, 327 P.2d 105, 108.

It is improper for the trial judge to throw the weight of his office behind a selection which is for the jury alone. "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." (*Starr v. United States* (1894), 153 U.S. 614, 626, 14 S.Ct. 919, 38 L.Ed. 841, quoted in *Bollenbach v. United States* (1946), 326 U.S. 607, 612, 66 S.Ct. 402, 90 L.Ed. 350, and in *Sanguinetti v. Moore Dry Dock Co.* (1951), 36 Cal.2d 812, 819, 228 P.2d 557.) In the *Sanguinetti* case, an action for damages under the Jones Act, 46 U.S.C.A. § 688, plaintiff's counsel in the presence of the jury asked leave to amend the complaint to increase the amount of damages prayed for from \$50,000 to \$75,000. The trial court, outside the presence of the jury, granted the motion

and denied defendant's motion for mistrial on the ground of misconduct of plaintiff's counsel in presenting the motion in the jury's presence. The court instructed the jury that "The damages must be reasonable and cannot be in excess of the amount alleged in the complaint, namely \$75,000." We held (p. 819 [3] of 36 Cal.2d, 228 P.2d 557) that "Any practice which would include the making of a motion, in the presence of the jury, after production of evidence, to increase the amount of damages asked, and which would bring to the knowledge of the jury the fact that the court after hearing plaintiff's evidence permitted the complaint to be amended by increasing the prayer for damages, should be unhesitatingly condemned and stricken down," for (p. 819 [4] of 36 Cal.2d, 228 P.2d 557) "It is, of course, elementary that the amount of damages is ordinarily a question of fact to be determined by the jury."

It is true that the Sanguinetti case was by a bare majority of this court but I do not understand that the declared principles of law, as such, were seriously disputed. It was, rather, application of those principles to the facts of the case on which we divided. In the specific criminal case now before us, it seems to me that the court's influencing the jury *as to selection of penalty*, a matter committed to the sole and absolute discretion of the jury, much more than its influencing the jury in any civil case as to amount of damages, should be unhesitatingly condemned and stricken down.

Also analogous are the following statements in *Dorsey v. Barba* (1953), 38 Cal. 2d 350, 240 P.2d 604, which holds that the trial court does not have the power to increase an inadequate award of unliquidated damages without plaintiffs' consent: (p. 356 [8] of 38 Cal.2d, 240 P.2d 604) "An essential element [of the constitutionally guaranteed right to trial by jury] * * * is that issues of fact shall be decided by a jury, and the assessment of damages is ordinarily a question of fact. The jury as a fact-finding body occupies so firm and important a place in our system of jurisprudence that any interference with its

function in this respect must be examined with the utmost care"; (p. 358 [10] of 38 Cal.2d, 240 P.2d 604) "it is not the mere form of a jury trial to which one is entitled under the Constitution, but the fundamental right to have a jury determination of fact." Likewise it is not the mere form of a jury selection of penalty to which a defendant is entitled under the Penal Code, but the fundamental right to have the selection made by the jury uninfluenced by the trial court.

It seems particularly incongruous, in my sense of relative values, that this court should reach the result of the majority in this case when so recently the court in considering a claim for damages in a civil case held that there must be a new trial because a jury *may* have been "misled [by statements of the trial judge] as to the proper manner of determining liability." In *Butigan v. Yellow Cab Co.* (1958), 49 Cal.2d 652, 300 P.2d 500 this court (even though the Vehicle Code expressly recognizes unavoidable accident as a defense in the circumstances there defined, and even though the instruction had been recognized as proper for many years) held that through the giving of the instruction on unavoidable accident the jurors "may get the impression that unavailability is an issue to be decided and that, if proved it constitutes a separate ground of nonliability of the defendant. Thus they may be misled as to the proper manner of determining liability * * *" How much more likely it is that the jury in this penalty-selection case were misled by the inaccurate, unwarranted, and inherently damaging statements of the trial judge.

The fact that the defendant in the instant case is a miserable, friendless creature, guilty of horrible crimes, does not make him, in what I view as the proper concept of our function, any less deserving of a fair trial than was the plaintiff in *Butigan v. Yellow Cab Co.*, supra.

The cases last cited and summarized apply to situations other than the one now before us the familiar concept that the trial judge should not improperly interfere

in matters which are for the exclusive determination of the jury. The Green (1956), supra, 47 Cal.2d 209, 302 P.2d 307 and earlier Friend (January 25, 1957), supra, 47 Cal.2d 749, 306 P.2d 463, cases specifically apply that concept to the problem of selection of penalty. Since the latter decisions (and since the return, on June 19, 1957, of the improperly influenced verdict now under consideration), the rules there announced have received implicit legislative approval by an enactment which went into effect on September 11, 1957, and which amended section 190 of the Penal Code and adopted section 190.1 of that code so as to provide for a separate trial on the issue of punishment in the case of a person charged with an offense for which the penalty is in the alternative death or life imprisonment.

Section 190.1 provides in part that "Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty." Thus the section clearly accepts our suggestion in the earlier Friend opinion (p. 763 of 47 Cal.2d, footnote 7, 306 P.2d 463) that "The character and scope of evidence pertinent to punishment which should be received in a case wherein the jury is required to fix the penalty, is a subject which could well receive legislative attention."

Section 190.1 further provides in material part that "In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty * * *" The wording of this new section certainly does not purport to authorize the trial judge to "order a new jury impaneled to try the issue of penalty" and to *instruct them that in his opinion they should fix the penalty at death.* It

does authorize the trial judge to "either impose the punishment for life * * * or order a new jury impaneled to try the issue of penalty."

There is not the slightest indication in the new section that the Legislature intended to alter the rules spelled out by this court in *People v. Green* (1956), supra, 47 Cal.2d 209, 302 P.2d 307 and *People v. Friend* (1957), supra, 47 Cal.2d 749, 306 P.2d 463. The section does not empower the judge to instruct the jury in any way whatsoever not consonant with those rules. Rather, by dealing with the matters there determined in a manner consistent with those determinations it in effect recognizes and approves our holdings. Today the majority not only refuse to recognize and apply those holdings; they further refuse to accept the legislative recognition of such holdings.

For the reasons above stated I would reverse the judgment and the order denying a new trial.

McCOMB, J., concurs.

CARTER, Justice.

I dissent.

I am in full accord with the views expressed by Mr. Justice SCHAUER in his dissenting opinion in this case. The quoted statements of the trial judge to the jury were obviously intended to and did influence the jury in the rendition of its verdict. The unmistakable effect of these statements was to deny defendant the free, untrammelled and unbiased determination of the jury as to punishment to which defendant was entitled under the law of this state. As forcibly pointed out in said dissenting opinion, the majority of this court has reversed judgments based upon jury verdicts in civil cases where the alleged error was infinitesimal compared to that shown by the record in this case. This is particularly true where the alleged error consisted of comments or statements of the trial judge which may have affected the determination reached by the jury.

In *Sanguinetti v. Moore Dry Dock Co.*, 36 Cal.2d 812, 228 P.2d 557, I could see no error, much less prejudicial misconduct, on the part of either the trial judge or counsel for plaintiff which in any manner influenced the verdict in that case (see my dissent, 36 Cal.2d at page 823 et seq., 228 P.2d 557), but a majority of this court nevertheless reversed a judgment for plaintiff which was obviously supported by substantial evidence because plaintiff's counsel, in the presence of the jury, moved to amend the prayer of plaintiff's complaint by increasing the demand for damages from \$50,000 to \$75,000. The court did not rule on this motion in the presence of the jury, but later granted it and instructed the jury that it could not return a verdict in excess of the sum of \$75,000, the amount demanded in the complaint. The jury returned a verdict for \$75,000 and a majority of this court reversed a judgment entered thereon on the sole ground that the foregoing occurrences constituted prejudicial error. I did not agree with that holding. Here, however, the prejudicial misconduct of the trial judge is so glaring that its adverse effect upon the jury cannot be denied.

To my mind it is exceedingly unfortunate when a judgment in a criminal case is upheld in the face of obvious and glaring prejudicial misconduct on the part of a trial judge, or prosecuting attorney with the judge's approval, as such a situation casts grave doubt upon the fairness of the trial and may amount to a violation of the due process clauses of both the state and federal Constitutions. Such was the situation in the recent case of *People v. Osslo*, 50 Cal.2d 75, 323 P.2d 397 (see dissenting opinion, 50 Cal.2d 106, 323 P.2d 415), where the same trial judge presided as in the case at bar.

It is my considered opinion that the administration of justice is defeated in many cases where a trial judge throws the weight of his position against a litigant by conduct or statements designed to influence the jury against such litigant. While jurors do not always respond to such conduct, there is a tendency for them to do so, which

has the effect of depriving the litigant of his right to a fair trial before a jury. Unless this court assumes the burden of correcting situations of this character when called to its attention, we might just as well abolish our jury system.

I would reverse the judgment imposing the death penalty and grant defendant a new trial on the issue of punishment.

Rehearing denied: CARTER, SCHAUER and McCOMB, JJ., dissented.



161 Cal.App.2d 762

John W. NEVAROV et al., Plaintiffs,

v.

Glenn E. CALDWELL et al., Defendants.

**John W. NEVAROV and Anna Nevarov,
Appellants,**

v.

Glenn E. CALDWELL, Respondent.

Civ. 22950.

**District Court of Appeal, Second District,
Division 2, California.**

July 2, 1958.

Hearing Denied Aug. 28, 1958.

Action by overtaken motorist, driving in outside lane of four-lane highway, and his passenger against overtaking motorist, driving on inside lane, for injuries to person and property when overtaken motorist crossed into inside lane to avoid automobile stopped on outside lane, was struck from rear by overtaking motorist's automobile, and crossed to wrong side of road and collided with oncoming automobile. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment on verdict for overtaking motorist, and overtaken motorist and the passenger appealed. The District Court of Appeal, Ashburn, J., held that evidence was sufficient to establish overtaking motorist's negligence and to

raise question for jury as to overtaken motorist's contributory negligence, and that judgment in favor of another passenger in an earlier trial did not conclusively establish, in favor of overtaken motorist and the passenger, the issue of overtaking motorist's negligence.

Judgment affirmed.

1. Courts ⇨89

Expressions used in judicial opinions are always to be construed and limited by reference to matters under consideration, and cannot be safely applied in largest and most universal sense to dissimilar cases.

2. Judgment ⇨540

Underlying the principle of *res judicata* is the public policy that there must be an end to litigation, and this policy requires that the issues involved in a case be set at rest by final judgment, but this policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which he can fully present his case.

3. Judgment ⇨665

Judgment for plaintiff in negligence action is not *res judicata* or conclusive, as to issues of negligence or contributory negligence, in a subsequent action growing out of the same accident but brought by a different plaintiff against the same defendant. West's Ann.Code Civ.Proc. § 1908, subd. 2.

4. Judgment ⇨665

Under California public policy, rule of *res judicata* is not applicable to multiple claims of different persons for personal injuries or property damage against a single defendant or set of defendants growing out of a single accident. West's Ann.Code Civ.Proc. § 1908, subd. 2.

5. Appeal and Error ⇨1195(1)

Where, in action by motorist and two passengers against other motorist arising from automobile accident, judgment on first trial went in favor of one passenger against whom no claim of contributory negligence had been made, and such passenger's judg-

ment became final and was satisfied, upon grant of new trial to motorist and other passenger with no limitation upon issues to be tried, judgment in favor of the one passenger did not conclusively establish, in favor of motorist and other passenger, issue of other motorist's negligence.

6. Automobiles ⇨242(8)

Where motorist, who was involved in automobile accident, had no recollection of events which occurred during and immediately prior to the accident, and inference of due care on his part could not arise in absence of showing of the cause for his loss of memory, such as a head injury or unconsciousness.

7. Automobiles ⇨244(12)

In action by overtaken motorist, driving in outside lane of four-lane highway, and his passenger against overtaking motorist, driving on inside lane, for injuries to personal property when overtaken motorist crossed to inside lane to avoid automobile stopped on outside lane, was struck from rear by overtaking motorist's automobile, and crossed to wrong side of road and collided with oncoming automobile, evidence was sufficient to establish overtaking motorist's negligence.

8. Appeal and Error ⇨1068(5)

Where verdict for defendant in negligence action could have been prompted only by jury's finding of contributory negligence, not a finding of absence of negligence on defendant's part, failure to instruct that defendant was negligent as matter of law could not be said to have worked a miscarriage of justice.

9. Appeal and Error ⇨930(1)

In determining on review whether a finding of contributory negligence on part of plaintiff is sustainable upon the record, plaintiff's testimony must be considered in connection with other testimony and reasonable inferences drawn therefrom.

10. Trial ⇨140(1), 142

Jury properly may reject part of a witness' testimony, even though not directly contradicted, and combine the accepted

portion with bits of testimony or inferences from other witnesses' testimony, thus weaving a cloth of truth out of selected available material.

11. Automobiles ⇨169

Motorist who changes lanes on highway must use reasonable care to ascertain whether the change can be safely made, but he need not be absolutely certain that the move can be successfully executed. West's Ann.Vehicle Code, §§ 526(a), 544 (a).

12. Automobiles ⇨245(81)

In action by overtaken motorist, driving on outside lane of four-lane highway, and his passenger against overtaking motorist, driving on inside lane, for injuries to person and property when overtaken motorist crossed into inside lane to avoid automobile stopped on outside lane, was struck from rear by overtaking motorist's automobile, and crossed to wrong side of road and collided with oncoming automobile, question whether overtaken motorist was contributorily negligent was for jury.

13. Automobiles ⇨242(2)

Where, prior to being struck from rear by overtaking automobile, overtaken motorist, who was driving on four-lane highway, turned from outside to inside lane in which overtaking motorist was approaching, overtaken motorist's participation in causing the collision precluded the application of the *res ipsa loquitur* doctrine. West's Ann.Vehicle Code, §§ 526(a), 544 (a).

14. Appeal and Error ⇨1064(1)

In absence of request for instruction on doctrine of *res ipsa loquitur*, giving of instruction that mere fact that accident happened does not support an inference that someone was negligent is not reversible error, if application of the *res ipsa loquitur* doctrine depends on the determination of disputed facts.

15. Negligence ⇨138(2)

In absence of request for instruction on doctrine of *res ipsa loquitur*, giving of instruction that mere happening of acci-

dent does not support an inference that someone was negligent does not constitute error unless the *res ipsa loquitur* inference arises as matter of law from facts conceded by defendant.

Franklin L. Knox, Jr., and George O. West, Los Angeles, for appellants.

Arthur M. Reilly, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiffs Nevarov appeal from judgment upon verdict for defendant Caldwell in a personal injury action, urging errors of law as the basis for reversal. The accident occurred on the Ridge Route, a four-lane highway, running generally north and south and having two lanes for southbound traffic and two for northbound traffic. Three southbound cars (those of Odisio, Caldwell and Nevarov), and one northbound car (of Bissiri), were involved in a series of impacts. First the Odisio car, in the first or outside southbound lane, swerved, whirled around and came to rest facing to the north, the direction opposite to the one in which it had been traveling; however, some of the witnesses say it was facing west when it came to rest. Defendant Caldwell's vehicle hit the right side of Odisio's; also hit the rear end of the Nevarov automobile; both Caldwell and Nevarov crossed the double white line and Nevarov had a collision with Bissiri's northbound car in the center northbound lane; Caldwell stopped just north of Nevarov. Out of a group of claims and cross-claims emerges the action of John W. Nevarov and his wife Anna Nevarov against Caldwell. The appeal is from the judgment rendered in a second trial of the issues raised between these parties.

At the first trial James Nevarov, a minor, was a co-plaintiff with his parents, John and Anna. No claim of contributory negligence was made against him and judgment went in his favor but against his parents. James' judgment became final and

was satisfied. A new trial was granted the parents with no limitation upon the issues to be tried.

At the second trial, and here, the parents claim that the judgment in favor of James establishes conclusively in their favor the issue of negligence on the part of defendant Caldwell. They rely upon *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892; *French v. Rishell*, 40 Cal.2d 477, 254 P.2d 26, and *Garcia v. Garcia*, 148 Cal.App.2d 147, 306 P.2d 80, to support the argument that the judgment against Caldwell in James' case is admissible and conclusive against Caldwell upon the issue of his negligence because he was a party to James' action and mutuality is no longer of the essence of *res judicata* in this state. On this basis appellants urge that it was prejudicial error to submit to the jury the question of Caldwell's negligence and to fail to instruct them that that issue was established against him. Respondent makes a vigorous argument that the *Bernhard* case is not here applicable. In any event that decision plainly goes no further than to establish negligence of defendant (if it goes that far) and cannot have any bearing upon the issue of John Nevarov's contributory negligence, an issue here present but absent from James' case.

The court refused plaintiffs' request for an instruction that defendant was negligent and his negligence the proximate cause of the accident as a matter of law; it also left to the jury over plaintiffs' objection the solution of those questions as matters of fact. In order to sustain the appeal counsel makes the further contention that plaintiffs as a matter of law were free from contributory negligence and that the court erroneously left this issue to the jury as one of fact.

If the *Bernhard* doctrine is here applicable, plaintiffs were entitled to the requested instruction (for which evidentiary basis had been laid); its refusal would be error; the further question would then arise whether it resulted in a miscarriage of justice.

Bernhard v. Bank of America, supra, 19 Cal.2d 807, 122 P.2d 892, broadly and definitely holds that mutuality of estoppel is not essential to application of *res judicata* either as a bar or in its other aspect of collateral estoppel. At page 812 of 19 Cal.2d, at page 894 of 122 P.2d it is said: "The requirements of due process of law forbid the assertion of a plea of *res judicata* against a party unless he was bound by the earlier litigation in which the matter was decided. [Citations.] He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. *Ibid*. There is no compelling reason, however, for requiring that the party asserting the plea of *res judicata* must have been a party, or in privity with a party, to the earlier litigation.

"No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as *res judicata* against a party who was bound by it is difficult to comprehend." At page 813 of 19 Cal.2d, at page 895 of 122 P.2d: "In the present case, therefore, the defendant is not precluded by lack of privity or of mutuality of estoppel from asserting the plea of *res judicata* against the plaintiff." In that instance Mrs. Sather authorized one Cook to draw upon her account in Security-First National Bank. Cook, without authority, opened an account with defendant's predecessor bank in the name of "Clara Sather by Charles O. Cook." Gradually her money was withdrawn from the Security account, redeposited in the other one, then transferred into a third account in defendant Bank standing in the name of Cook and his wife. After Mrs. Sather died Cook became executor, later resigned and presented his account which made no mention of the money in question. Helen Bernhard, and other beneficiaries of Mrs. Sather's will, objected to the accounting because it did not include that money; the court held after a hearing that Mrs. Sather had made a gift of the disputed funds to Cook during her lifetime. *Bernhard* was

later appointed administratrix with the will annexed and brought an action against the Bank of America to recover the deposited money upon the ground that it was indebted to the estate in that amount because the deposit was paid out without any authorization from Mrs. Sather. The Supreme Court, affirming a judgment for defendant, found there was privity between plaintiff, acting as administratrix, and the objectors in the probate proceeding and then disposed of the question of mutuality in the language above quoted. The question of the application of that case at bar must be examined in the light of the exact situation existing in the instant action.

Unquestionably the negligence of defendant Caldwell which caused or contributed to James Nevarov's injuries was identical with the negligence which his parents assert against defendant. In James' case it was not complicated by any claim of contributory negligence on his part and would fasten liability upon defendant though it operated only as a contributing proximate cause concurring with negligence upon the part of James' father, the appellant herein. With reference to the parents, however, defendant's negligence must have been the sole proximate cause of their injuries or defendant cannot be held liable. Thus his negligence takes on a different aspect when viewed by a jury in reference to the respective claims of James and his parents. And whether it would be fair to apply the Bernhard doctrine in the parents' case becomes a serious question. The judgment in favor of James was for \$691.65; it was satisfied about 11 months after the parents had been granted a new trial upon their cause of action. If Bernhard is applicable to such a situation it would have been necessary for defendant to appeal from a judgment for an insignificant amount (compared to the claims of the parents) in order to keep the issue of his own negligence open for the second trial, to take an appeal which well might have been frivolous. Such a rule would be promotive of litigation, "would tend to defeat

rather than to promote the preventing vexatious litigation with its objective of attendant expense both to the parties and the public" (quoting *Taylor v. Hawkinson*, 47 Cal.2d 893, 897, 306 P.2d 797, 799). But this case should not be decided upon that narrow ground.

This action is part of a larger pattern which has developed in personal injury cases in Los Angeles County and probably elsewhere in the state. The attorney who has a difficult case or group of cases on his hands files in the municipal court an action for recovery from a single defendant for property damage or minor personal injuries in the expectation that liability will be easily and speedily established and the question of damages left as the only issue to be decided in the principal action or actions brought in the superior court because *res judicata* establishes defendant's liability. This strategy (quite legitimate if *Bernhard*, *supra*, has universal application) is applied to multiple injuries to different people arising from the same accident. This occurs repeatedly in situations developed by accidents such as the collision of two aeroplanes over the Grand Canyon; the injury to many passengers on the San Diego-Los Angeles line of a railroad where the train was wrecked and the engineer claimed a momentary blackout; the breaking of the St. Francis Dam many years ago, followed by a great number of claims against the City of Los Angeles; the collision between the *Andrea Doria* and the *Stockholm* off the New England Coast in recent years. As several commentators have pointed out, *Bernhard*, *supra*, if held applicable to such situations, means that a defendant who obtains a favorable judgment, or 10 of them, cannot use those judgments against other claimants because the want of mutuality would spell absence of due process if the judgments were pleadable in bar or estoppel. But the plaintiff in the eleventh case is fortunate enough to establish liability and the defendant is confronted by a conclusive adjudication of its own negligence in the next 10 or 20 cases,—this being due to the fact that mutuality is not necessary and it

has had its day in court, in fact 11 of them (none of which resulted adversely except the eleventh). This looks like the scales of justice are weighted in favor of the plaintiff. That our Supreme Court meant no such lopsided justice seems reasonably plain from an examination of its rulings later than Bernhard, *supra*.

[1] Our statute, Code of Civil Procedure, § 1908, subdivision 2,¹ declares mutuality of estoppel to be of the essence of *res judicata*. The Supreme Court in departing from that concept in Bernhard, *supra*, did so upon the ground of public policy, saying in part: "The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. See cases cited in 38 Yale L.J. 299; 2 Freeman, Judgments, 5th Ed., sec. 626; 15 Cal.Jur. 98. The doctrine also serves to protect persons from being twice vexed for the same cause. *Ibid.*" 19 Cal.2d at page 811, 122 P.2d at page 894. See, also, as to the basis of the rule and its limitations, 50 C.J.S. Judgments § 592, p. 11; 30A Am.Jur. § 326, p. 373. In determining the extent to which this state has gone in abolishing the test of mutuality of estoppel it is also well to keep in mind the fact that "[i]t is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court." Porter v. Bakersfield & Kern Electric Ry. Co., 36 Cal.2d 582, 590, 225 P.2d 223, 228. "[I]t is a familiar rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases." City of Pasadena v. Stimson, 91 Cal. 238, 250, 27 P. 604, 606.

[2] The Supreme Court has recognized that the public policy underlying *res judi-*

cata dictates that the rule yield to considerations showing that its application would result unjustly. "But in rare cases a judgment may not be *res judicata*, when proper consideration is given to the policy underlying the doctrine, and there are rare instances in which it is not applied. In such cases it will not be applied so rigidly as to defeat the ends of justice or important considerations of policy." Greenfield v. Mather, 32 Cal.2d 23, 35, 194 P.2d 1, 8. "The public policy underlying the principle of *res judicata* that there must be an end to litigation requires that the issues involved in a case be set at rest by a final judgment. * * * This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case." Jorgensen v. Jorgensen, 32 Cal.2d 13, 18, 193 P.2d 728, 731." In re Estate of Charters, 46 Cal. 2d 227, 235, 293 P.2d 778, 783. To the same effect, see, In re Estate and Guardianship of Di Carlo, 3 Cal.2d 225, 235, 44 P.2d 562, 90 A.L.R. 990; Natural Soda Products Co. v. City of Los Angeles, 109 Cal.App.2d 440, 446, 240 P.2d 993; In re Estate of Spinosa, 117 Cal.App.2d 364, 369-370, 255 P.2d 843.

An examination of later rulings of the Supreme Court indicates that it does not entertain the view that the Bernhard doctrine is to be universally applied regardless of consequences.

In Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, 29 A.L.R.2d 1185, there were five actions for death and for personal injuries against the same defendants which resulted in small verdicts for the respective plaintiffs. Defendants' motion for new trial was denied but plaintiffs Leiperts' motion for new trial upon the sole issue of damages was granted as to Denny Leipert. This was held upon defendants' appeal to be error because the record showed a series of compromise verdicts and hence there had been no actual decision of the major issue

1. Code Civ.Proc. § 1908, subd. 2: "In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or spe-

cial proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

of liability. Mr. Justice Carter dissented, urging *inter alia* that, as there was no appeal in the death cases and those judgments had become final, "[i]t would be idle to send the case back for a new trial on all of the issues, including liability, because the rule of *res judicata* would be applied, and there would be nothing left to try except damages—the very issue embraced in the limited new trial which the trial court granted. That *res judicata* is pertinent to the case is clear from the principles enunciated in *Bernhard v. Bank of America*, 19 Cal.2d 807, 812, 122 P.2d 892, 894, where this court said: 'There is no compelling reason, however, for requiring that the party asserting the plea of *res judicata* must have been a party, or in privity with a party, to the earlier litigation. * * *' The identical issue is whether defendant driver was negligent and was his negligence the proximate cause of the collision. The answer is yes in the four death actions. There are four final judgments on the merits of that issue. The party against whom the prior adjudications are asserted is the same." 39 Cal.2d at page 479, 247 P.2d at page 334. It has been argued by at least one reviewer and by respondent herein that, as the majority opinion does not mention this argument or the *Bernhard* case, the court impliedly and necessarily rejected its application to personal injury actions. We find, however, that the silence of the opinion merely reflects that of the briefs upon this subject and we think it cannot be said that Leipert does amount to a ruling upon the point. If there was no plea of *res judicata* before the court (and the briefs seem to indicate that such was the case), there was no occasion for the majority of the court to surmise that one would be interposed later, or to pass in advance upon the effect of such a supplemental plea if interposed. In fact, the court never reached the point urged by Mr. Justice Carter because the parties stated that they wished the judgment to stand if a limited new trial was not to be had. "It is clear, therefore, that all parties have deliberately waived any rights to a reversal of the judgment. Un-

der these circumstances, the judgment should be affirmed." 39 Cal.2d at page 471, 247 P.2d at page 329.

Taylor v. Hawkinson, supra, 47 Cal.2d 893, 306 P.2d 797. Three verdicts in favor of plaintiffs in personal injury actions were found to have been for inadequate amounts. Only one plaintiff applied for a new trial, which was granted. Upon the new hearing plaintiff sought to limit the evidence to the issue of damages because the judgments in favor of the other plaintiffs had become final and hence operated as *res judicata*. The court, speaking through the author of the *Bernhard* opinion, held that all the verdicts were compromises and, as the issue of liability had not been determined, *Bernhard* was not controlling. At page 896 of 47 Cal.2d, at page 799 of 306 P.2d, it is said: "Accordingly, had defendant or plaintiff's husband and the driver moved for a new trial, it would have been granted, and their failure to do so was tantamount to accepting the jury's compromise as their own. [Citations.] Regardless of the effectiveness of such a compromise in extinguishing the causes of action or in settling the rights directly involved therein [citations], it does not constitute such a determination of the issues involved as to render them *res judicata* where distinct rights are sought to be litigated in a separate cause of action. [Citations.] To hold otherwise would tend to defeat rather than to promote the objective of preventing vexatious litigation with its attendant expense both to the parties and the public. Defendant did not have his day in court during the first trial on the issue of liability, and plaintiff can now justify making that judgment binding upon him in her action only on the ground that he had an opportunity to attack it. Had he done so, more rather than less litigation would have ensued, and plaintiff would have gained nothing. Defendant did not vex her by seeking a redetermination of an issue once decided, but sought and secured only the right to have the issue of liability determined once after plaintiff by securing a new trial on all issues had established the propriety thereof." This

is but an application of the philosophy of the Greenfield case, *supra*, that *res judicata* is not to be applied "so rigidly as to defeat the ends of justice or important considerations of policy." 32 Cal.2d at page 35, 194 P.2d at page 8.

In *Re Estate of Miller*, 104 Cal.App.2d 1, 17, 230 P.2d 667, 677, the court said: "An analysis of the Bernhard case shows that while it uses broad language which might indicate that the requirement of mutuality had been completely abandoned in *res judicata* cases it is only in cases where there is a real privity to the party against whom the plea is asserted that it actually is not required." The Supreme Court denied a hearing.

It is a fair conclusion that the later rulings of that court evince no inclination to enlarge the application of Bernhard to dissimilar situations or to give it universal import. The following cases cited by the litigants throw no additional light upon our present problem: *French v. Rishell*, *supra*, 40 Cal.2d 477, 254 P.2d 26; *Garcia v. Garcia*, *supra*, 148 Cal.App.2d 147, 306 P.2d 80; *Quinn v. Litten*, 148 Cal.App.2d 631, 307 P.2d 90.

[3] The general rule applicable to situations such as that presented at bar is thus stated in an annotation found in 133 A.L.R. at page 185: "With but few exceptions it has been held, in cases in which the question has arisen, that a judgment for the plaintiff in an action growing out of an accident was not *res judicata*, or conclusive, as to issues of negligence or contributory negligence, in a subsequent action growing out of the same accident, by a different plaintiff against the same defendant." Most of the decisions cited in support of the text expressly or impliedly rest upon the mutuality concept. Illustration 15, under § 93, Restatement of Law of Judgments, at page 466 says: "A and B are passengers in a car driven by C which collides with a car driven by D. A brings action against D and obtains judgment on the ground that D was negligent. This finding is not *res judicata* in a subsequent proceeding brought by B against D."

In determining whether this state should now depart from the stated rule (which really is an open question) the courts are required to pass upon a matter of public policy.

Professor Brainerd Currie of the University of Chicago Law School discusses the Bernhard case in an article entitled "Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine," 9 Stanford Law Review 281. In the concluding paragraph, at page 322, he says: "The Bernhard decision is sound, not only on its facts but in its deliberate excursion beyond the strict necessities of the case for the purpose of stamping out the requirement of mutuality." The discussion starts with supposititious statements, as follows: "An express train speeds through the night. Suddenly, as it enters a curve, the locomotive leaves the rails, followed by half a dozen tumbling passenger cars. Fifty passengers are injured. Fifty actions for personal injuries are filed against the railroad—some in California courts, some in federal courts in California, some in other state and federal courts. The first of these to be reached for trial is in a California court. A full trial is had on the issue of the railroad's negligence, and the result is a verdict and judgment for the plaintiff. The judgment becomes final. What is the status of the forty-nine remaining actions?" (P. 281.) At page 285 it is said: "It does not follow, however, that the forty-nine remaining plaintiffs in our hypothetical case may plead the judgment in the first case against the railroad. Those who would read such a meaning into the Bernhard decision overlook a fundamental fact. Judges, and especially enlightened and perceptive judges as those who could reach such a decision, will confine the authority of prior opinions to what was necessarily decided for purposes of the case then in hand, notwithstanding language which was unnecessarily broad. What the California Supreme Court did in the Bernhard case was to sweep aside the supposed requirement of mutuality when it loomed as an impediment to a just result in the case before the court, and to declare that it saw no virtue in the requirement of

mutuality for its own sake. It does not follow that every case in which the result was formerly justified on the ground of 'lack of mutuality' must now be decided differently, even though it can be brought within the general language of the Bernhard opinion.

"Let there be no doubt that the facts of our hypothetical case can be brought within the language of the Bernhard decision. * * * Yet I predict with confidence that the Supreme Court of California will *not* hold that the former judgment is *res judicata* in these circumstances." The burden of the author's argument is that the Bernhard doctrine should be confined to use for defensive purposes and should not be an instrument of offense; in other words, should be used as a shield and not a sword.

57 Harvard Law Review 98, 104: "Thus, where in a suit by A against B it is found that B is negligent, the judgment is not conclusive against B in a subsequent action by C who was hurt at the same time and by the same conduct. To apply the alleged tendency to this situation would mean that where a defendant was sued by forty people who were hurt in an explosion caused by the defendant, none of the actions being consolidated, the first adverse judgment would conclude the defendant on the question of his negligence in all subsequent actions, although in all cases prior to the judgment he had been successful.

"The idea that in general such an alleged rule should not be applied is not based on any belief that there must be 'mutuality of estoppel.' It results from the general principles of our system of litigation from which the rules of *res judicata* have evolved. These principles would seem to require that a party to an action should risk the loss of rights or the creation of liabilities only with reference to his adversaries, except in the rare case where the limitation would adversely affect relations between the adversary and a third person. This exceptional situation exists where an action is brought unsuccessfully by or against a person who, if the judgment were against him, would be under

a duty of indemnity or contribution. It does not exist where there is no such duty of indemnity or contribution or where the first action is brought by or against a person who is only secondarily liable. Identity of issue in the two cases is not sufficient to bind the unsuccessful party in reference to all subsequent adversaries." We do not consider that Bernhard is confined to indemnity situations for its language shows that such is not the case.

The fact that the question of *res judicata* arose from a judgment favorable to a co-plaintiff in a single case is not controlling in either direction, nor is the view entertained by the trial judge who granted the new trial to these appellants important. James' cause of action was separate from that of the parents; it was presented in the same action merely as a matter of procedural convenience; it remained a separate cause and the judgment upon it was essentially separate, just as if obtained in an action brought by James alone. When the trial judge granted a new trial upon all issues he had exhausted his function in the premises; he had nothing to do with the evidence to be received upon the re-trial; what he thought about that subject is immaterial. Moreover, James' judgment had not become final at that time and it is unlikely that the judge had in mind any potential supplementary complaint alleging a subsequently accruing *res judicata*.

[4, 5] It becomes necessary in this case to declare the public policy of this state upon the application of the rule of *res judicata* to multiple claims of different persons for personal injuries or property damage against a single defendant or set of defendants growing out of a single accident. We hold that *res judicata* does not apply to those situations; that such an extension of the doctrine would be promotive of litigation and in subversion of sound principles of judicial administration looking to equal justice for all. There was no error in refusing the instruction which appellants sought upon this subject.

There can be little doubt about defendant's negligence in point of fact. The acci-

dent occurred on February 1, 1953, about 7:30 p. m., after dark. The scene is the Ridge Route, a short distance north of Newhall in Los Angeles County. Some witnesses say the highway was straight and some that it curved slightly to the west; all agree that it was downgrade. First Mrs. Odisio, southbound, lost control of her car for some unexplained reason; it skidded, turned around and came to rest on the west shoulder, according to her testimony, or on the outside southbound lane and partially blocking it, as related by most of the other witnesses. Mrs. Odisio said it was headed north when it came to rest; the police say it was headed west. At any rate she and her companion, Mrs. Avery, sat in the car after turning the headlights off and the parking lights on, and watched cars coming toward them from the north. It was dark and all had their headlights on. Two or three cars passed them without incident. Defendant's car, a Nash, was in the inside lane (lane 2), and traveling at 60 to 70 miles an hour, according to Mrs. Odisio; at 40 to 50 miles in defendant's own estimation. He was seen when some 200 to 300 feet to the north by Mrs. Odisio and Mrs. Avery. There were two cars running along together; one of them would be ahead at times and then they would run along side by side; both were swerving back and forth from right to left; Caldwell seemed to be trying to pass the other car, according to Mrs. Odisio. Both ladies said that Caldwell's car went over onto the other side of the highway, came back and turning counterclockwise slammed into their car. It was stipulated that the Odisio automobile was damaged in the right side; also that defendant's car hit it and was damaged on its own rear right side. At approximately the same time, and probably before collision with the Odisio vehicle, the front of defendant's car hit the rear of plaintiffs' car, a Chevrolet, which had pulled out of the outside southbound lane into the inner lane in order to pass the Odisio car. Both Caldwell and Nevarov lost control of their cars, which crossed the double line where

the Nevarov car collided with the Bissiri Ford, traveling north in the inner northbound lane. Defendant's car stopped just north of plaintiffs' in that same lane. It was stipulated that plaintiffs' car was a total loss.

Plaintiff, John W. Nevarov, testified that he had been traveling south in the outer lane, saw another car ahead of him pull around the Odisio car and pass it, looked in his rear view mirror, saw that all was clear behind, pulled into the center lane to pass Odisio and as he did so was hit in the rear end by a car which proved to be defendant's.

Mrs. Avery's version was somewhat different from that of Mrs. Odisio, for the latter saw the cars coming down the road almost side by side, both swaying from lane to lane. Mrs. Avery saw three cars in a row in the inner lane; the last one, defendant's, swung around to pass the others. Both saw it go to the center of the highway, then to the west shoulder, then back again, spin around counterclockwise and hit them on the right side, then cross the double line where Mrs. Avery heard another crash. She, like Mrs. Odisio, said defendant's car was going 65 to 70 miles an hour. Neither of them was able to describe the course of the Nevarov car because they were intent upon the approach of the Caldwell vehicle.

[6-8] Defendant Caldwell testified that, going 40 to 50 miles an hour and driving in the center lane all the time, without swerving back and forth, he became aware of something going on ahead of him; saw tail lights of Mrs. Odisio's car, which was across the highway headed west; he slowed his speed and could have stopped before reaching Odisio; another automobile ahead of him was slowing its speed; at this point his recollection of ensuing events ceased, according to his testimony. No head injury or unconsciousness or other cause for loss of memory through the accident having been shown, an inference of due care on his part could not arise. *Ireland v. Marsden*, 108 Cal.

App. 632, 643-644, 291 P. 912; Bergman v. Bierman, 138 Cal.App.2d 692, 695-696, 292 P.2d 623. Defendant did testify that he saw no vehicle change lanes or cut in front of him before he lost his recollection, saw no car in front of him except Odisio's, and had no knowledge of running into the Odisio automobile or the plaintiffs' automobile; his first knowledge of the accident was the fact of being thrown out of his seat. It was stipulated that the front of his automobile hit the back of plaintiffs'. There is nothing in Caldwell's testimony to overthrow the plain inference of negligence that arises from this combination of facts. The showing of his negligence is clear. We do not see that the verdict for defendant could have been based upon a finding of absence of negligence on his part; it must have been prompted by a finding of contributory negligence (which will be discussed presently). Such being the case, the failure to instruct that defendant was negligent as matter of law (assuming plaintiffs were entitled to such an instruction) cannot be said to have worked a miscarriage of justice, for we cannot say that a different result probably would have occurred if the assumed error had not been committed. *People v. Watson*, 46 Cal.2d 818, 836, 299 P.2d 243.

[9, 10] Appellants argue vigorously that a finding of contributory negligence on the part of Mr. Nevarov, the driver, is not sustainable upon this record; that as matter of law there was no contributory negligence on his part. This argument is built mainly upon his own testimony which is said to be uncontradicted. It must be considered in connection with other testimony and reasonable inferences therefrom, and the rule that the jury properly may reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected available material. *Bechtold v. Bishop & Co., Inc.*, 16 Cal.2d 285, 291-292, 105 P.2d 984; *In re Estate of Pelton*, 140 Cal.App.2d 512, 516, 295 P.2d 483.

[11, 12] Mrs. Nevarov was dozing in the car and unable to throw any light upon the accident; it was stipulated that Mrs. Caldwell, if called as a witness, would testify that she had no recollection of the accident. Other witnesses were unable to do much better with respect to Mr. Nevarov's conduct. He testified that he was driving in the outside lane (No. 1) going 40 to 45 miles an hour; his Chevrolet was in good condition in all respects; he was following another car at a distance of about 300 feet; he noticed an obstacle ahead, looked into his mirror and saw lights behind; traffic was light; the car ahead skidded and almost stopped, then pulled over and started to pass the Odisio vehicle; plaintiff released the throttle, stuck his hand out, saw the lights behind, applied his brakes and started slowly to pull to the left to pass Odisio; the lights behind were "where he could notify them" and there was plenty of time for them to see him; the lights were back in the distance; they were about as far behind him as he was behind the car immediately preceding him, which would be about 300 feet; plaintiff could have stopped in his lane (No. 1) before reaching the Odisio car, but he decided to follow the other vehicle around it; as he was making this move he was struck in the rear end by defendant's car. His deposition said he was 200 feet from the Odisio automobile when he was hit; that he was just about passing it. The deposition also said that he was a half mile from point of impact when he saw headlights in his mirror; they were then 500 to 600 feet behind him; at another time he said they were about the same distance as he was behind the car he was following; he was then figuring on trouble ahead; he did not know whether he again looked in his rear view mirror; he could not recall whether he looked again in the mirror after he put out his arm and applied his brakes. It may have been "a few seconds" before the car ahead skidded that he last looked in his rear mirror. Of course he did not and could not know the speed of the approaching

lights or how far they were behind, but normally he could tell whether they were traveling fast and whether they were gaining on him. If going 70 miles an hour an object covers 210 feet in two seconds and 315 feet in three seconds; one going 45 miles travels 135 feet in two seconds or 202½ feet in three seconds. Plaintiff should have seen, but apparently did not, that the cars behind were gaining on him, and that both or one of them were or was swerving or switching from side to side; that one went over to the west shoulder, then east across the double line, then back in his direction, which things were seen by Mrs. Odisio and Mrs. Avery. At least the jury had the prerogative of drawing those inferences. One who changes lanes must use reasonable care to ascertain that it can be done safely. Veh.Code, §§ 526(a) and 544(a). It is not necessary that he absolutely ascertain that the movement can be successfully executed, but it is obligatory upon him to use reasonable care to that end. *Washam v. Peerless Automatic Staple Mach. Co.*, 45 Cal.App.2d 174, 177, 113 P.2d 724; *Spear v. Leuenberger*, 44 Cal.App.2d 236, 247, 112 P.2d 43; *Chambers v. Spada*, 133 Cal.App.2d 231, 236, 283 P.2d 1067; *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 320 P.2d 500. It is a fair inference that plaintiff cut in front of defendant's automobile without using reasonable care to ascertain that he could do so safely. Presumptively the jury so found. It cannot be said that plaintiff was free of contributory negligence as a matter of law.

[13-15] Appellants contend that it was error to give the following instruction at defendant's request: "The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action, was negligent." The phrasing is almost identical with that found in *Barrera v. De La Torre*, 48 Cal.2d 166, 170, 308 P.2d 724, and *Phillips v. Noble*, 50 Cal.2d 163, 323 P.2d 385. The argument seems to be that

the fact of a rear end collision is some proof of negligence on defendant's part and hence the instruction was improper under the recent decisions of *Shaw v. Pacific Greyhound Lines*, 50 Cal.2d 153, 323 P.2d 391, and *Phillips v. Noble*, supra, 50 Cal.2d 163, 323 P.2d 385. No request for a *res ipsa loquitur* instruction was made by plaintiffs and the above review of the evidence shows that there was no occasion for such an instruction; that the participation of plaintiff in causing the accident, according to his own testimony, was such as to preclude application of *res ipsa*. The following passage from *Phillips v. Noble*, supra, 50 Cal.2d at page 166, 323 P.2d at page 386, is apposite and determinative here: "We have recently held that, in the absence of a request for instructions on the doctrine of *res ipsa loquitur*, it is not reversible error to give the instruction on the mere happening of an accident if the application of the doctrine depends upon the determination of disputed facts. *Barrera v. De La Torre*, 48 Cal.2d 166, 170 et seq., 308 P.2d 724. In such a case a request for appropriate instructions on the doctrine is essential so that the court may be apprised of the plaintiff's reliance on it and have an opportunity to explain the relationship between the doctrine and the instruction on the mere happening of an accident. In the absence of such a request, the only situation in which the giving of the challenged instruction was held to constitute error was where the *res ipsa loquitur* inference arose as a matter of law from facts conceded by the defendant. *Jensen v. Minard*, 44 Cal.2d 325, 329, 282 P.2d 7.

"Here no instruction on *res ipsa loquitur* was requested or given, and the case is not one in which the doctrine may be applied as a matter of law on the basis of undisputed facts."

No reversible error appearing herein, the judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.
Hearing denied; CARTER, J., dissenting.

161 Cal.App.2d 727

**Elmer G. JACOBS and Clarence Bell, doing
business as J. B. P. Wreckers, Petition-
ers and Appellants,**
v.

**DEPARTMENT OF MOTOR VEHICLES of
the State of California and Paul Mason,
Director of the Department of Motor Ve-
hicles, State of California, Defendants and
Respondents.**

Civ. 22752.

District Court of Appeal, Second District,
Division 2, California.
June 30, 1958.

Hearing Denied Aug. 28, 1958.

Mandate proceeding to review decision of director of department of motor vehicles suspending petitioners' automobile wrecker's license. The Superior Court, Los Angeles County, Bayard Rhone, J., entered, judgment for defendants, and petitioners appealed. The District Court of Appeal, Fox, P. J., held that statute requiring any automobile wrecker desiring to dismantle or wreck any vehicle subject to registration to immediately forward to the department of motor vehicles the certificate of ownership, registration card, and license plates for such vehicle, means that once a wrecker has the desire or intention to dismantle, he is required to immediately send the documents and plates in question to the department, before commencing such dismantling, and not within a few days after wrecking a vehicle.

Judgment affirmed.

1. Automobiles Ⓒ363

Word "immediately" as used in statute requiring an automobile wrecker desiring to dismantle or wreck any vehicle subject to registration to immediately forward certain items to the department of motor vehicles, refers to the action of desiring or intending to dismantle an automobile, and not to the act of wrecking or dismantling. West's Ann.Vehicle Code, § 246.

See publication Words and Phrases, for other judicial constructions and definitions of "Immediately".

2. Automobiles Ⓒ363

Statute requiring any automobile wrecker desiring to dismantle or wreck any vehicle subject to registration to "immediately" forward to the department of motor vehicles the certificate of ownership, registration card, and license plates for such vehicle, means that once a wrecker has the desire or intention to dismantle, he is required to immediately send the documents and plates in question to the department, before commencing such dismantling, and not within a few days after wrecking a vehicle. West's Ann.Vehicle Code, § 246.

3. Automobiles Ⓒ363

Primary purpose of statute providing that any automobile wrecker desiring to dismantle or wreck any vehicle subject to registration shall forward to the department of motor vehicles the certificate of ownership, registration card, and license plates for such vehicle, is to prevent the theft of motor vehicles and traffic in stolen vehicles and their parts, to frustrate criminals who would use the plates or other parts of dismantled vehicles in order to conceal the identity of stolen automobiles. West's Ann.Vehicle Code, § 246.

4. Statutes Ⓒ181(2)

Where a statute is susceptible to two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense and wise policy, the former should be rejected and the latter adopted.

5. Statutes Ⓒ219

Although not necessarily controlling, contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.

6. Statutes Ⓒ47

A statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language, and the fact that its meaning is difficult to ascertain will not render a statute nugatory.

7. Statutes 47

Statute requiring any automobile wrecker desiring to dismantle or wreck any vehicle subject to registration to immediately forward to department of motor vehicles the certificate of ownership, registration and license plates for such vehicle was not invalid on theory that it was too vague and indefinite to be enforced. West's Ann. Vehicle Code, § 246.

8. Mandamus 190

Where in a mandate proceeding to review decision of director of motor vehicles suspending automobile wrecker's license of petitioners, real issue in the case was the interpretation of statute under which petitioners' license was suspended, and on such issue defendants prevailed, and case was remanded to director of motor vehicles only for reconsideration of penalty, petitioners therefore lost the case on the merits, and were not the prevailing parties within meaning of statute providing that if expense of preparing transcript of an administrative hearing has been borne by the prevailing party, such expense shall be taxable as costs. West's Ann.Code Civ.Proc. § 1094.5(a).

C. P. Von Herzen and Samuel L. Laidig, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., N. B. Peek, Deputy Atty. Gen., for respondents.

FOX, Presiding Justice.

This is a mandate proceeding to review the decision of the Director of the Department of Motor Vehicles suspending the automobile wrecker's license of appellants, Elmer G. Jacobs and Clarence Bell, doing business as J. B. P. Wreckers, for six months, staying, however, all but 30 days of such suspension, and placing appellants on probation for five years.

There are two issues in this case: first, whether or not Vehicle Code, section 246, as it read in 1956, required an automobile wrecker to submit to the Department of Motor Vehicles the certificate of owner-

ship, registration card and license plates for any vehicle prior to dismantling; and, second, whether or not appellants were entitled to certain costs.

In January, 1956, an accusation was filed against appellants charging that they had dismantled and wrecked certain motor vehicles without first having surrendered the certificates of ownership, registration cards and license plates of such vehicles, and had failed and refused to allow inspection of their record of wrecked or dismantled vehicles required by the Vehicle Code to be maintained by automobile wreckers. There was testimony before the hearing officer that on or before January 7, 1956, appellants dismantled and wrecked five specific automobiles without first having surrendered to the Department of Motor Vehicles the certificates of ownership, registration cards and license plates. This testimony was not controverted; hence the hearing officer made a finding in accordance therewith.

The hearing officer also found that appellants failed and refused to permit representatives of the department to inspect their records of wrecked or dismantled cars.

The hearing officer recommended as a penalty that appellants' automobile wrecker's license be suspended for six months. The director adopted the proposed decision of the hearing officer except that he reduced the penalty to that above stated.

In December, 1956, appellants filed their petition for writ of mandate, seeking to reverse this decision. They also filed points and authorities and the original reporter's transcript of the administrative hearing.

By their petition appellants attacked the decision on the primary ground that they had not violated section 246 of the Vehicle Code.

The respondents filed their return by way of answer to the petition and a trial brief in support thereof. In their brief they pointed out that the charge in the accusation relating to the licensees' refusal

to allow inspection of their records had been dismissed during the course of the administrative hearing; respondents also expressed doubt as to whether disciplinary action could be predicated upon such refusal. Hence there was no foundation for the adverse finding on that issue. Since the penalty was based on two violations, only one of which was valid, respondents requested that the matter be remanded for reconsideration of the penalty. Appellants, however, chose to argue their basic attack on the interpretation of section 246. The trial court held against them, the minute order stating: "Judgment for respondent[s] on the merits; but matter ordered remanded to Director of Motor Vehicles for reconsideration of the penalty; each party to bear its own costs. Peremptory writ granted; alternative writ discharged; respondent[s] * * * to prepare judgment and writ."

In its formal findings the trial court found, *inter alia*, that respondents have interpreted and enforced section 246 of the Vehicle Code as requiring that any person desiring to dismantle or wreck any vehicle registered under the Vehicle Code submit to the Department the certificate of ownership, registration card and license plates before dismantling such vehicle. In its conclusions of law the court concluded that this was the correct interpretation of the section and that the failure of appellants to comply therewith subjected them to disciplinary action. The court also concluded that inasmuch as it had no means of knowing whether the director would have imposed the same penalty against the appellants for one violation of section 246 as he had imposed for two supposed violations, appellants were entitled to judgment, and the decision should be vacated and the matter remanded to the director for reconsideration of the penalty alone. The judgment was in harmony with these conclusions; the judgment also provided that each side should bear its own costs.

[1-4] Appellants' initial contention is that in 1956 Vehicle Code section 246 did not require an automobile wrecker to for-

ward to the department the specified items relating to a motor vehicle *before* dismantling such vehicle. In 1956 the pertinent portion of section 246 read as follows: "Any automobile wrecker * * * desiring to dismantle or wreck any vehicle subject to registration hereunder shall immediately forward to the department the certificate of ownership, registration card, and the license plate or plates last issued for such vehicle." Appellants argue that the word "immediately" in the statute refers to the act of wrecking or dismantling; they then assert that forwarding the required items a few days *after* wrecking a vehicle is within the time contemplated by "immediately." Their conclusion is that their activities herein met the requirements of the statute. Appellants are in error. We are convinced that the legislature intended to require submission of the designated items *prior* to dismantling of a vehicle. The word "immediately" in the statute obviously refers to the act of desiring (or intending) to dismantle. Once a wrecker has the desire or intention to dismantle, he is required immediately to send the documents and plates to the department, *before* commencing such dismantling. That this is the meaning intended by the legislature is shown by an examination of the reasoning underlying the statute. The primary purpose of section 246 is to prevent the theft of motor vehicles and the traffic in stolen vehicles and their parts. The statute is intended to frustrate criminals who would use the plates or other parts of dismantled vehicles in order to conceal the identity of stolen cars. Effective law enforcement requires that the documents and plates be submitted prior to dismantling. "It is * * * a well recognized rule that where a statute is susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense and wise policy, the former should be rejected and the latter adopted." *Kennard v. Rosenberg*, 127 Cal.App.2d 340, 345, 273 P.2d 839, 842; see, also, *Carson v. Lampton*, 23 Cal.App.2d 535, 538, 73 P.2d 629, and cases cited therein. We are convinced that

the legislature intended the construction consistent with "sound sense and wise policy"—submission of the required items prior to dismantling a vehicle. Adoption of appellants' interpretation would frustrate the principal objective of the statute.

The language used in Vehicle Code, section 247 lends further support to our conclusion. That statute, which has remained unchanged since its adoption in 1941, provides as follows: "Any person acquiring a vehicle subject to registration hereunder, for the purpose of wrecking or dismantling the same, who fails to forward to the department the documents required by Section 246, within ninety (90) days after taking possession of the vehicle, and *before* dismantling and wrecking such vehicle, shall pay in addition to any other penalties an investigation service fee. * * *" (Emphasis added.) Since this section requires prior submission, section 246 would be inconsistent with it if the latter did not also require prior submission.

[5] Furthermore, there is evidence in the record from which it reasonably may be inferred that the director of motor vehicles has always construed section 246 as requiring submission of the necessary items prior to dismantling. "Although not necessarily controlling * * * the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." *Coca-Cola Co. v. State Board of Equalization*, 25 Cal.2d 918, 921, 156 P.2d 1, 2; see, also, cases cited therein. The director's construction of the statute therefore lends additional support to our conclusion.

Appellants point out that in 1957 (after these proceedings had been initiated) the pertinent portion of section 246 was amended to read as follows: "Any person desiring to dismantle or wreck any vehicle subject to registration hereunder shall forward to the department the certificate of ownership, registration card, and the license plate or plates last issued therefor *before* begin-

ning to dismantle or wreck such vehicle." (Emphasis added.) They argue that this amendment shows an intent on the part of the legislature to change the pre-existing law. We cannot agree. Under the circumstances here presented it is clear that the legislature intended to clarify rather than change the existing law. *Bermite Powder Co. v. Franchise Tax Board*, 38 Cal.2d 700, 704, 242 P.2d 9; *Coca-Cola Co. v. State Board of Equalization*, supra, 25 Cal.2d at page 923, 156 P.2d at page 3.

[6, 7] Appellants assert that if their construction of the statute is incorrect, then the statute is too vague and indefinite to be enforced against them. "A statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language. The fact that its meaning is difficult to ascertain will not render a statute nugatory." *Paraco, Inc., v. Dept. of Agriculture*, 118 Cal.App.2d 348, 357, 257 P.2d 981, 987; see, also, *Drumney v. State Board of Funeral Directors*, 13 Cal.2d 75, 80, 87 P.2d 848. As we have already pointed out, prior submission of the documents and plates is necessary if the motivating purpose behind the statute is to be achieved. The language in section 246 is reasonably susceptible to the interpretation the director has placed upon it. The statute is certainly not so vague and indefinite as to require us to rule that it is invalid.

[8] Appellants' final contention is that they were entitled to their costs of preparing the transcript of the administrative hearing. The statute governing this matter is Code of Civil Procedure section 1094.5 (a). The pertinent provision is as follows: "If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs." The question, therefore, is whether or not appellants were the prevailing parties in the court below.

The real issue in this case was the interpretation of section 246. On that issue the respondents prevailed. It was only by reason of a procedural inadvertency, which

respondents called to the court's attention, that the case was in fact remanded (as per respondents' request) for the sole purpose of redetermining the penalty. Furthermore, in their petition and memorandum of points and authorities in the trial court, appellants did not even specify as one of the grounds for granting the writ the error of respondents in finding a violation based upon a count in the accusation that had been dismissed previously. Since appellants lost the case on the merits, it cannot fairly be said that they were the prevailing parties within the meaning of Code of Civil Procedure section 1094.5(a). See 3 Witkin, California Procedure 1095.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.



161 Cal.App.2d 792

Carl A. PETERSEN and Marjorie L. Petersen, doing business as Palomar Egg Farms, Plaintiffs and Appellants,

v.

CLOVERDALE EGG FARMS, a California corporation, Cloverdale Egg Farms, a Co-partnership, et al., Defendants,

Orvil Cessna, Lena M. Church and Frank T. Stokes, Defendants and Respondents.

Civ. 5821.

District Court of Appeal, Fourth District, California.

July 2, 1958.

Rehearing Denied July 23, 1958.

Hearing Denied Aug. 28, 1958.

Action for balance due for eggs delivered. The Superior Court of San Diego County, Dean Sherry, J., rendered judgment in favor of individual defendants, and plaintiffs appealed. The District Court of Appeal, McCabe, J. pro tem., held that evi-

dence would sustain finding that defendant corporation was not the alter ego of the individual defendants, as well as finding that plaintiffs were estopped to take advantage of corporation's failure to obtain permit for issuance of its shares.

Affirmed.

1. Pleading ⚡4

Courts are not bound by title given to complaint; and if pleading sets forth cause of action different from that indicated by title, defect does not make invalid, or affect, pleading.

2. Trial ⚡404(2)

Finding of fact set forth under heading "Conclusions of Law" should nevertheless be considered as one of findings of fact.

3. Corporations ⚡34(3)

In action to recover for balance due for eggs delivered, evidence, on estoppel issue, would sustain finding that plaintiffs' transactions had been with defendant corporation and not with other defendants as individuals.

4. Appeal and Error ⚡1010(1)

Findings supported by substantial evidence will not be disturbed on appeal.

5. Corporations ⚡1

Estoppel ⚡118

In action for balance due for eggs delivered, evidence would sustain finding that defendant corporation was not the alter ego of the individual defendants, as well as finding that plaintiffs were estopped to take advantage of corporation's failure to obtain permit for issuance of its shares.

Robert H. Lund and Floyd H. King, Long Beach, for appellants.

Clinton F. Jones, Escondido, for respondents.

McCABE, Justice pro tem.

This is an appeal by plaintiffs from a judgment entered in favor of certain individual defendants. No appeal is taken from the judgment entered in favor of plaintiffs

against the defendant Cloverdale Egg Farms, Inc., a corporation.

In the spring of 1955 defendants Cessna and Lena Church became partners with plaintiffs under the name "Cloverdale Egg Farms". The partnership had an active business and substantial assets. In September, 1955, plaintiffs and defendant Church, as incorporators, obtained articles of incorporation for Cloverdale Egg Farms, Inc. In November, 1955, a meeting was held at which plaintiff Carl Petersen was elected President, defendant Church was elected Vice-President, and plaintiff Marjorie Petersen was elected Secretary-Treasurer. Each acted in these respective capacities until May 8, 1956. No assets were ever formally transferred from the partnership to Cloverdale Egg Farms, Inc. except one vehicle. From November, 1955, to May 8, 1956, plaintiffs and defendants Church and Cessna carried on the business as a corporation under the name Cloverdale Egg Farms, Inc. Although at the November, 1955, meeting plaintiff Carl Petersen was authorized to apply for a permit to issue stock, no such application was ever prepared or filed.

In the spring of 1956, and before May 8, 1956, plaintiff Carl Petersen verified, as president, a complaint wherein the corporation brought an action at law against a creditor of the corporation. During the period from November, 1955, to May 8, 1956, billings were sent to creditors, using the corporate title, notes were signed at the bank by plaintiffs as President and Secretary of the corporation, and all business done by Cloverdale was done under the corporate name.

On May 8, 1956, an agreement was signed by plaintiffs and defendant Church wherein it is recited that defendant Church was purchasing all of plaintiffs' "right, title and interest in and to the business known as Cloverdale Egg Farms, including their interest, if any, in its capital assets, current contracts, accounts receivable, cash on hand and capital stock heretofore and hereafter issued by said business. It is mutually understood that this transfer of the Cloverdale

Egg Farms is intended to encompass said business in all of its possible entities, including a sole proprietorship, a partnership, a joint venture and a corporation * *". Further, the agreement provided for plaintiffs' resignations as directors and officers, and defendant Church assumed and agreed to pay all debts and liabilities, and to hold plaintiffs harmless from any and all claims. The agreement provided defendant Church "agrees on behalf of the corporation to purchase from" plaintiffs "for a period of twelve months from date, not less than 500 nor more than 550 cases of eggs per week, subject to the following terms and conditions * * *". As to this latter provision, the record reflects that from at least early in 1955 to August, 1956, plaintiffs had a different and separate egg business which they conducted under the name of Palomar Egg Farms. Using this name they sold eggs to Cloverdale during that period.

Plaintiff Carl Petersen testified that from May 8, 1956, to the latter part of July, 1956, other than new parties coming into the business, he knew of no other change of "capacity" in the Cloverdale business.

From the spring of 1955 to May 8, 1956, defendant Cessna conducted an egg business of his own, but this did not interfere with his being present at meetings of Cloverdale, being elected a director of defendant corporation, conducting business on behalf of the Cloverdale business, being present at least twice a week at the Cloverdale plant, giving instructions and advice on behalf of defendant corporation, seeking legal advice from the attorney for Cloverdale, having access to and receiving business records of Cloverdale, knowing the details of the business, and representing to plaintiffs that defendant Stokes was purchasing an interest in the business. There is no record as to how, if at all, defendant Cessna's interest in the partnership created any interest for him in the corporation. It is clear that immediately after the May 8, 1956 agreement was executed he and defendant Church took charge of and ran the business. Factually, he was present on May 8, 1956, when the agreement was signed and was instrumental

in having the agreement signed on that day, and had physical possession of the cashier's check which went to pay plaintiffs for their interest. After May 8, 1956, the name "Rite-way Cloverdale Egg Farms" was used in addition to Cloverdale Egg Farms, Inc.

In the spring of 1956, defendant Stokes, a friend of defendant Cessna, engaged in some transactions which concerned the Cloverdale business. It was his money, by way of a cashier's check, which was used in purchasing plaintiffs' interests. Defendant Stokes contends he loaned the money to the Cloverdale Egg Farms, Inc. but plaintiffs contend he purchased an interest in the business. The trial court found defendant Stokes was a creditor only.

During the period of May 8, 1956, to the latter part of July, 1956, plaintiffs delivered eggs to the Cloverdale plant, billed the corporation, and received several checks drawn on the corporate check form. In the latter part of July, 1956, not only did plaintiffs cease to do further business with Cloverdale but all business of Cloverdale "stopped". After May 8, 1956, defendants Cessna and Church had control of the assets. From the record it cannot be ascertained what became of the assets except that as of the latter part of July, 1956, the business closed and, as defendant Cessna testified, "all of the assets are gone". The record is silent as to how the income or any other asset was used, or disbursed or distributed, except that a relatively small portion went to pay off bank loans, and plaintiffs received a few payments for eggs delivered.

Plaintiffs' complaint sets forth two causes of action, both of which were common counts to recover for the balance due from the defendant corporation and the individual defendants for eggs delivered during the period from May 8, 1956, to the latter part of July, 1956. In the title of the complaint plaintiffs named as defendants Cloverdale Egg Farms, Inc., a California Corporation, Cloverdale Egg Farms, a copartnership, and Cessna, Church and Stokes. The case was tried upon the theory that all these defendants were before the court.

Among other facts, the trial court found "After the Petersens sold the business to Church, as evidenced by the written contract (Exhibit 2), Petersen continued to do business with the concern as a corporation," and under the heading "Conclusions of Law" the following appears:

"I

"The Cloverdale Egg Farms, a corporation was not the alter ego of the defendants, or any of them.

"II

"The plaintiffs are estopped from taking advantage of the failure of the corporation to obtain a permit from the State Corporation Commissioner of California to issue shares of stock in the corporation.

"III

"The defendant Stokes was only a creditor of the corporation and had no other interest therein."

The trial court entered a judgment against the defendant corporation for the sum of \$18,143.72, and in favor of the individual defendants.

As previously stated, the trial court had to decide this case upon a complaint setting forth common counts and the issues as created by the denials in the answers. There were no allegations in the complaint except those commonly found in common counts. There were no allegations of facts and plaintiffs were content to proceed under their chosen theory. Plaintiffs contend the trial court should have made additional findings and that there can be no estoppel found unless affirmatively pleaded.

[1,2] It is a firm principle that the courts are not bound by the title given to a complaint. If the pleadings set forth a cause of action different from that indicated by the title the defect does not make invalid or affect the pleadings. *Shimmon v. Moore*, 104 Cal.App.2d 554, 556, 232 P.2d 22. We think this same principle should apply as between findings of fact and conclusions of

law. If there is a finding of fact set forth under a heading "Conclusion of Law", the finding should be considered as one of the findings of fact. Therefore, in the instant case, we will consider such findings as are contained under the title "Conclusions of Law" as valid and effectual findings, as though they had been placed under the title of "Findings of Fact."

The trial judge found, in effect, that there was a contract between plaintiffs and defendant corporation, and that plaintiffs are estopped to deny the existence of the defendant corporation.

[3,4] There is substantial evidence upon which to base the finding that plaintiffs' transactions between May 8, 1956, and the latter part of July, 1956, were with defendant corporation and not with defendants, as individuals. This being true, we will not disturb the finding on appeal. In *re Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689; *Berniker v. Berniker*, 30 Cal.2d 439, 182 P.2d 557.

Plaintiffs contend that the law as contained in the cases of *Automotriz Del Golfo De California v. Resnick*, 47 Cal.2d 792, 306 P.2d 1, and *Geisenhoff v. Mabrey*, 58 Cal.App.2d 481, 137 P.2d 36, is controlling in the instant case. We cannot agree to this position. In the two cited cases the trial court, upon the evidence before it, made a finding that the corporate entity could be set aside and judgment obtained against the individual defendants. A review of these cases indicates that the appellate court decided that there was substantial evidence to sustain the finding. In the instant case, the trial court has made certain findings which are set forth herein, and we determine that there is substantial evidence to sustain the finding of the trial court. It is the duty of the appellate court to sustain the finding of the trial court when there is substantial evidence supporting such finding. In *re Estate of Bristol*, *supra*; *Berniker v. Berniker*, *supra*.

[5] The finding of estoppel and that the defendant corporation is not the alter ego

of the individual defendants is proper. The evidence is that prior to May 8, 1956, plaintiffs conducted the business as a corporation, and after May 8, 1956, plaintiffs continued to do business with Cloverdale as a corporation, billed the egg deliveries to the corporation, received and cashed checks from the corporation, and did not know of any change of "capacity". They did not know, or at least they did not testify they knew, of the activities of the individual defendants after May 8, 1956, in using a different name or partnership name, or in what form they were conducting business. They transacted the business with Cloverdale as though only a corporation was involved. Later, and after about August 1, 1956, they made certain discoveries of the activities of defendants. After this, plaintiffs brought this action against "Cloverdale Egg Farms, a California Corporation" and other defendants. They did not allege that Cloverdale Egg Farms, Inc. was the alter ego of the individual defendants, nor did they allege facts upon which such a finding could be based. During the trial, evidence was offered on which the claimed estoppel is based. No objection to this evidence was interposed by plaintiffs.

In *Wynn v. Treasure Co.*, 146 Cal.App.2d 69, 75-76, 303 P.2d 1067, 1071, the court said:

"While defendants did not plead an estoppel, evidence on which the claimed estoppel is based was admitted without objection, the issue was fully litigated, and any objection that defendants did not plead the estoppel was waived. *Pacific Finance Corp. v. Foust*, 44 Cal.2d 853, 858, 285 P.2d 632. * * *

"It is a well-settled general rule that a person who has acted as director, officer, or agent of an association purporting to be a corporation is estopped to deny its corporate existence both as against the alleged corporation itself and its members and stockholders. 18 C.J.S. Corporations § 110(4), p. 512. 'It is a well-established general rule that one who deals with an apparent

corporation as such and in such manner as to recognize its corporate existence de jure or de facto is thereby estopped to deny the fact thus admitted. The estoppel extends as well to the privies as to the parties to such transactions. The general rule is applied in actions brought by either of the contracting parties against the other, and in actions by the person dealing with the corporation, wherein the existence of the corporation is assailed for the purpose of establishing individual partnership liability on the part of its members.' 13 Am.Jur. 207, § 63. Fletcher says: 'A person who has acted as an officer of a pretended corporation, either as director or as president, or in any other capacity, and has thus participated in holding out the corporation as having a legal existence, is estopped to deny such existence.' 8 Fletcher Cyclopaedia Corporations (Permanent Ed.) 280, § 3940. 'An estoppel to deny corporate existence may arise from an express or implied admission of the fact in an action or proceeding brought by or against an alleged corporation. One who sues an alleged corporation as such thereby necessarily admits that it is a corporation, and is estopped to deny its corporate existence either in that action, or in a subsequent action against the members or corporators on the same liability based upon the ground that the corporation was not legally organized.' 18 C.J.S. Corporations § 113, p. 519."

The issues as framed by the pleadings and the theory upon which the case was tried limited the findings of fact to be found by the trial court. Not only are all of the findings proper, but they are substantiated by the evidence. There was no necessity to make additional findings.

Judgment affirmed.

MUSSELL, Acting P. J., and GRIFFIN, J., concur.

Emily HUNDLEY, Plaintiff and Respondent,
v.

ST. FRANCIS HOSPITAL et al.,
Defendants,

Frederick G. Niemand, Defendant and
Appellant.

Civ. 17464.

District Court of Appeal, First District,
Division 2, California.

July 3, 1958.

Rehearing Denied Aug. 1, 1958.

Hearing Denied Aug. 28, 1958.

Action against doctor for malpractice, and for performing unnecessary surgery without her consent, consolidated for trial with action against hospital. The Superior Court, City and County of San Francisco, William F. Traverso, J., entered judgment for plaintiff against doctor and he appealed. The District Court of Appeal, Draper, J., held that evidence, including testimony of a doctor of osteopathy, was sufficient to present a question for the jury as to whether defendant doctor, was guilty of negligence, and/or unnecessary removal of certain of plaintiff's organs without her consent.

Judgment affirmed.

1. Appeal and Error 971(2)

Evidence 546

The qualification of an expert witness is a question for the sound discretion of the trial court, and its ruling will not be disturbed upon appeal unless a clear abuse is shown.

2. Evidence 538

In action for malpractice, and for unnecessary and unauthorized removal of certain of plaintiff's organs without her consent, trial court did not abuse its discretion in permitting a doctor of osteopathy who was a graduate of the college of osteopathic physicians and surgeons and who testified that standards of skill and treatment by doctors of medicine were identical with such standards of osteopaths, to testify as an expert witness.

3. Assault and Battery ⚭42**Physicians and Surgeons** ⚭18(9)

In action against doctor for malpractice, and for performing unnecessary surgery without patient's consent, evidence, including testimony of a doctor of osteopathy, was sufficient to present a question for the jury as to whether defendant doctor was guilty of negligence and/or unnecessary and unauthorized removal of certain of plaintiff's organs without her consent.

4. Appeal and Error ⚭1015(5)

The view of a trial judge as to whether error in admission of evidence was prejudicial must be given weight in determination by District Court of Appeal as to whether erroneous admission of evidence was prejudicial.

5. Appeal and Error ⚭1050(1)**Assault and Battery** ⚭29**Physicians and Surgeons** ⚭18(7)

In action for malpractice, and for unnecessary and unauthorized removal of certain organs of plaintiff, evidence of defendant's use or addiction to narcotics at periods long after operation in question were not relevant, and the admission thereof was error, although, in view of finding by trial judge that admission of such evidence was not prejudicial, District Court of Appeal would not deem such error prejudicial.

6. Limitation of Actions ⚭95(1)

In malpractice actions, while the physician-patient relation continues, the patient is not ordinarily put on notice of the negligent conduct of the physician upon whose skill, judgment and advice he continues to rely, and in the absence of actual discovery of the negligence, the statute does not commence to run during such period, and this is true even though the condition itself is known to the patient, so long as its negligent cause and its deleterious effect is not discovered. West's Ann.Code Civ.Proc. § 340, subd. 3.

7. Limitation of Actions ⚭197(2)

In malpractice action, and action for unauthorized and unnecessary removal of

certain of patient's organs, evidence supported jury's implied finding that negligent method of treatment was not discovered by plaintiff until less than one year before action was filed. West's Ann.Code Civ.Proc. § 340, subd. 3.

8. Assault and Battery ⚭10**Physicians and Surgeons** ⚭15(15)

Surgical removal of portions of the body not authorized by the patient is actionable unless, in the course of the authorized surgery, a condition arose or was disclosed which necessitated further surgery.

9. Limitation of Actions ⚭95(1)

In action for unauthorized and unnecessary removal of certain organs of plaintiff, where fact of surgery to which plaintiff had not consented was accompanied by statement of defendant doctor that unauthorized surgery was necessitated by conditions revealed in the course of such surgery, statute of limitations did not begin to run upon revelation that surgery had gone beyond scope of plaintiff's consent, but action was within time where filed within one year of plaintiff's discovery that organs removed without her consent were removed unnecessarily. West's Ann.Code Civ.Proc. § 340, subd. 3.

10. Appeal and Error ⚭1058(2)

In malpractice action, and action for unauthorized and unnecessary removal of certain of plaintiff's organs, rejection of defendant doctor's offer of photostatic copies of his office records was not prejudicial where his deposition, which was read into evidence, disclosed that doctor had records before him and testified extensively from them.

11. Appeal and Error ⚭1004(1)

The amount of damages to be awarded is primarily for the trial court.

12. Assault and Battery ⚭40**Physicians and Surgeons** ⚭18(11)

Award of \$75,000 to a woman for the unauthorized and unnecessary removal of her uterus and then remaining ovary and Fallopian tube, and for surgical damage to

the vagina resulting in an inability to have sexual intercourse was not excessive.

Peart, Baraty & Hassard, Alan L. Bonnington, San Francisco, for appellant.

Andrew J. Eyman, San Francisco, Fitz-Gerald Ames, Sr., San Francisco, George Olshausen, San Francisco, for respondent.

DRAPER, Justice.

The complaint upon which this action went to trial alleged that defendant doctor "without the knowledge and consent" of plaintiff operated upon and treated her in "an unnecessary, careless and negligent manner." The evidence makes clear that plaintiff relied upon the claimed "negligent and careless" manner of operation, i. e., malpractice, as well as upon the allegation that the surgery was performed without consent and was unnecessary. In this latter respect, the basis of the claim was technically battery. *Valdez v. Percy*, 35 Cal.App.2d 485, 491, 96 P.2d 142. It is clear that there was a failure to state separately two causes of action, but since no demurrer upon this ground was filed the point need not be considered here. The action was consolidated for trial with one against a hospital. Jury verdict was in favor of the hospital, and plaintiff does not appeal. In the action against the doctor, verdict was in favor of plaintiff, and the doctor appeals from judgment entered upon that verdict.

[1,2] The sole expert called by plaintiff was a doctor of osteopathy. He testified that he is a graduate of the College of Osteopathic Physicians and Surgeons, that he has performed many operations of the type here involved, that the standards of skill and treatment by doctors of medicine are "identical" with such standards of osteopaths, and that he is familiar with such standards in the City and County of San Francisco. Appellant contends that this witness was not qualified as an expert, and that it was error to permit him to testify as such. It has been noted that

the Board of Osteopathic Examiners issues licenses which "authorize the holders to practice medicine and surgery the same as licensed physicians and surgeons." *Oosterveen v. Board of Medical Examiners*, 112 Cal.App.2d 201, 202-203, 246 P.2d 136, 138. In any event, "the qualification of an expert witness is a question for the sound discretion of the trial court and its ruling will not be disturbed upon appeal unless a clear abuse of it is shown." *Sinz v. Owens*, 33 Cal.2d 749, 755-756, 205 P.2d 3, 6, 8 A.L.R.2d 757; see, also, *Huffman v. Lindquist*, 37 Cal.2d 465, 476, 234 P.2d 34, 29 A.L.R.2d 485. No such abuse of discretion appears here.

[3] Appellant contends that the evidence is insufficient to support the verdict. It is undisputed that the condition requiring surgery was a dropping of the uterus, and there is evidence also of a pre-operative diagnosis of rectocele and cystocele. The operation removed the body or fundus of the uterus, the Fallopian tube and ovary (one tube and ovary had previously been removed). There is evidence that plaintiff did not consent to these excisions. There is uncontradicted evidence that pathological examination of the excised tissues revealed them to be normal. There is evidence from which the jury could find that it is not accepted surgical practice to remove such organs when there are no pathological abnormalities. Defendant offered testimony that clinical, as distinguished from pathological, findings could warrant such removal. However, the evidence of two medical witnesses is subject to a contrary view and, still further, the jury could view the testimony of appellant's witnesses as being insufficient to show the claimed clinical necessity here. There is evidence that after the surgery an opening, or fistula, existed between rectum and vagina, and that gas and fecal matter escaped through the vagina. Appellant apparently argues that this fistula was caused by improper administration of an enema, shortly after the operation, by a hospital nurse. But this was the basis of the claim against the hospital. The jury found in

favor of the hospital and against appellant. The symptoms of this fistula appeared shortly after surgery, and the evidence warrants the inference by the jury that it resulted from the surgery. The original hospital records prepared by the operating surgeons show a conflict between the diagnoses (admitting and post-surgery) and the surgery performed. This conflict was resolved in a "corrected copy" of the report later filed. Following the May operation, further surgery was required in August. There is testimony that appellant told respondent that she should not bear the expense of the second hospitalization, and that he would arrange that she need not pay. We have reviewed the record with care. Appellant's argument is based in part upon his unwillingness to accept the views of an expert who is not a doctor of medicine. As we have pointed out, the trial court acted within its discretion in determining that this doctor of osteopathy is qualified as an expert. We have concluded that the testimony as a whole supports the verdict.

[4, 5] Appellant asserts prejudicial error in the admission of evidence relating to his use of narcotics. The operations upon respondent were performed in 1949. The case did not go to trial until early 1956, by which time appellant was confined in a state hospital, and was unable to appear. In mid-1955, hearing upon revocation of appellant's license to practice medicine had been held. Portions of the doctor's testimony before the Board of Medical Examiners were read to the jury at trial of the case at bar. Before the board, he admitted having used narcotics, that "I realized it was more than I should have" and that "in the end of 1947 or the beginning of 1948" he shifted to another narcotic, methadon. After introducing expert testimony that excessive use of narcotics would adversely affect surgical stability, reflexes and judgment, respondent offered evidence intended to show excessive use of narcotics after 1949, the date of the surgery here in issue. Some of this testimony concerned dates as

late as 1955. Part of it consisted of evidence of admissions by appellant. Respondent's counsel asked questions relating to records of pharmacists, apparently intended to show that prescriptions nominally for patients in fact were delivered to the doctor. The great bulk of this testimony was objected to by appellant and in substantial part the objections were sustained. In view of the testimony that protracted use of methadon would adversely affect a surgeon's ability to operate, it seems clear that evidence which would show such a condition in appellant at the time of the surgery here in issue would be admissible. Evidence introduced did show excessive use more than a year before this surgery. Some evidence of excessive use within a reasonable period after the surgery would, on a like basis, be admissible as tending to show that the surgeon's use of narcotics continued through the period of surgical and medical treatment. Evidence of use or addiction at periods long after the operation were not relevant, and the admission thereof was error. Similarly, the attempt to question as to even later periods, and the questions as to delivery to the doctor's office of prescriptions for patients were, in the light of the complete failure to connect them with the surgery here in issue, improper. However, motions for mistrial were denied, and the matter was again before the trial court on motion for new trial. While a mere reading of the transcript might incline us to the view that these errors were prejudicial, we must recognize the established rule that the trial judge, in passing upon a motion for new trial, is in a better position than an appellate court to determine whether the jury has been prejudicially influenced. *Music v. Southern Pacific Co.*, 91 Cal.App.2d 93, 98, 204 P.2d 422. His view must be given weight in our determination. *Tellefsen v. Key System Transit Lines*, 158 Cal.App.2d 243, 322 P.2d 469; *Aydlott v. Key System Transit Co.*, 104 Cal.App. 621, 629, 286 P. 456. Here the able and experienced trial judge has determined, both at trial and on motion for new

trial, that prejudice did not result. We accept his view.

Appellant next argues that the action is barred by the statute of limitations. As pointed out above, respondent's complaint stated her cause of action upon two grounds, one negligence or malpractice and the other the removal of organs without her consent, a technical battery. In either case, the action must be brought within one year. Code Civ.Proc. § 340, subd. 3. Here the first operation was performed May 25, 1949 and the second August 12, 1949. This action was filed February 8, 1952. To avoid the bar of the statute, respondent pleaded and offered evidence to show that she continued as the patient of appellant until February 28, 1951, that she continued to have confidence in him, and that she did not discover until on or after that date that his negligence had caused injury to her. There was contrary evidence, but the jury was properly instructed and its implied finding resolves this fact question in respondent's favor.

[6, 7] The rule is clear, as to malpractice actions, that "while the physician-patient relation continues the plaintiff is not ordinarily put on notice of the negligent conduct of the physician upon whose skill, judgment and advice he continues to rely." *Myers v. Stevenson*, 125 Cal.App.2d 399, 401-402, 270 P.2d 885, 887. Thus, in the absence of actual discovery of the negligence, the statute does not commence to run during such period (*Huysman v. Kirsch*, 6 Cal.2d 302, 57 P.2d 908), and this is true even though the condition itself is known to the plaintiff, so long as its negligent cause and its deleterious effect is not discovered (*Trombley v. Kolts*, 29 Cal.App.2d 699, 85 P.2d 541). The evidence here fully supports the jury's implied finding that the facts necessary to commence the running of the statute, so far as it relates to malpractice, were not discovered by respondent until less than one year before the action was filed.

[8, 9] Appellant, however, argues that even if the malpractice action was filed in time, that for unauthorized surgery (battery) was not. Since the jury was instruct-

ed on both theories of recovery, it is argued that the verdict may be based on the theory of battery, and thus there must be a reversal. It is true that respondent's own testimony establishes that she was told the full extent of the surgery some three weeks after the operation. However, there is testimony that at the same time the doctor told respondent the excisions were necessary because of "the pathology that he found there." As already pointed out, the evidence is clear that no pathological abnormality was found in any of the tissues removed. Surgical removal of portions of the body not authorized by the patient is actionable (*Kritzer v. Citron*, 101 Cal.App.2d 33, 38, 224 P.2d 808; *Markart v. Zeimer*, 67 Cal.App. 363, 367, 227 P. 683) unless, in the course of the authorized surgery, a condition arose or was disclosed which necessitated the further surgery (*Valdez v. Percy*, supra, 35 Cal.App.2d 485, 491, 96 P.2d 142; see, also, 26 A.L.R. 1036, et seq.). Here the disclosure to respondent of the fact of surgery to which she had not consented was accompanied by a statement that the unauthorized surgery was necessitated by conditions revealed in the course of the authorized surgery. The latter representation negated the existence of a cause of action for battery. It follows that appellant cannot contend that the statute began to run upon the revelation that the surgery had gone beyond the scope of respondent's consent. We find no authority directly in point, but have no hesitancy in holding, upon the analogy of the malpractice cases, that the action is within time because filed within one year of respondent's discovery that the organs removed without her consent were removed unnecessarily. The court's instructions properly presented this fact question to the jury which, upon substantial evidence, determined it in favor of respondent.

What has been said disposes in large part of appellant's contentions as to the impropriety of instructions given and refused. We have examined the instructions in detail. We find no error in them, and are satisfied that as whole they are full and fair and accurately state the law.

[10] Appellant also urges error in the Court's rejection of his offer of photostatic copies of his office records. The transcript is not clear as to whether, when first offered, they were received in evidence or merely marked for identification. When the question later arose, the court ruled that they had been marked for identification only. There is reason to question whether the copies were properly identified. In any event, their exclusion is without prejudice to appellant. His deposition, which was read into evidence, discloses that he had his records before him and testified extensively from them.

[11, 12] Appellant also urges that the verdict for \$75,000 is excessive. It is well established that the amount of damages to be awarded is primarily for the trial court. (15 Cal.Jur.2d 33.) Here the jury apparently accepted respondent's testimony that her uterus and her then remaining ovary and Fallopian tube were removed without her consent and without necessity therefor. An opening between vagina and rectum was created. She also asserts that as a result of the surgery her vagina was so contracted that sexual intercourse became so painful as to be impossible. A defendant might prefer to have damages for such injuries fixed in what he assumes to be the serene and somewhat aged atmosphere of the appellate cloister rather than in the jury room. The validity of such assumption is doubtful. Its irrelevance is plain. Where the jury has fixed the award and the trial court has reviewed it upon motion for new trial, we may interfere only when it appears, as a matter of law, that the verdict was the result of passion or prejudice. *Sexton v. Key System Transit Lines*, 144 Cal.App.2d 719, 722, 301 P.2d 612; *Harris v. Lampert*, 131 Cal.App.2d 751, 752, 281 P.2d 292. We do not find such a situation here.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

Nick VANGEL and Ernest Vangel, Plaintiffs and Respondents,

v.

Charles VANGEL, Defendant and Appellant.*

Civ. 22734.

District Court of Appeal, Second District,
Division 1, California.

June 27, 1958.

Rehearing Denied July 22, 1958.

Hearing Granted Aug. 21, 1958.

Action for dissolution of partnership and for an accounting. The Superior Court of Los Angeles County, Clarence M. Hanson, J., rendered judgment, and the defendant appealed. The District Court of Appeal, Fourn, J., held that where partnership had been dissolved and retiring partner had withdrawn a part of the total sum due him for his partnership interest he was entitled to profits on the sum remaining due him, until the date of the accounting.

Partly affirmed, and partly reversed and remanded with directions.

Opinion, 322 P.2d 76, vacated.

1. Appeal and Error $\S$ 1097(1), 1195(1)

When the precise question before the court has been decided in a former appeal in the same action and under substantially the same state of facts, the parties are estopped from again litigating this question in any subsequent proceeding either before the trial or appellate courts.

2. Appeal and Error $\S$ 1097(2)

Where the Supreme Court directed the trial court to determine, in accordance with the Supreme Court's opinion, the respective share of the profits to which each partner was entitled on dissolution of the partnership, and in the subsequent accounting the trial court's findings and judgment were supported by substantial evidence, any argument to the effect that the final result was a manifestly unjust decision must be addressed to the Supreme Court.

3. Partners $\S$ 306

Where partnership had been dissolved and retiring partner had withdrawn a part

* Opinion vacated 334 P.2d 863.

of the total sum due him for his partnership interest, he was entitled to profits on the sum remaining due him until the date of the accounting. West's Ann.Corp.Code, § 15042.

Pacht, Ross, Warne & Bernhard, Isaac Pacht, Harvey M. Grossman, Los Angeles, for appellant.

Harold M. Heimbaugh, Los Angeles, Geo. W. Rochester, La Habra, for respondents.

FOURT, Justice.

This is an appeal from a judgment in the Superior Court following an accounting ordered by the Supreme Court in a prior appeal of this same controversy.

Charles Vangel and his brothers Nick Vangel and Ernest Vangel purchased the Cascade Ranch in the San Fernando Valley in 1944, pursuant to a written partnership agreement. From the very start there was dissension between the brothers, and this action was filed in April, 1946, requesting, among other things, a dissolution of the partnership and an accounting. For a detailed statement of the facts involving the litigation between the parties hereto, see *Vangel v. Vangel*, 116 Cal.App.2d 615, 254 P.2d 919.

The case has now been before the superior court four times. The first trial was in 1947, and the trial judge granted a motion for a new trial.

The judgment of the trial court in the second trial was affirmed in part, and reversed in part with directions to the superior court to take an accounting and enter a judgment in accordance with the views expressed by the appellate court. *Vangel v. Vangel* (March 11, 1953), *supra*. There was no petition for a hearing before the Supreme Court.

Upon the third trial, the superior court interpreted the opinion of the District Court of Appeal and rendered an accounting. There was an appeal from that judgment, and the District Court of Appeal affirmed the judgment, indicating that the trial judge had interpreted their opinion (116 Cal.App.

2d 615, 254 P.2d 919) correctly, and that the accounting had was a proper one. See *Vangel v. Vangel*, Cal.App., 282 P.2d 967 (April 28, 1955). The appellant petitioned for a hearing before the Supreme Court, and such a hearing was granted. See *Vangel v. Vangel*, 45 Cal.2d 804, 291 P.2d 25, 55 A.L.R.2d 1385 (December 23, 1955).

The Supreme Court said, among other things, in *Vangel v. Vangel*, *supra*, 45 Cal. 2d at pages 805-807, 291 P.2d at page 26:

"In 1944, the three brothers purchased a citrus ranch pursuant to a written partnership agreement. After the commencement of operations, a dispute arose which culminated in an action by Nick and Ernest to dissolve the partnership. By the prior judgment, a dissolution was decreed effective as of June 15, 1950. The court found that Charles wrongfully caused the dissolution and concluded that Nick and Ernest were privileged to purchase his interest. The value of the ranch was fixed at \$235,000, and a finding was made as to the value of Charles' interest in the partnership. According to another finding, he was entitled to participate in profits accruing between the date of dissolution and January 1, 1951.

"Upon the prior appeal, findings as to the value of the ranch property and Charles' fault in causing the dissolution were approved. It was held that the trial judge properly allowed the plaintiffs to purchase Charles' interest, but that he erred in failing to include certain items in his valuation of it. Furthermore, said the District Court of Appeal, the right of Charles to participate in profits accumulated by joint use of the partnership assets should not have been terminated as of January 1, 1951. That period, it was determined, should extend so as to include the proceeds from fruit substantially matured and soon ready for marketing, the final date to be left to the sound judgment of the chancellor. As to those matters, the judgment was reversed with directions for an accounting.

"The amounts of profits from the operation of the ranch after dissolution of the partnership and of set-offs, claims and advances, as determined upon the retrial, are not now disputed. The value of Charles' interest in the partnership at the time of dissolution based upon those amounts, was found to be 23.96% of the partnership net worth. The court also declared that Charles is entitled to that percentage of the profits from the operation of the ranch accruing between the date of dissolution and the winding up of the partnership affairs. Another finding is that 'whatever services defendant may have rendered toward the conduct of the partnership affairs, from the date of the dissolution of the partnership * * * was voluntary on his part and against the wishes and directions of the plaintiffs.'

"The judgment gives Nick and Ernest, *inter alia*, the right to purchase Charles' interest in the partnership for its value as determined at the retrial, plus interest on that amount from September 8, 1953. Charles is allowed 23.96 per cent of the profits accruing prior to that date and the same percentage of certain proceeds from sales of crops. He is denied any wages for services performed after the dissolution of the partnership and must pay 23.96% of the costs of the audit.

"Charles contends that the trial judge erred in his computations of the values at the time of the dissolution of the respective partnership interests and of the partners' shares of the profits accruing between dissolution and the winding up of the partnership affairs."

The court then stated, 45 Cal.2d at page 808, 291 P.2d at page 27, " * * * the computation of his share was made upon an erroneous basis." The court then set forth the following (45 Cal.2d at pages 808-809, 291 P.2d at page 27):

"Upon the former appeal it was held that the trial judge was correct in

concluding that the partnership had been dissolved by reason of Charles' breach of the partnership agreement and that the remaining partners had exercised their privilege of continuing the partnership business. Corp.Code, § 15038, subd. (2) (b). In that situation Charles was entitled to have computed the value of his interest in the partnership, exclusive of his share of the good will of the business, and less any damages caused to his copartners. Corp.Code, § 15038, subd. (2) (c) par. II. For the use of his partnership assets in the continuing business, pending a settlement of the accounts, he was entitled to receive 'as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option * * * in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership.' Emphasis added; Corp. Code, § 15042. Said the District Court of Appeal, 'From the position defendant has taken on this appeal it is fair to say that he has elected to take profits rather than interest on the value of his share of the partnership.' 116 Cal. App.2d 629, 254 P.2d 928.

"The record presents the rather unusual situation of a partner, expelled from the partnership for cause and by judicial decree, continuing to participate with his former partners in the operation and management of the business. Charles contends that he is entitled to receive compensation for services so performed. In reply, his brothers rely upon the finding that his post-dissolution services were voluntary and against their wishes. However, the evidence does not support that finding. It appears that Charles continued to participate in the business in substantially the same manner as before the action for dissolution. There is no evidence of any protest by his brothers. On the contrary, they

appear to have acquiesced fully in his continuing services.

"Section 15042 of the Corporations Code fixes the right of one retired from a partnership for cause, or the personal representative of a deceased partner, to recover compensation for the use of his assets in the continuing business pending an accounting. In such case, he is entitled to 'the profits attributable to the use of his right in the property.' As a practical matter, his share of the profits usually is computed on the basis of the ratio that his share of the partnership assets bears to the whole of them. (Citing cases and authority.) However, that division may not be equitable when the contribution to profits from capital is relatively minor in comparison to the contribution from the skills or services of one conducting the business. In such a case, the managing partner may be entitled to a greater share of the profits. (Citing cases.) Although such a method of dividing profits is usually spoken of in terms of providing extra compensation for the managing ex-partner, in reality it merely reflects the statutory requirement that the retired or deceased partner be allowed the profits attributable to his right in the assets used in the business.

"No California case considers the right to compensation for services in a continuing business of one whose fault has caused the dissolution of the partnership. The authorities in other jurisdictions are in conflict. Denying compensation: *Major v. Todd*, 84 Mich. 85, 47 N.W. 841; *Germann v. Jones*, 220 App.Div. 5, 221 N.Y.S. 32; see *Zimmerman v. Harding*, 227 U.S. 489, 33 S.Ct. 387, 57 L.Ed. 608. Allowing compensation: *Drummond v. Batson*, 162 Ark. 407, 258 S.W. 616; *Hartman v. Woehr*, 18 N.J.Eq. 383. Those which deny recovery generally proceed upon a theory similar to the unclean hands principle; most of the

decisions which allow recovery are based upon the principle that one who seeks equity must do equity.

"In the present case the balance of the equities favors the allowance of compensation based upon services rendered. The type of operation here shown is one which involves a considerable amount of service and skill in the cultivation and harvesting of a citrus crop. Furthermore, it would be inequitable to deny Charles compensation for his services when his brothers acquiesced in them."

As heretofore set forth, the value of the ranch was fixed at \$235,000, and as of the time of dissolution, the value of Charles Vangel's interest in the partnership was found to be 23.96 per cent of the partnership net worth, or \$37,440.45.

In the accounting in the trial court, pursuant to the directions of the Supreme Court, Charles Vangel was found to have an interest in capital assets (profits) of \$48,600.55; an interest in post-dissolution profits of \$45,849.39; an interest in profits on crops in (fruit on trees) prior to May 12, 1953, paid subsequent to May 12, 1953, of \$9,024.74; or, in other words, it was found that a total sum of \$140,915.13, was due Charles Vangel for his entire interest in said former partnership. Of this sum \$81,999.45 was found to have been withdrawn by Charles Vangel, leaving a balance due to him of \$58,915.68 for his interest in said former partnership real property and profits "attributable to the use of (defendant's) share of the assets."

In addition, it was found that Charles Vangel was entitled to receive a total amount of \$8,200 for post-dissolution services rendered to the partnership from June 15, 1950, to November 10, 1953.

In this appeal, Charles Vangel contends as follows:

(1) That it was error to terminate his "right to participate in profits or receive interest on the balance due him as of May 12, 1953;"

(2) That it was error to allocate to Charles Vangel "only 23.96 per cent of the partnership assets and post-dissolution profits;" and

(3) That it was error to invoke "the procedures set up in section 15038(2) (b) of the Corporations Code."

[1] We think that the applicable rule, appropriate here, is stated by the Supreme Court in *Penziner v. West American Finance Co.*, 10 Cal.2d 160, 169, 74 P.2d 252, 256, as follows: "It is clearly established by the decisions in this state that when the precise question before the court has been decided in a former appeal in the same action and under substantially the same state of facts, the parties are estopped from again litigating this question in any subsequent proceeding either before the trial or appellate courts."

The Supreme Court in *Vangel v. Vangel*, supra, indicated (45 Cal.2d at page 810, 291 P.2d at page 28) that it was improper to divide post-dissolution profits *solely* "upon the basis of the relative values of the partners' interests in the partnership property," indicating further (45 Cal.2d at page 810, 291 P.2d at page 29) that consideration should be given in the apportionment to "(t)he amount of profits attributable to the use of Charles' share of the assets and also those allocable to his services in the continuing business." The Supreme Court further recognized (45 Cal.2d at page 810, 291 P.2d at page 29) the rule that "a proceeding to dissolve and liquidate a partnership is controlled by equitable principles," also stating (45 Cal.2d at pages 808 and 809, 291 P.2d at page 28), "As a practical matter, his share (the retiring partner) of the profits usually is computed on the basis of the ratio that his share of the partnership assets bears to the whole of them."

[2] It appears to us that the trial court was not bound to apportion the profits on the basis of the accountants' determination of the shares of the partners in and to the assets of the partnership. However, in view of the large amount of discretion accorded to the trial court in such a pro-

ceeding, we cannot conclude that the findings and judgment of the trial court were not supported by substantial evidence. Accordingly, any argument to the effect that the final result is a manifestly unjust decision must be addressed to the Supreme Court. See *England v. Hospital of Good Samaritan*, 14 Cal.2d 791, 97 P.2d 813.

[3] As has been previously stated herein, the Supreme Court, in *Vangel v. Vangel*, supra, in commenting upon the judgment in the prior appeal, stated (45 Cal.2d at page 806, 291 P.2d at page 26), "The judgment gives Nick and Ernest, *inter alia*, the right to purchase Charles' interest in the partnership for its value as determined at the retrial, *plus interest on that amount from September 8, 1953.*" (Emphasis added.) One of the contentions of Charles Vangel before the Supreme Court was that the trial court erred in his computation of the profits accruing between dissolution and the winding up of the partnership affairs, and the Supreme Court stated (45 Cal.2d at page 808, 291 P.2d at page 28): "Section 15042 of the Corporations Code fixes the right of one retired from a partnership for cause, * * * to recover compensation *for the use of his assets in the continuing business pending an accounting.*" (Emphasis added.) We regard this to be the law of the case. See *Penziner v. West American Finance Co.*, supra. Charles Vangel was found to have previously withdrawn \$81,999.45 of the total sum due to him for his partnership interest, and so he is entitled to "profits attributable to the use of his right in the property" on the sum of \$58,915.68, remaining due him therefor, from May 12, 1953, until the date of the accounting.

The judgment is reversed as to this single issue and is remanded with directions to the trial court, in accordance with this opinion, to determine upon the evidence before it, the share of the profits, if any, attributable to the use of Charles Vangel's right in the property until the date of the accounting, or, if there is no evidence to support such a determination, then the trial court

is instructed to award interest on such amount from May 12, 1953, to the date of the accounting. In all other respects, the judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.



162 Cal.App.2d 23

C. K. SIMMONS, Plaintiff and Appellant,

v.

SANTA BARBARA ICE & COLD STORAGE
COMPANY, a corporation, Defendant
and Respondent.

Civ. 22794.

District Court of Appeal, Second District,
Division 2, California.

July 7, 1958.

Hearing Denied Sept. 3, 1958.

Action wherein judgment of dismissal was entered. Plaintiff moved to correct an alleged error in the minutes and to vacate judgment. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., denied motions, and plaintiff appealed. The District Court of Appeal, Herndon, J., held that the orders were not appealable.

Appeals dismissed.

1. Appeal and Error ⇨113(1)

Order denying motion to vacate judgment was not appealable.

2. Appeal and Error ⇨81

Orders denying plaintiff's motions to correct minutes, so as to show that court had not ordered a dismissal but had merely taken case under submission, were not appealable. West's Ann.Code Civ.Proc. §§ 473, 581(3), 581d, 963 and subd. 2.

3. Appeal and Error ⇨81

With respect to appealability of an order not mentioned in statute relating to appealable orders, it is not sufficient that

the order determine finally for purposes of further proceedings some distinct issue in the case, and it must direct the payment of money by a party or the performance of an act by or against him. West's Ann. Code Civ.Proc. § 963.

4. Appeal and Error ⇨82(1)

Notwithstanding statute authorizing an appeal from a special order after judgment, not every order subsequent to judgment is appealable, unless it affects the judgment in some manner or bears some relation to it, either by way of enforcing it or staying its execution. West's Ann. Code Civ.Proc. § 963 and subd. 2.

Price, Postel & Parma and H. Clarke Gaines and Gerald S. Thede, Santa Barbara, for appellant.

Griffith & Thornburgh, and Laselle Thornburgh, Santa Barbara, for respondent.

HERNDON, Justice.

Appellant, plaintiff below, seeks a review of two orders: (1) an order made on April 11, 1957, denying appellant's motion to correct an alleged error in the minutes of the trial court; and (2) an order made on April 29, 1957, denying appellant's second motion to correct the minutes and denying appellant's motion to vacate a judgment of dismissal.

The trial court sustained a general demurrer to appellant's second amended complaint, granting leave to amend within ten days. Appellant having failed to amend within the time allowed, respondent served and filed a notice of motion to dismiss the action pursuant to the provisions of section 581(3) of the Code of Civil Procedure. Counsel for appellant was present in court on August 27, 1956, when the motion to dismiss came on for hearing, but since appellant had elected to stand on his pleading, counsel voiced no opposition to the dismissal. Although the motion was unopposed, the court ordered the matter submitted "for the purpose of reviewing the

file." Later on the same day the court, in chambers, advised the clerk that the motion to dismiss was granted. The clerk notified respondent of the order but apparently did not notify the appellant. The minute order of that day (August 27, 1956) constitutes the judgment of dismissal (section 581d Code of Civil Procedure) and reads as follows: "Motion to Dismiss Action coming on regularly to be heard, the same proceeded and it is ordered that said motion, be, and the same is hereby granted."

Appellant did not take an appeal from the foregoing judgment within sixty days after its entry, but seven months later, on March 28, 1957, he filed a notice of motion "for correction of record" on the ground that the minutes "erroneously state that said motion was granted at the time of said hearing, whereas, in fact, the said Court took the same under submission." This motion was denied on April 11, 1957.

Thereafter, appellant noticed for hearing on April 29, 1957, a second motion for a nunc pro tunc order to correct "a clerical error appearing in the minutes of the proceedings of said Court for the 27th day of August, 1956, * * * in order that said minutes shall conform to the facts and speak the truth." The ground upon which this motion was made was stated in the notice as follows: "Said motion will be made upon the ground that said minutes, insofar as they relate to the above captioned case, do not truly record the order of said Court, in that, (1) said Court, in making its order in chambers, granting the motion to dismiss the above entitled action theretofore on said day made by the defendant above named in open Court, did further direct the clerk of said Court to notify counsel for said defendant of the action of the Court but did not direct said clerk so to notify counsel for plaintiff, and, (2) that by so doing said Court did intend that said order should direct the defendant to prepare a written order to be signed and filed herein."

Simultaneously with the filing of the last mentioned notice of motion, appellant filed

a notice of motion to vacate the order of dismissal of August 27, 1956. The stated ground of this motion was as follows: "Said motion will be made upon the ground that unless in making said order said Court further ordered that a written order be prepared, signed and filed, said order is void, having been made in chambers." Both the last mentioned motions were heard and denied on April 29, 1957.

Appellant filed separate notices of appeal from the order of April 11, 1957, and from the order of April 29, 1957. By stipulation, both appeals are presented upon the same record. Appellant is met at the threshold with respondent's contention that the orders here presented for review are nonappealable. We conclude that this contention must be sustained.

[1] That the order denying the motion to vacate the judgment is nonappealable is indicated by the following language from 3 Cal.Jur.2d, Appeal and Error, § 57, very recently quoted with approval in *Spellens v. Spellens*, 49 Cal.2d 210, 228-229, 317 P.2d 613, 624:

"Even where there is a right of appeal from a judgment or order, a party cannot ordinarily take an appeal from a subsequent order denying a motion to vacate the judgment or order complained of, under such circumstances that the motion merely calls upon the court to repeat or overrule the former ruling on the same facts. And if the grounds upon which the parties seek to have a judgment vacated existed before the entry of the judgment and would have been available on an appeal from the judgment, an appeal will not lie from an order refusing the motion. The party aggrieved by a judgment or order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside. The reason for denying an appeal in the latter case is not because the order on the motion to vacate

is not within the terms of the statute allowing appeals, for it may be. Indeed, an order refusing to vacate a final judgment is in its very nature a special order made after judgment. But the right of appeal from the order is denied because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appeal, contrary to the intent of the statute. A further reason is that the order on the motion is merely a negative action of the court declining to disturb its first decision. The first decision being reviewable, the refusal any number of times to alter it does not make it less so."

In *Litvinuk v. Litvinuk*, 27 Cal.2d 38, 162 P.2d 8, the trial court proceeded with the trial of a divorce action over the protest of the defendant wife, notwithstanding the absence of her attorney. At the conclusion of the trial, the court made an order for judgment in favor of the plaintiff. After defendant's motion to set aside this order had been denied, an interlocutory judgment of divorce was entered. Thereafter, defendant moved for a new trial which also was denied. Following this ruling, defendant gave notice of a motion, under section 473, Code of Civil Procedure, to vacate the decree upon the grounds of "mistake, inadvertence, [and] surprise." This motion was denied.

Eleven days after the denial of her motion to vacate the judgment, but more than sixty days after the entry of judgment, and more than thirty days after the denial of her motion for a new trial, defendant filed her notice of appeal (1) from the judgment; (2) from the order denying the appellant's motion to vacate and set aside the interlocutory decree and to reopen the matter for further proceedings; (3) from the order of the trial court denying her motion for a new trial; and (4) from the order denying the appellant's motion to vacate and set aside the interlocutory decree under section 473.

In dismissing the appeal from the judgment and from each of the specified orders, the Supreme Court declared the law as follows, 27 Cal.2d at pages 43 and 44, 162 P.2d at page 11 of the opinion: "Considering the appeal from the order denying the motion to vacate the judgment under section 473 of the Code of Civil Procedure, as a thing prohibited directly may not be done indirectly, it is the general rule that an appeal may not be taken from a nonappealable order by the device of moving to vacate the order and appealing from a ruling denying the motion. In *re Estate of Spafford*, 175 Cal. 52, 165 P. 1; In *re Estate of Keane*, 56 Cal. 407. Nor will an appeal from an order denying a motion to vacate an appealable order or judgment be entertained when the purpose of the motion was to change the decision of the trial court upon the same facts. *Bell v. Solomons*, 162 Cal. 105, 121 P. 377; *Alpers v. Bliss*, 145 Cal. 565, 79 P. 171. Stated differently, if the grounds upon which the party sought to have a judgment vacated existed before the entry of judgment and would have been available upon an appeal from the judgment, an appeal will not lie from an order denying the motion. *Mather v. Mather*, 22 Cal.2d 713, 720, 140 P.2d 808; In *re Estate of Richards*, 17 Cal.2d 259, 267, 109 P.2d 923."

In the instant case, as in *Litvinuk*, the grounds upon which appellant sought to have the judgment vacated existed when the judgment was entered and would have been available upon an appeal from the judgment had it been taken within the time allowed. This is clearly indicated by the very language of the notice of motion to vacate: "Said motion will be made upon the grounds that unless in making said order [of dismissal] said court further ordered that a written order be prepared, signed, and filed, said order is void, having been made in chambers."

[2,3] It is equally clear that the orders denying appellant's motions to correct the minutes are not appealable. With respect to the appealability of an order not mentioned in section 963, Code of Civil Proce-

ture, the test, as stated in *Sjoberg v. Has-torf*, 33 Cal.2d 116, 119, 199 P.2d 668, 670, is as follows: "It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him."

[4] Although subdivision 2 of section 963 provides that an appeal may be taken "from any special order made after final judgment", it does not follow that every order subsequent to the final judgment in point of time is appealable. "It is necessary that the order affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution." 3 Cal.Jur.2d 471, 472, Appeal and Error, § 45. The controlling rule is stated in *Lake v. Harris*, 198 Cal. 85, 89, 243 P. 417, 419: "In order that a special order, made after final judgment, as contemplated by subdivision 2 of section 963, of the Code of Civil Procedure, be appealable, such order must affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. *Griess v. State Investment etc. Co.*, 93 Cal. 411, 28 P. 1041; *Kaltschmidt v. Weber*, 136 Cal. 675, 69 P. 497; *Watson v. Pryor*, 49 Cal.App. 554, 193 P. 797; 2 Cal.Jur. 153."

In *Hixson v. Hixson*, 146 Cal.App.2d 204, 303 P.2d 607, 608, this court applied the foregoing tests of appealability in dismissing an appeal from an order refusing to amend a final decree of divorce to conform to an alleged oral agreement of the parties that such amendment be made. The trial court had found that the agreement was in fact made, but concluded that it had no jurisdiction to make the requested amendment, the decree having become final. The following concluding language of the *Hixson* decision applies with equal force to the orders presently under consideration: "The order at bar leaves the judgment intact; it neither adds to it nor subtracts from it."

In *Griess v. State Investment etc. Co.*, 93 Cal. 411, 413, 28 P. 1041, the Supreme

Court dismissed an appeal from an order denying a motion to correct the minutes of the court. The following language of the opinion, 93 Cal. at page 413, 28 P. at page 1041, is clearly applicable to the two orders denying the motions to correct the minutes in the case at bar: "That part of the order denying the motion to amend the minutes of the court is also clearly not appealable. It was not a special order, made after final judgment, within the meaning of subdivision 2 of section 963 of the Code of Civil Procedure. It in no manner affected the judgment or bore any relation to it, either by way of enforcing it or staying its operation, nor did it concern any pending motion in the case itself. It was only the determination of the court that its minutes did not require correction, and the action of a court of record in such a matter is not subject to review by the ordinary process of appeal."

Among other decisions applying the same rule are: *Title Insurance & Trust Co. v. California, etc. Co.*, 159 Cal. 484, 487, 114 P. 838; *Postal Telegraph-Cable Co. v. Superior Court*, 22 Cal.App. 770, 779, 136 P. 538; *Lawson v. Guild*, 215 Cal. 378, 381, 10 P. 2d 459; *Reynolds v. Reynolds*, 191 Cal. 435, 437, 216 P. 619; *Williams v. Superior Court*, 14 Cal.2d 656, 666, 96 P.2d 334; *Imperial Beverage Co. v. Superior Court*, 24 Cal.2d 627, 632, 150 P.2d 881; *McWilliams v. Hudson*, 98 Cal.App. 185, 189, 276 P. 598, 277 P. 529; *Kaufman v. Brown*, 106 Cal.App.2d 686, 689, 235 P.2d 632.

Hilliker v. Board of Trustees, 91 Cal. App. 521, 526, 267 P. 367, relied upon by appellant is distinguishable. In that case the defendants took a timely appeal from an adverse judgment, and on the same day that they filed their notice of appeal they served and filed in the trial court a notice of motion to amend the judgment by eliminating a recital that it was entered upon stipulation. This court held appealable the order denying the motion to amend. As noted in the *Hixson* case, *supra*, 146 Cal.App.2d 204, 206, 303 P.2d 607, 608, "[t]his was because the judgment as it

stood recited that it was entered by consent and thereby would deprive the party of a right of appeal."

The appeals from the specified orders are, and each of them is, dismissed.

FOX, P. J., and ASHBURN, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



Jessie F. ERNIE, Plaintiff and Appellant,
v.

TRINITY LUTHERAN CHURCH, a non-profit corporation, First Doe, Second Doe, Third Doe, Fourth Doe, and Fifth Doe, Defendants and Respondents.*

Civ. 17918.

District Court of Appeal, First District,
Division 2, California.

July 2, 1958.

Rehearing Denied Aug. 1, 1958.

Hearing Granted Aug. 28, 1958.

Quiet title action. The Superior Court, Marin County, Thomas M. Keating, J., quieted defendant's title to strip of land in question, and plaintiff appealed. The District Court of Appeal, Kaufman, P. J., held that there was fatal repugnancy between finding that taxes had been paid by plaintiff and decree quieting title in defendant as adverse possessor of land involved.

Judgment reversed and case remanded with directions.

1. Adverse Possession ¶95

Even though defendant claiming title by adverse possession was a church (entitled to tax exemption), burden was upon it to show, in quiet title action, that it had paid taxes or that none had been assessed. West's Ann.Code Civ.Proc. §§ 318, 325, 338; West's Ann.Const. art. 13, § 1½; West's Ann.Rev. & Tax.Code, §§ 254, 256, 260.

2. Judgment ¶256(1)

There was fatal repugnancy between finding that taxes had been paid by plaintiff and decree quieting title in defendant as adverse possessor of land involved in quiet title suit. West's Ann.Code Civ.Proc. §§ 318, 325, 338; West's Ann.Const. art. 13, § 1½; West's Ann.Rev. & Tax.Code, §§ 254, 256, 260.

3. Adverse Possession ¶40

Where one of its walls had for 30 years rested upon the strip of plaintiff's land, defendant's rectory was a permanent structure; and plaintiff's title could be quieted only subject to defendant's right to maintain encroaching portion of its building. West's Ann.Code Civ.Proc. § 338, subd. 2.

4. Easements ¶5

Payment of taxes is not essential to acquisition of easement by adverse possession, except where taxes have been assessed or levied against easement itself. West's Ann.Code Civ.Proc. § 325.

5. Easements ¶5

Prescriptive right may be acquired by open, visible, continuous and unmolested use of an easement for more than statutory period. West's Ann.Code Civ.Proc. § 338, subd. 2.

6. Quieting Title ¶51

A fence was not an "encroachment," and even though it had been on plaintiff's land for more than three years, it would not be necessary that plaintiff's title be quieted only subject to defendant's right to maintain fence. West's Ann.Code Civ.Proc. § 338, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Encroachment".

Joseph A. Brown, San Francisco, for appellant.

John B. Ehlen, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

The plaintiff appeals from a judgment quieting the defendant's title to a strip of

land in the City of San Rafael. Her contentions on appeal are that the trial court erred in its implied finding that the defendant had obtained title by adverse possession and its conclusion that the plaintiff's action was barred by the Statute of Limitations, laches and lack of due diligence by the plaintiff and her predecessor in interest.

Plaintiff and defendant are adjoining landowners along the southern side of Fifth Avenue, near its intersection with D Street in the City of San Rafael. Fifth Avenue runs east and west; D Street runs north and south. Defendant acquired its parcel of land in 1942 from St. Matthews Evangelical Church. St. Matthews acquired the following property from Mrs. Hock in 1925.

"Beginning at a point in the southerly line of Fifth Avenue, distant 155 feet West from its intersection with the westerly line of D Street; thence southerly parallel with D Street, 140 feet; thence westerly parallel with Fifth Avenue 5 feet; thence northerly parallel with D Street, 40 feet; thence westerly parallel with Fifth Avenue, 30 feet; thence northerly parallel with D Street, 100 feet to the southerly line of Fifth Avenue; thence easterly along said Avenue 35 feet to the point of beginning."

In 1944, plaintiff acquired from Mrs. Hock, a parcel of land described as follows:

"Commencing at a point on the southerly line of Fifth Avenue, distant thereon westerly 100 feet from the point of intersection of said southerly line of Fifth Avenue with the westerly line of "D" Street, thence westerly along said southerly line of Fifth Avenue, 55 feet; thence at right angles southerly 140 feet; thence at right angles easterly 55 feet; and thence at right angles northerly 140 feet to the point of beginning."

The dispute concerns a strip of land $\frac{1}{10}$ of a foot wide and 140 feet long on the west side of the plaintiff's property. In 1926, St. Matthews built its rectory, a wooden

frame building in a cement foundation, a cement walkway and erected a substantial fence along the east side of its property, 154 $\frac{1}{10}$ feet from the intersection of Fifth Avenue and D Street. Therefore, each of these encroached $\frac{9}{10}$ of a foot on the land subsequently conveyed to the plaintiff. The evidence is that St. Matthews was in the sole and exclusive possession of the rectory, sidewalk and fence from 1926 until 1942 and used the walkway and rectory for church purposes. On June 30, 1942, the defendant bought the property from St. Matthews, believing the east boundary of the property to be along the fence, the walkway and the rectory, 154 $\frac{1}{10}$ feet from the intersection of Fifth Avenue and D Street. Ever since June 30, 1942, the defendant has been in continuous possession of the disputed strip and has used the property exclusively for church purposes.

Until 1952, no one made any claim to the disputed strip. The reason for the present controversy, is a survey made by the plaintiff in February 1952, which brought to light the encroachment. She mentioned the matter to the defendant's minister, but took no further action until January 30, 1956, when she filed her complaint in this action, asking the court to quiet her title and abate the encroachment upon her property. The defendant pleaded adverse possession, statute of limitations, laches and an agreed boundary line but did not pray for decree quieting title. Both sides waived a jury trial. After receiving oral and documentary evidence the trial court found for the defendant. The court expressly found that the plaintiff had paid all taxes on the property described in her deed, and that the plaintiff had never used, occupied or possessed the disputed property. In its conclusions of law, the trial court stated the plaintiff's action was barred by Code of Civil Procedure, sections 318 and 338, and by the laches and lack of due diligence of both the plaintiff and her predecessor in interest.

[1, 2] Defendant has not shown payment of taxes upon the property it claims. Pay-

ment of taxes by the claimant is essential to establishment of title by adverse possession. Code Civ.Proc. § 325. Defendant suggests that, since church property is tax exempt (Cal.Const. Art. XIII, sec. 1½), there is no need to show such payment. But filing of an affidavit for exemption is required (Rev. & Tax. Code, §§ 254, 256) and the right to exemption is waived by failure to file such affidavit (Rev. & Tax.Code, § 260). The burden is upon the defendant to show that it paid the taxes or that none were assessed (2 Cal.Jur.2d 570-1). The court specifically found that the taxes were paid by plaintiff. Under the findings, the decree quieting title to the fee in defendant can be supported only upon the theory of adverse possession. Since the essential element of payment of taxes is lacking, this decree, insofar as it quiets title in defendant, cannot stand.

[3] It does not follow, however, that plaintiff is entitled to the decree for which she prays. Her complaint, in addition to seeking quieting of her title, describes the sidewalk, building and fence of defendant as an "encroachment" and prays for a decree "requiring the removal of the said encroachment". Defendant's rectory is a permanent structure. Since one of its walls has for 30 years rested upon a strip of plaintiff's land, it is clear that it is a permanent encroachment. Rankin v. De Bare, 205 Cal. 639, 271 P. 1050. An action either for its removal or for damages for its maintenance is barred after three years. Code Civ.Proc. § 338(2); Bertram v. Orlando, 102 Cal.App. 2d 506, 227 P.2d 894, 24 A.L.R.2d 899; Tracy v. Ferrera, 144 Cal.App.2d 827, 301 P.2d 905. This does not affect plaintiff's title to the fee of the land encroached upon, but requires that her title to that fee be quieted only subject to defendant's right to maintain the encroachment portion of its building.

[4,5] The concrete walk running from the front line of the property to the rectory presents a somewhat different situation. Along the side of this walk nearest plaintiff's

land is a fence, the posts of which are embedded in the concrete of the walk. The evidence is undisputed that for more than 30 years this walk has been openly and exclusively used by the church to afford access to the rectory and Sunday School. Payment of taxes is not essential to acquisition of an easement by adverse possession, unless the party resisting the claim to a prescriptive easement shows that taxes have been assessed or levied against the easement. (17 Cal.Jur.2d 126-7.) Plaintiff contends that the use was not adverse. However, the rule is clear that an open, visible, continuous and unmolested use of an easement for more than the statutory period fully warrants a prescriptive right, whether the terminology be that such use gives rise to a presumption of adverse use and claim of right (Fleming v. Howard, 150 Cal. 28, 30, 87 P. 908) or that it presents a fact situation warranting such a finding (17 Cal.Jur. 2d 125-6). Thus decree establishing an easement in defendant over this portion of the disputed strip would be proper. However, the present decree purports to quiet title to the fee, rather than to an easement. While the findings refer to an easement, they do not specifically determine its acquisition by prescription.

[6] As to the portion of the disputed strip lying to the rear of the rectory, we find in the record no basis for any determination adverse to plaintiff. Defendant cites and we find no authority indicating that a fence constitutes an encroachment within the meaning of the rule above applied to the rectory. There is no evidence of user of an easement upon this portion. Defendant paid no taxes upon the land. It follows that plaintiff is entitled to a decree quieting title to the fee of this portion of the strip.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion. The trial court may reopen the case for further evidence or revise its findings upon the evidence already before it, as it deems advisable.

DOOLING and DRAPER, JJ., concur.

161 Cal.App.2d 692

Myrtle FORD, Petitioner and Appellant,

v.

CIVIL SERVICE COMMISSION OF COUNTY OF LOS ANGELES, State of California, and Harry Albert, Winston Crouch, Hayden Jones, Harry W. Case and Ray Lee, County Recorder of the County of Los Angeles, Defendants and Respondents.

Civ. 22751.

District Court of Appeal, Second District,
Division 1, California.

June 27, 1958.

Proceeding on a petition for a writ of mandate challenging discharge of a clerk by civil service commission. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgment adverse to clerk and she appealed. The District Court of Appeal, Fourth, J., held that evidence supported findings of the commission that clerk had been guilty of insubordination, failed to do her work properly, and falsified records.

Judgment affirmed.

1. Officers ⇨72(1)

In hearing before civil service commission which entered an order discharging a clerk with civil service status documents, records, and evidence pertaining to manner in which clerk performed her work, including notes from which clerk's supervisor testified, without objection, were properly received in evidence.

2. Mandamus ⇨187(9)

It is not function of District Court of Appeal to weigh evidence which was before a superior court in proceeding on a civil service clerk's petition for a writ of mandate challenging final order of civil service commission discharging clerk from her position.

3. Trial ⇨105(1)

Where civil service clerk, during hearing before civil service commission, failed to make objections to certain evidence, she would be deemed to have waived any right to complain thereafter about the receipt of such evidence.

4. Mandamus ⇨168(4)

In proceeding on a petition for a writ of mandate challenging discharge of a clerk by civil service commission, evidence supported findings of the commission that clerk had been guilty of insubordination, failed to do her work properly, and falsified records, and record established that the hearing was full and fair.

5. Officers ⇨72(1)

A hearing before the civil service commission would not be deemed improper merely because the civil service commission was advised by member of the staff from the county counsel's office, and another agency involved was also represented by another member of the county counsel's staff.

6. Administrative Law and Procedure ⇨445

An administrative agency can be both the prosecutor and the judge in the same matter if the procedure remains fair and proper.

7. Officers ⇨72(1)

A civil service clerk was not denied a hearing before a full commission even though only two of the three commissioners were present for the hearing, since statutory words giving joint authority to three or more public officers or persons are construed as giving such authority to a majority of them. West's Ann.Civ.Code, § 12; West's Ann.Code Civ.Proc. § 15.

G. G. Baumen, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Los Angeles County, Joel R. Bennett, Deputy County Counsel, West Covina, for respondent.

FOURT, Justice.

This is an appeal from a judgment denying and discharging an alternative writ of mandate and denying a peremptory writ of mandate decreeing that appellant take nothing by her action.

The appellant, a clerk who had attained permanent civil service status in the Recorder's office of the County of Los An-

ges, was, by letter dated August 30, 1955, suspended as of September 1, 1955, and discharged September 30, 1955. Pursuant to a written demand, a hearing was had before two members of the three-man Civil Service Commission of the County of Los Angeles in November, 1955. The Commission found that such discharge was proper, and that the facts and reasons given justified her discharge. Thereafter, a petition for a writ of mandate was filed in the superior court upon the claim and ground that the Commission acted in an arbitrary and capricious manner, and that hearsay evidence had been presented as a basis of the charges, and that there was no competent evidence presented to support the charges made.

The trial court found that the Civil Service Commission proceeded as required by law, that there was substantial evidence to support the findings, that the findings supported the charges, that the charges were sufficient to justify the discharge, and thereupon entered the order from which the appeal is taken.

The appellant now contends that there was no substantial evidence before the Civil Service Commission to support the findings of the Commission; that the hearing before the Commission was neither full nor fair, and that the Commission proceeded without, or in excess of its jurisdiction in this matter.

The Civil Service Commission made a final order November 30, 1955, discharging the appellant from her position. The petition for the writ of mandate was served October 8, 1956, and filed December 6, 1956. An alternative writ of mandate was applied for about January 3, 1957, but was refused because, among other reasons, the County Recorder was not made a party defendant. An amended petition was filed January 9, 1957, and an alternative writ issued January 21, 1957. Hence it was thirteen months after the final order of the Commission before an effective petition was filed. Appellant apparently made no claim to back salary, but only for reinstatement, and therefore any defense of laches by

the respondents under the particular facts here set forth is not well taken. See *Kimberlin v. Los Angeles City High School Dist.*, 115 Cal.App.2d 459, 252 P.2d 344; *Jones v. City of Los Angeles*, 120 Cal.App.2d 858, 262 P.2d 37; *Hayman v. City of Los Angeles*, 17 Cal.App.2d 674, 62 P.2d 1047.

Marjory Beucler, a head clerk in the Recorder's office, testified that appellant was under her supervisory capacity and that on a number of occasions, she had spoken to the appellant in relation to her work. When asked if she could remember the dates upon which the talks were had she indicated there were a number of such conversations and that she had some records in her handwriting which she could refer to, and that she could not give the information without referring to the pages of the records prepared by her.

Miss Beucler was then asked questions with reference to what her records revealed as to what was done and said on many specific dates. There was no objection to any such questions, and the witness gave her answers. Appellant's counsel, at one stage of the proceedings while Miss Beucler was testifying, stated, "May the record show that the witness is reading from her memorandum. I think the memorandum should be introduced for identification." Counsel for the department stated, "We will be glad to do so." Appellant's counsel cross-examined the witness at length about the entries in her records, and during such cross-examination they were marked for identification.

Ray Lee, the County Recorder, testified that he had a meeting in his office with the appellant, the purpose of which was to acquaint her with charges against her, which were to the effect that she had been guilty of insubordination, had failed to do her work properly, had falsified records, and so forth, and to give her an opportunity to disprove such charges. With appellant's consent, a tape recording of what was said at such meeting was made. Miss Beucler, as the head clerk in charge of the index division, where the appellant had

been employed, Mr. Daley, the Chief County Deputy Recorder, and John Bugg, as Secretary of the Committee on Human Relations (an official concerned with matters involving racial discrimination and prejudice), were present. The witness stated that the meeting lasted about two and one-half hours, and that about ten persons were called in and asked questions; further it was stated that the witness had called upon Marjory Beucler in such meeting to read from her notes regarding the conduct of the appellant, and that she had done so.

Counsel for the Department offered the notes into evidence. Appellant's attorney stated: "No objection * * *." It was then brought out from the witness that after Miss Beucler had gone over the note material appellant made an explanation about them, stating, "essentially that they were not true."

Near the conclusion of the hearing before the Civil Service Commission, counsel for the Department again stated, "We should, at this time, like to offer all of our exhibits for evidence that have been marked for identification." Appellant's counsel stated, "I have only one objection. They may all go in except the recheck sheet of Mr. Myles. I don't think there is any foundation for that." The records or notes of Miss Beucler, among other items, were then received in evidence.

The notes heretofore referred to, which were introduced into evidence without objection, revealed that the appellant was "stalling on her checking of her work;" that she pretended not to understand certain directions; that she was admonished not to go to other desks in the office; that she wasted time and was not up to the work schedule; that she was told not to go outside of the Department, and although reminded of such direction, did leave and when the matter was called to her attention said, "I will do as I please." She was directed to Miss Beatty but refused to go at first. The notes also revealed that her work was done unwillingly and she would not comply with directions, and that she made many errors, failed to get along with

the other employees and created a great deal of dissension.

There were other witnesses who testified before the Civil Service Commission, in substance and to the effect that the appellant failed to do her work accurately and promptly; that appellant referred to a co-worker as "a white folk's nigger", and that she was always watching to see whether other workers were being assigned less work than was the appellant.

Furthermore, there was evidence that appellant carried on a campaign of personal abuse against her fellow workers and would refer to them in terms of vulgarity and violence, which, if true, certainly impaired her ability to concentrate upon her own work. She was also resentful when mistakes in her work were called to her attention.

There was a work log admitted into evidence which disclosed that appellant was not a good employee; she made many more mistakes than the average employee. Too, there was substantial evidence to the effect that appellant purported to correct entries on the temporary indices of Grantees and Grantors by erasing and re-writing, or by writing over letters and figures appearing thereon which were originally correct. She would then enter such fraudulent corrections in her daily sheet as errors which she had found and corrected. She made no reasonable explanation of such conduct.

[1] We are convinced under the facts and circumstances of this case that the documents, records and evidence were all properly received.

[2] It is not our function to weigh the evidence which was before the superior court. *Moran v. State Board of Medical Examiners*, 32 Cal.2d 301, 196 P.2d 20.

[3] The appellant failed to make objections to the evidence of which she now complains. We think she waived any right to complain thereafter about the procedure, but in any event the records of Miss Beucler were merely cumulative. See *Shaver*

v. United Parcel Service, 90 Cal.App. 764, 266 P. 606.

The general rule is stated by McCormick on Evidence, page 126, in section 54, which reads in part as follows: "A failure to make a sufficient objection to evidence which is incompetent waives as we have seen any ground of complaint of the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of whatever rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof so far as it has probative value. Such incompetent evidence, unobjected to, may be relied on in argument, and alone or in part may support a verdict or finding." See, also, *People v. Averett*, 54 Cal.App.2d 625, 628, 129 P.2d 739; *People v. Judson*, 128 Cal.App. 768, 18 P.2d 379; *Manney v. Housing Authority*, 79 Cal.App.2d 453, 180 P.2d 69; *Weiss v. Bank of America*, 57 Cal.App.2d 892, 135 P.2d 584; *Tieso v. Tieso*, 67 Cal. App.2d 872, 155 P.2d 659; *Keim v. D. B. Berelson & Co.*, 105 Cal.App.2d 154, 233 P.2d 123.

[4] A complete reading of the transcript of the proceedings in this case leads us to believe that the hearings in each instance were full and fair.

[5, 6] Appellant now insists that because the Civil Service Commission is advised by a member of the staff from the County Counsel's office, and the Department is also represented by another member of the County Counsel's staff, that such presents "a cozy situation" and is reversible error. Whether it was cozy or dismal and cheerless makes little difference if it was entirely fair and proper. Under our law, an administrative agency can even be both the prosecutor and the judge in the same matter. *Murphy v. Board of Medical Examiners*, 75 Cal.App.2d 161, 170 P.2d 510. There is no evidence that the deputy county counsel who advised the Commission did anything other than that which was wholly proper.

[7] Appellant's next contention is that in this cause only two of the three Commissioners were present for the hearing, and that therefore she did not have a hearing before a full Commission. Code of Civil Procedure, section 15, and Civil Code, section 12, read as follows:

"Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the Act giving the authority."

Rule 4.09 of the Civil Service Commission provides that the concurrence of only two members is necessary to any action of the Commission.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.



161 Cal.App.2d 734

Clifton E. BROOKS, Plaintiff and Respondent,

v.

Eunice N. VAN WINKLE, as administratrix of the Estate of Walter S. Van Winkle, Defendant and Appellant.

Civ. 17738.

District Court of Appeal, First District, Division 1, California.

July 1, 1958.

Attorney's action against estate for services rendered decedent. The Superior Court, County of Contra Costa, Harold Jacoby, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peters, P. J., held that evidence supported finding that attorney and decedent had had an express contract for a particular fee, but had entered into a second,

broader contract for which attorney was to receive the reasonable value of his services.

Judgment affirmed.

1. Executors and Administrators Ⓒ205(2)

Evidence in attorney's action against estate for services rendered decedent supported award of \$14,674.

2. Executors and Administrators Ⓒ221(5)

In attorney's action against estate for services rendered to decedent, evidence supported finding that attorney and decedent had had an express contract for a particular fee, but had entered into a second, broader contract for which attorney was to receive the reasonable value of his services.

3. Attorney and Client Ⓒ159

Where attorney and his client first entered into agreement whereby attorney was to handle certain tax matters in return for a percentage of the tax saving, and later entered into broader agreement for additional services, without specified fee, the existence of the original, express contract did not foreclose attorney from recovery on theory of implied contract.

4. Limitation of Actions Ⓒ197(1)

In attorney's action against estate for services rendered decedent, evidence supported finding that the services were of a continuous nature, so as to escape the bar of statute of limitations. West's Ann.Code Civ.Proc. §§ 339, subd. 1, 353.

5. Limitation of Actions Ⓒ49(2)

Where attorney's services to client, in incorporating and organizing client's corporation, were merely a step in a plan to secure tax savings for client, statute of limitations on attorney's claim for compensation for incorporation and organization did not begin to run on date incorporation was completed. West's Ann.Code Civ.Proc. §§ 339, subd. 1, 353; 26 U.S.C.A. (I.R.C.1954) § 1 et seq.

6. Limitation of Actions Ⓒ49(2)

Normally, the due date of payment for services rendered is date such particular service was completed, but if the services are continuous in nature, the due date be-

comes the date of the total termination of the services.

Herron & Winn, San Francisco, for appellant.

Breed, Robinson & Stewart, Brooks & Winter, Oakland, for respondent.

PETERS, Presiding Justice.

Plaintiff, Clifton Brooks, brought this action against the administratrix of the estate of Walter S. Van Winkle to recover the reasonable value of legal services rendered by Brooks to Van Winkle between January 1, 1949, and August 3, 1952. The complaint alleged that the reasonable value of such services was \$16,074.54, of which \$1,400 had been paid. The trial court entered its judgment in favor of Brooks in the amount of \$14,674.54. From that judgment the administratrix appeals.

[1] The evidence supports the finding that the services rendered were reasonably worth at least the amount of the award. The plaintiff and his expert so testified, and there was no conflicting testimony. Defendant's major contention on this appeal, which is the same argument made on the trial, is that there is a fatal variance between the pleading and the proof. It is argued that respondent pleaded a cause of action on a *quantum meruit* and proved an express contract, and that in such a case recovery cannot be had. At the close of plaintiff's case defendant moved for a nonsuit on this ground, and, when this was denied, immediately rested without the production of any evidence.

The complaint does allege a cause of action based on an implied contract. It alleges that Van Winkle died August 3, 1952; that between January 1, 1949, and August 3, 1952, the plaintiff, at the request of Van Winkle, performed services for Van Winkle by incorporating four corporations, by representing Van Winkle and another corporation in tax deficiency proceedings and before the Public Utilities Commission in rate proceedings, by representing Van Winkle in proceedings before the Corporation Com-

missioner, and by advising Van Winkle in reference to his business. Such services are alleged to be reasonably worth \$16,074.54, on which \$1,400 has been paid.

The evidence, while indicating that the relationship between the parties started with an express agreement, also shows that subsequently a different superseding arrangement was entered into for additional services without any agreement as to compensation. Thus, the finding that Van Winkle agreed to pay the reasonable value of these services is substantially supported.

It appears that in the early part of 1948 one Cowles was assisting Van Winkle with certain insurance and estate planning problems. Cowles needed legal assistance in connection with some of these problems. He employed the plaintiff to advise him and Van Winkle on these matters. Van Winkle was apparently satisfied with plaintiff's assistance because, later in 1948, he asked Cowles to have plaintiff get in touch with him. This was arranged, and several months later Van Winkle told Cowles that he had retained plaintiff "to act as his attorney, and also told me that he got quite a good deal—Mr. Brooks was going to handle his business for 25% of his savings on tax matters."

Brooks, who has been an attorney since 1913, and who specializes in corporate and tax practice, testified that he was first hired by Cowles to advise him on Van Winkle's tax problems in January of 1949, and that in March of 1949 Van Winkle entered into a specific oral agreement with him in connection with these tax matters. Brooks testified that Van Winkle stated that he had had unpleasant experiences with attorneys; that he told Van Winkle he would be willing to work for what he could save Van Winkle on taxes; that Van Winkle stated that he supposed this meant for the total tax savings; that he, Brooks, replied that he "would settle for 25% of the savings"; and that this was agreed upon.

At that time Van Winkle was operating some ten bowling alleys and amusement centers. Brooks recommended that these enterprises be segregated into three groups,

and that each group be separately incorporated. This would result in a substantial tax savings. Van Winkle and his wife were then in the 60% tax bracket, and the type of incorporation recommended would reduce the corporate income to the 22% tax bracket. Brooks carried through the recommended incorporations to completion, and, until Van Winkle's death, continued to render legal service to these corporations.

Plaintiff testified that this first agreement referred only to the tax problems of Van Winkle, but that some time later Van Winkle asked him to handle all of his legal affairs, except actual litigation, and that he agreed to do so. There was no discussion about compensation for these augmented services.

After the second agreement was entered into Brooks handled many non-tax matters for Van Winkle. He opposed a rate increase of the California Telephone and Water Company on behalf of one of the bowling alley corporations; on behalf of Van Winkle he incorporated the Clyde Water Company and applied for a rate increase for the company; he did considerable work in preparing for an application for an increased rate for another public corporation controlled by Van Winkle; he assisted Van Winkle in preparing and presenting claims against the Navy for damages to his property growing out of the Port Chicago explosion; he handled a deficiency assessment against the Delta Foods Company in which Van Winkle was a partner; and he incorporated a building construction corporation for his client. In addition he rendered legal services in connection with the preparation of a net worth statement for his client that had been demanded by the Internal Revenue Bureau. Such a demand indicated a possible claim of fraud against the taxpayer. With the assistance of an accountant he negotiated a deficiency assessment of \$32,000 with no penalties. Plaintiff also testified that, during the 3½ years he handled the legal work for Van Winkle, he had about 150 conferences with his client. He spent a total of 1064½ hours on work for this client. He appraised the total value

of his services at about \$25,000. He testified that he received \$1,400 on account of his fee. In the fall of 1951 Van Winkle stated that he intended to pay plaintiff a regular retainer from the public utility organized by plaintiff after the first of the year, but later postponed the date, stating that the corporation was not yet ready for this. The retainer was never paid. On several occasions the parties discussed paying plaintiff \$250 a quarter as an advance on the fee, but nothing ever came of this. Plaintiff did not submit a bill for his services, because under the provisions of the Internal Revenue Code, 26 U.S.C.A. § 1 et seq., he figured that there would be a material savings to his client if he spread his services out over a three-year period.

An expert tax lawyer testified that the reasonable value of the services rendered by plaintiff was somewhere between \$20,000 and \$25,000.

On this evidence the trial court made the following basic three findings:

"That during the month of January, 1949, decedent, Walter S. Van Winkle, did retain and employ plaintiff as an attorney at law for the purpose of advising upon and performing legal services in connection with the achieving of an over-all income tax reduction for Walter S. Van Winkle and Eunice Van Winkle, his wife. That all of the properties and businesses involved in said retainer and employment were community property of the aforesaid Walter S. Van Winkle and Eunice N. Van Winkle, and said contract was made by Walter S. Van Winkle as husband pursuant to his power of control and management of community property. That it was the agreement between plaintiff and decedent Walter S. Van Winkle that the compensation of plaintiff for the services as aforesaid should be based upon twenty-five per cent of tax savings. That no more detailed method of computation of tax savings and no time during which such tax savings should be computed was agreed upon or

discussed by plaintiff and decedent Walter S. Van Winkle.

"That thereafter decedent Walter S. Van Winkle did retain and employ plaintiff as his attorney to perform all other legal services required in connection with the business affairs of Walter S. Van Winkle and his wife, excepting only litigation. That no basis for compensation of plaintiff for services rendered or to be rendered under the employment described in this paragraph was agreed upon between plaintiff and Walter S. Van Winkle.

"That prior to the death of Walter S. Van Winkle plaintiff did perform various legal services under and pursuant to the two contracts of employment hereinabove described. That the reasonable value of said services is the sum of \$16,074.54."

The court concluded that plaintiff was entitled to a judgment for \$14,674.54, that amount being the \$16,074.54 less the \$1,400 already paid.

Appellant makes several arguments in support of the contention that the judgment is erroneous. Basically, these arguments are all addressed to the problem of whether there is substantial evidence to support the findings. In contending that the evidence is insufficient, appellant's basic argument is that the proof established an oral express contract to employ respondent to do certain work and to pay him 25% of the taxes saved, while the complaint alleged an implied contract to pay the reasonable value of the services. Thus, so it is asserted, there was a fatal variance. In support of this assertion the case of *Roche v. Baldwin*, 135 Cal. 522, 65 P. 459, 67 P. 903, is cited. That is an unusual case. It involved an action by an assignee of an attorney for professional services rendered. In the trial court the plaintiff recovered a substantial verdict. On appeal Department Two of the court affirmed. The cause was then heard by the court in bank. Judge Van Dyke wrote the main opinion reversing the judgment, giving two reasons

for the reversal. One was that an erroneous instruction had been given. The other was that there was a fatal variance between the pleading and proof, the complaint alleging a *quantum meruit* and the proof showing an express contract. But one of the other six justices agreed with Van Dyke on the variance point. Three concurred in the reversal solely on the ground that the challenged instruction was erroneous, and two dissented, coming to the conclusion that the opinion rendered in department affirming the judgment was correct. Judge Van Dyke did hold that, since the proof showed an express contract as to how compensation for the services was to be fixed, it could not be supported by a complaint based on a *quantum meruit*. We have found no subsequent case since *Roche v. Baldwin* was written in 1902 that has followed the Van Dyke holding. It has been held that, where an attorney has been retained under an express contract as to his compensation, but is wrongfully discharged before completion of the services, he may recover on a *quantum meruit* for the reasonable value of his services. *Oliver v. Campbell*, 43 Cal.2d 298, 273 P.2d 15. Under these circumstances the opinion of Judge Van Dyke cannot be considered as a very persuasive authority.

[2,3] But even if the Van Dyke opinion is sound, it would not be controlling in the instant case. That is so for several reasons. In the first place the court here found, and the evidence supports the finding, that there were two separate contracts of employment. The first contract was to handle certain tax matters for Van Winkle in return for 25% of the tax savings. The second contract retained respondent to perform all legal services required by Van Winkle, except actual litigation. This included many services in no way related to Van Winkle's tax problems. Certainly, since no fee for these services was agreed upon it was necessarily implied that Van Winkle was to pay the reasonable value of these services. The second contract was much broad-

er than the first. Thus, the findings to the effect that there was an implied contract to pay the reasonable value of these services is amply supported.

Appellant contends that if the first contract did not cover all of the services involved it was respondent's duty to call that fact to Van Winkle's attention, and, failing to do so, it must be inferred that the first contract was all inclusive, citing such cases as *Lavenson v. Wise*, 131 Cal. 369, 63 P. 622, and *Reynolds v. Sorosis Fruit, Co.*, 133 Cal. 625, 66 P. 21. Those cases undoubtedly stand for the proposition that, where an attorney has an express contract to perform a legal service for a fixed fee, he cannot charge extra for certain services fairly included in the written contract. The cases also support the contention that, if the written contract is ambiguous in this respect, the ambiguity should be interpreted against the lawyer. But these rules are not here applicable. In the instant case the attorney is not seeking to change the terms of a contract after he discovered that he has made a bad bargain. Here an express contract for a limited and specified service was entered into. Then the client requested, and the lawyer agreed, to greatly broaden the services to be rendered. There is nothing ambiguous in the subsequent employment extending the field of operation to non-tax matters. Certainly, it is a reasonable, if not almost inevitable, inference that, since nothing was said about compensation for these extended services, the parties intended that the fees would be fixed in accordance with the usual rule, that is, the reasonable value of the services. The situation is analogous to one where a contractor agrees to build a shed for a fixed price. Later the parties agree that a house will be constructed. There is no express agreement as to the fee to be paid for these services. Certainly it cannot reasonably be implied that the contractor or the owner intended that the extended job should not be paid for. At any rate, the inference drawn by the trial court was that the parties intended to pay the reasonable value of the extended

services. That is a reasonable inference from the evidence produced.

There is a second factor to be considered. The first contract was to pay to respondent 25% of the tax savings. Such an agreement is highly uncertain. It does not provide for the manner in which "savings" are to be computed, nor does it provide for how long a period the 25% was to be collected. If suit were brought on the 25% agreement it would be very difficult, if not practically impossible, to determine these matters with any reasonable degree of accuracy. Under such circumstances it is a reasonable inference that when the parties agreed to extend and change the nature of the work they also impliedly agreed to change the method of computing the fee. Thus, the findings on this issue are amply supported.

Appellant's second main contention is that respondent's claim is barred by the statute of limitations. Section 339, subd. 1, of the Code of Civil Procedure, provides for a 2-year period of limitation for most actions based on contracts not in writing. The present action was commenced April 24, 1953. The appellant claims that many of the services rendered were completed more than two years prior to that date, and that recovery for them is barred.

The trial court, in this connection, found:

"That except for the Delta Foods Co. tax deficiency matter, more particularly described in Allegation II of the complaint, all of the services rendered by plaintiff for the purpose of achieving tax savings pursuant to the retainer and employment between plaintiff and Walter S. Van Winkle during the month of January 1, 1949, were of a continuing nature, and none of said matters had been completed within two years of the date of the death of decedent, Walter S. Van Winkle, as above set forth."

Based on this finding the court concluded that no part of the cause of action was barred.

As to the dates involved herein, the complaint alleges that the services were ren-

dered between January 1, 1949, and August 3, 1952. That last date is when Van Winkle died. Letters of administration were issued to appellant on August 25, 1952. The complaint was filed April 24, 1953.

Section 353 of the Code of Civil Procedure provides, in part:

"If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

[4] Thus, under this section the statute of limitations does not apply to any claim accruing after August of 1950. It was the burden of appellant to prove that the services sued for were rendered prior to that date. This she did not do. In view of the finding of the court, a finding amply supported, and the failure of proof, the statute of limitations clearly did not run as to any item except possibly the \$2,500 item found in the bill of particulars for organizing and incorporating the three bowling alley corporations.

The bill of particulars lists the various services performed by respondent, gives the date such services were rendered, and places a value on such services. Nothing is said in the bill of particulars about when the amounts listed were payable. Thus, in reference to the three bowling alley corporations the bill of particulars states:

"To professional services in connection with the incorporation and organization of Monterey Bowl, Sacramento Bowl, and Berkeley Bowl performed in period of January 20, 1949, to April 3, 1950—\$2500.00."

[5] If the \$2,500 was payable on April 3, 1950, the claim for such services would be barred by the statute of limitations. But that is not the reasonable interpretation of

the evidence. Obviously, the actual work in connection with the incorporation was completed on April 3, 1950. But the incorporation was simply a means to an end, not an end in itself. The end desired by both parties was to secure a tax savings for the client. The incorporation was not severable from that basic purpose. It is a reasonable interpretation of the evidence that respondent was to be paid the reasonable value of the incorporation—the sum of \$2,500—but that such sum was not payable until tax savings resulted. That would be well within the two-year period, or at least appellant has not proved that it was not. The services rendered in connection with incorporation were part and parcel of a continuous service rendered in connection with trying to secure a tax savings for the client. They were part and parcel of a general program aimed at achieving a tax savings. These services were continuous in nature. They continued right up to the death of Van Winkle.

[6] Of course, normally, the due date of payment for services rendered is the date such particular service was completed, but that rule is not always applicable. It is well settled that, if the services are continuous in nature, and the court found in the instant case that the services were of that nature and such finding is supported, the due date becomes the date of the total termination of the services. This well-settled rule, supported by many authorities, stated as follows in 6 Cal.Jur.2d p. 404, § 201, is applicable:

"Where the attorney represents his client under a general retainer, but in distinct matters, his right of action accrues upon the performance and completion of each such matter, in the absence of any contractual provision as to time or amount of payment. A different rule applies, however, to services which are intended to be continuous. It would seem that in such a situation, the attorney's cause of action does not accrue until the services are completed, or until completion is prevented by an event beyond his con-

trol." See particularly Mitchell v. Towne, 31 Cal.App.2d 259, 87 P.2d 908.

The judgment appealed from is affirmed.

FRED B. WOOD and DOOLING, JJ.,
concur.



John W. SCOTT, Plaintiff and Respondent,
v.

Winlfred C. SCOTT, Elmi Scott, Defendants.

Winlfred C. Scott, Appellant.*

Civ. 22959.

District Court of Appeal, Second District,
Division 2, California.

July 2, 1958.

Rehearing Denied July 25, 1958.

Hearing Granted Aug. 28, 1958.

Declaratory judgment action by husband against his first wife and his second wife to determine parties' rights in view of second of two successive Mexican divorce decrees obtained by husband regarding his first marriage. The Superior Court of Los Angeles County, Newcomb, Condee, J., entered judgment adverse to first wife, and she appealed. The District Court of Appeal, Herndon, J., held that evidence failed to sustain trial court's finding that husband had established a bona fide domicile in the Mexican state in which the second Mexican divorce decree was granted.

Judgment reversed.

1. Divorce ⇐359(2)

Jurisdiction to grant a divorce rests upon bona fide domicile, and a foreign divorce decree procured on simulated residence has no force or effect in California.

2. Divorce ⇐416(2)

In declaratory judgment action by husband against his first wife and his second

* Opinion vacated 331 P.2d 641.

wife to determine parties' right in view of second of two successive Mexican divorce decrees obtained by husband regarding his first marriage, evidence failed to sustain trial court's finding that husband had established a bona fide domicile in the Mexican state in which the second Mexican divorce decree was granted.

3. Domicile $\Leftrightarrow$ 4(2)

Generally, acquisition of new domicile requires actual change of residence accompanied by intention to remain, either permanently or for an indefinite time, without any fixed or certain purpose to return to former place of abode.

4. Domicile $\Leftrightarrow$ 4(2)

Merely abiding in a place for a definite time for a transient purpose, such as obtaining a divorce, unaccompanied by any intention to remain permanently or indefinitely, is not sufficient to result in acquisition of a new domicile.

Monta W. Shirley, Los Angeles, for appellant.

Hahn, Ross & Saunders, Los Angeles, for respondent.

HERNDON, Justice.

The declaratory judgment here presented for review sustains the validity of the second of two successive decrees which respondent husband had obtained in Mexico, and both of which purported to dissolve his marriage to appellant wife. Appellant had successfully challenged the validity of the first Mexican decree in her California separate maintenance action, which followed the first Mexican decree and preceded the second.

Appellant attacks the instant judgment and the Mexican decree which it purports to validate on several grounds. However, we find it necessary to consider only the first and most basic of these grounds, namely: that the Mexican divorce decree is invalid because respondent was never domiciled within the territorial jurisdiction of the court which granted it. Chronologi-

cally stated, the essential facts appear to be as follows:

Colonel Scott (respondent) and his wife, Winifred, (appellant) were married on January 10, 1931, and separated on July 9, 1948. In 1951, Col. Scott sued Winifred for divorce in Wyoming, which apparently was the matrimonial domicile. This action was dismissed.

In 1952 Col. Scott secured a Mexican divorce decree at Juarez, State of Chihuahua, giving as his residence 212 Juarez Avenue, Juarez, Mexico, that being the location of the law office of his Mexican lawyer, Arturo Martinez. On December 5, 1952, he married respondent Elli Scott.

On December 11, 1952, Winifred filed in the Los Angeles superior court her action for separate maintenance, alleging cruelty and alleging facts adverse to the validity of the Mexican divorce. Col. Scott answered, denying the material allegations of the complaint, and making countercharges of cruelty against Winifred. On May 9, 1953, judgment was rendered in the separate maintenance action, holding in effect that Winifred was the innocent party, declaring the Mexican decree to be invalid, and awarding separate maintenance. This judgment became final.

On December 31, 1954, Col. Scott was retired from the United States Army. In January, 1955, he went to Guadalajara in the state of Jalisco, Republic of Mexico, and employed an attorney to secure another divorce from appellant Winifred. Referring to the efforts of his Mexican attorney in Jalisco, Col. Scott testified: "He prepared a petition and took it to the Court to place it on the docket. It was refused by the Judge and the Judge said that he cannot hear the case, that so far as he is concerned, I was divorced in 1952 and the only place that I can get a rehearing on it is under another set of circumstances and charges in Chihuahua."

In January, 1956, Scott went back to Juarez in the state of Chihuahua and on January 14, 1956, there filed his second action for a divorce again giving as his resi-

dence 212 Juarez Avenue, his attorney's office address. The complaint alleged the date of separation to be July 9, 1948, the same date as alleged in the California separate maintenance action. This complaint was served on Winifred at Omaha, Nebraska, by mail on January 25, 1956. She made no appearance in the Mexican divorce proceedings. On March 17, 1956, the Mexican decree here in question was granted, reciting as grounds "mental cruelty, residence apart for over one year and incompatibility of characters."

On July 26, 1956, Scott filed in the Los Angeles separate maintenance action his application for a modification of the support decree, alleging his retirement from the Army, the resulting decrease in his income, and therein stated: "Further that on or about March 17, 1956, this affiant did obtain a valid and subsisting divorce from the plaintiff, Winifred C. Scott, in the Second Civil Court, in and for the District of Bravos, State of Chihuahua, Republic of Mexico; and further, since said date, affiant has remarried."

In August, 1956, this order to show cause was heard whereupon the court made findings including the following: "That the Decree of Divorce obtained by the defendant in the State of Chihuahua on March 17, 1956, is contrary to and is in violation of the injunction issued against the defendant in this action on March 2, 1956, whereby the defendant was restrained from proceeding with any divorce proceedings instituted in the City of Juarez, State of Chihuahua, Mexico; * * *. For the purposes of this hearing, there is no finding as to the validity or the invalidity of the Mexican decree of divorce obtained by the defendant from the plaintiff on March 17, 1956; * * *." The court ordered Scott to continue paying support money in a reduced amount and ordered him to pay counsel fees to the attorney for appellant.

On August 23, 1956, Scott filed his complaint in the instant action, alleging the rendition of the former separate maintenance decree and "that thereafter on March

17, 1956, this plaintiff * * * did obtain a valid and subsisting divorce from the defendant Winifred C. Scott." The complaint further alleges Scott's marriage to Elli on July 23, 1956. The prayer is for a judgment declaring "the rights and the duties of this plaintiff", and declaring "the rights and the duties" of defendants Winifred C. Scott and Elli Scott. Winifred filed her answer to this complaint on September 14, 1956.

The instant case was tried in April of 1957. The records and files in the separate maintenance action and authenticated copies of the pleadings and decrees in the two Mexican divorce actions were received in evidence. Oral testimony was given by Col. Scott and by his Mexican attorney, Arturo Martinez. Winifred did not appear personally at the trial. Upon findings of fact and conclusions of law favorable to respondent, the trial court rendered judgment declaring as follows:

"A. That the Judgment of Divorce between John W. Scott, the plaintiff, and Winifred C. Scott, the defendant, dated March 17, 1956, in the State of Chihuahua, Republic of Mexico, is a valid and subsisting divorce. B. That Winifred C. Scott is not the wife of John W. Scott, and that the defendant Elli Scott is the wife of John W. Scott. C. That there is the relation, the rights and duties of husband and wife as between the plaintiff, John W. Scott, and the defendant Elli Scott."

[1] We have concluded that appellant's attack upon the jurisdictional basis of the Mexican decree must be sustained. Appellant's position is supported by the well settled rule "that jurisdiction to grant a divorce rests upon bona fide domicil." *Crouch v. Crouch*, 28 Cal.2d 243, 249, 169 P.2d 897, 900; *DeYoung v. DeYoung*, 27 Cal.2d 521, 165 P.2d 457; *Williams v. State of North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279; *Williams v. State of North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577. "It has been invariably held that a foreign divorce decree procured on

simulated residence has no force or effect in this state." Union Bank & Trust Co. v. Gordon, 116 Cal.App.2d 681, 686, 254 P.2d 644, 647.

Respondent's own testimony clearly and conclusively demonstrates that he was not domiciled in the state of Chihuahua, Mexico, at the time he sought and obtained the decree of divorce here in question. The substance of his testimony may be summarized as follows: That he was a registered voter in Wyoming and intended to continue as such; that he maintained residences in California, in Switzerland and in the state of Jalisco, Mexico; that he had resided in Jalisco since January of 1955 and attended the university there; that he intended to retain his citizenship in the United States, both for voting and income tax purposes; that his sole purpose in going to Juarez, in the state of Chihuahua, was to obtain a divorce; that he did not intend to remain in Chihuahua any longer than necessary to obtain the divorce, but intended to return to Jalisco to continue his studies; that he actually remained in Juarez approximately two weeks; that he went to Juarez to obtain his divorce after the judge in Jalisco had declined to entertain the proceedings; that in registering as a resident of Juarez in January, 1956, he gave his lawyer's office address as his place of residence as he had done in 1952 when he secured his earlier divorce.

The following direct quotations from respondent's testimony on cross examination clearly show that he was not domiciled in the state where he obtained his divorce:

"Q. By Mr. Shirley: Now, on the date that that complaint was filed, Col. Scott, did you not then actually reside in the State of Chihuahua, did you?

A. If my information on the Mexican law is correct that you establish a residence by registering with the Municipal Presidencia that I was a legal resident of Juarez on that date. * *

"Q. In other words you didn't go to Juarez, Mexico, for the purpose of

living there, you went there to get your divorce; is that correct? A. I testified yesterday and I will testify again today that I went there on the advice of the Supreme Court Judge to go there and I went there upon his advice.

"Q. I understand that, I am merely saying that is why you went there, upon the advice of the attorney to get a divorce there; is that correct? A. That's correct.

"Q. Not for the purpose of permanently living there; is that correct? A. That's true."

Arturo Martinez, an attorney licensed to practice law in the state of Chihuahua, was called by respondent and testified that he had represented respondent in the two proceedings in which the Mexican decrees of 1952 and 1956 had been rendered; that in his opinion both decrees were valid, and that the only residence required by law of the state of Chihuahua as a basis of jurisdiction is established by the simple process of registration with a specified municipal authority. That the testimony of Mr. Martinez correctly stated the Chihuahua law is indicated by the following statement by Summers, *The Divorce Laws of Mexico*, 2 Law & Contemp. Prob. 310, 319:

"According to the Chihuahua law the court of the situs of the residence of the plaintiff has jurisdiction to try the case, this jurisdictional fact being established by proof of registration in the municipal register of the locality wherein the plaintiff alleges he has his abode. Inasmuch as this registration apparently can be made on the day of arrival it is obvious that no insuperable bar is presented to the migratory divorce seeker. Moreover, purported jurisdiction is acquired by the express or tacit consent of the parties, the statute going so far as to say that there is tacit submission when a defendant

who has been properly served does not raise the issue of jurisdiction."

The complaint in the instant case contains the following allegation: "That thereafter on March 17, 1956, this plaintiff having maintained a bona fide residence in Chihuahua, *or Jalisco*, Mexico, and did obtain a valid and subsisting divorce from the defendant Winifred C. Scott." The italicized words "or Jalisco" evidently were inserted in pen and ink at the time the complaint was verified. It is perhaps significant that this allegation of bona fide residence is made by way of recital rather than by direct averment. In any event, it is a self-nullifying allegation which in itself indicates respondent's own recognition that he could not truthfully swear to a bona fide residence in *Chihuahua*.

[2-4] That respondent did not establish the requisite domicile in Chihuahua is clear. As stated in *DeYoung v. DeYoung*, 27 Cal.2d 521, 524, 165 P.2d 457, 458: "The acquisition of a new domicile is generally understood to require an actual change of residence accompanied by the intention to remain either permanently or for an indefinite time without any fixed or certain purpose to return to the former place of abode. See cases collected in 106 A.L.R. 6, 14; 28 C.J.S. Domicile § 1; 17 Am.Jur., Divorce and Separation, § 250, Domicile, § 2; Rest., Conflict of Laws, § 12, p. 24. *Merely abiding in a place for a definite time for a transient purpose such as obtaining a divorce, unaccompanied by any intention to remain permanently or indefinitely, is not sufficient.* See 106 A.L.R. 6, 15; 9 R.C.L. 452; Rest., Conflict of Laws, § 22, p. 46." (Emphasis added.)

In *Wynne v. Wynne*, 20 Cal.App.2d 131, 66 P.2d 467, this court reversed a judgment upholding a Nevada divorce decree. In that case, as in the case at bar, the trial court found that the respondent had established a bona fide domicile in the state where the questioned divorce was granted. In the cited case, as here, the finding was conclusively impeached by the respondent's own testimony.

Indeed the challenged finding in the instant case appears to be more clearly lacking in evidentiary support than that in the *Wynne* case.

The judgment is reversed.

FOX, P. J., and ASHBURN, J., concur.



161 Cal.App.2d 718

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James THORNTON, Jr., Defendant and
Appellant.

Cr. 6106.

District Court of Appeal, Second District,
Division 1, California.

June 27, 1958.

Defendant was convicted of violating Penal Code with respect to bookmaking. The Superior Court of Los Angeles County, James G. Whyte, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Fourn, J., held that where confidential informant, who advised a police officer that wagers on horse-races were being accepted at a certain address, was neither a participant in nor a witness to crime and informant merely gave information which resulted in police investigation, and reliance on informant to establish guilt was not necessary, prosecution was not required to disgorge name of informant.

Affirmed.

I. Gaming ☞60

Affidavit, setting forth that defendant had in his possession, with intent to use as a means of committing a public offense, bookmaking, records, markers, bookmaking

paraphernalia, that police department had received information that defendant had, through an agent, placed bets, and that affiant had reasonable cause to believe and did believe that bookmaking paraphernalia was concealed in house was sufficient, under circumstances, upon which to issue a warrant for search of house. West's Ann.Pen. Code, § 337a.

2. Witnesses ⚡216

Where confidential informant, who advised a police officer that wagers on horse-races were being accepted at a certain address was neither a participant in, nor a witness to, the crime of bookmaking, and informant merely gave information which resulted in police investigation and reliance on informant to establish guilt was not necessary, prosecution was not required to disgorge name of informant in order to sustain conviction. West's Ann.Pen.Code, § 337a.

3. Gaming ⚡98(3)

Evidence sustained conviction for bookmaking. West's Ann.Pen.Code, § 337a.

Joseph T. Forno, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment wherein the defendant was convicted of violating the provisions of subdivision 1, section 337a, Penal Code (bookmaking), and from an order denying motion for a new trial.

In an information filed in Los Angeles County, the defendant was charged in four counts with violation of section 337a, Penal Code, subdivisions 1, 2, 3 and 4, respectively. The cause was submitted upon the transcript of the preliminary hearing and additional evidence introduced at the time of trial. The defendant was found guilty of the charges set forth in Count 1, and not guilty as to Counts 2, 3 and 4.

A résumé of the facts is as follows: Prior to April 2, 1957, Peter Ellena, Jr., a police officer of Pasadena, received information from a reliable confidential informant that wagers on horse races were being accepted at a residence at 269 South De Lacey Street, Pasadena. On April 2, 1957, the house was placed under surveillance and the officers observed many automobiles arriving at the house between the hours of 10:30 o'clock a. m. and 12:30 o'clock p. m. The occupants of the automobiles would enter the house and then return to their cars in three to five minutes, and then leave the area. They observed also a great deal of "foot traffic." The house was "staked out" the next day, and the officers on that day "observed the same thing."

On April 4, 1957, the officers secured a search warrant. To secure such a warrant one of the officers set forth in an affidavit that on or about the 3rd day of April, 1957, the crime of bookmaking, a felony, was committed by Thornton, who then and there had in his possession, with the intent to use as a means of committing a public offense, bookmaking records, markers, bookmaking paraphernalia, etc.; further, that the police department had received information in regard to Thornton, and had, through an agent, placed bets with a person at the 269 South De Lacey Street location; that Thornton had a gambling past and had been known to men in the police department for several years; that there was reasonable cause to believe, and that the affiant did believe that the personal goods and property above referred to were then concealed in the house. There then followed a request for a search warrant for the recovery of said goods and property, and that the same be brought before a magistrate and disposed of according to law.

On the date the warrant was issued the officers entered the premises and found several people there with Thornton. During the time the officers were there several telephone calls were received. The calling parties would ask for "Jimmy" (and it is

admitted that the appellant in this case was known as "Jimmy"). In answering the telephone calls, the officer identified himself to the callers as "Jimmy." Five of the telephone callers hung up, but the sixth caller stated, "Bay Meadows, third, Kid Robin, two to win, this is Jimmy." One of the officers found a National Daily Reporter, dated April 4, 1957, crumpled into a tight ball and stuffed between some clothes in a closet on the first floor. Another officer found a copy of the same paper dated March 16, near a telephone extension on the second floor, and he also found a book in which was a piece of paper which was identified as a typical bookmaking record or marker. An expert stated that the National Daily Reporter was used in bookmaking activities.

Dr. Robert Heller, a dentist, was among those present in the residence when the officers entered. He was using a part of his noon lunch hour to listen to the race results over the radio, and in talking with Thornton. In answer to a question as to whether he had any business dealings with Thornton on April 4, 1957, he stated that he had "placed a bet on a horse" with Thornton. At the time of the trial he could not remember the name of the horse or the track where the race in question was being run; however, he did state that he would have remembered such on April 4, 1957, had he been asked the name of the horse and the race track on that date.

Thornton was taken into custody on April 8, 1957, pursuant to a warrant. At the police station he was asked to explain his activities, if he was a bookmaker, and an officer testified that he stated in substance, "That he accepts the wagers at his location by phone and in person. In other words, people coming to his house. He immediately destroys any evidence and phones them to Los Angeles to the bookmaker.

"He tries his best to keep the bets at least to a five to ten dollar level to make it worth the bookmaker's time in Los Angeles to make the trip over here to collect and pay off and get the money and to pay off the winners.

"The bookmaker in Los Angeles gives the defendant the money to pay off the people that have placed wagers at 269 South De Lacey. In odds, Mr. Thornton told me that the bookmaker pays off 60 to 2 for the first five, 30 to 2 for the second five; that he accepts bets from possibly 12 to 15 people and always forwards it to the same person in Los Angeles who he considers a reliable person who always pays off and is trusted."

Appellant contends that the court erred as a matter of law in upholding the validity of the search warrant, and in permitting the introduction of the evidence seized; that the court erred in refusing to require the officer to disclose the name of the informer, or the name of the agent through whom the informer allegedly placed bets with the defendant, and that the evidence is insufficient as a matter of law to sustain the judgment.

[1] A reading of the affidavit for the search warrant convinces us that under the circumstances it was sufficient upon which to issue the warrant. As succinctly stated in *Arata v. Superior Court*, 153 Cal.App. 2d 767, at pages 769-770, 315 P.2d 473, at page 475:

"We must bear in mind, of course, that the issuance of a search warrant is a judicial act. A warrant may be issued only upon 'probable cause, supported by oath or affirmation' (Const., Art. I, § 19; Pen.Code, § 1525) by a 'magistrate' (Pen.Code, § 1523) who must examine on oath the plaintiff and any witnesses he may produce and take their depositions (§ 1526) and thereupon be 'satisfied of the existence of the grounds [see § 1524] of the application, or that there is probable cause to believe their existence' (§ 1528). See *Mai v. State*, 1928, 152 Miss. 225, 119 So. 177, 178, and *Sykes v. State*, 1930, 157 Miss. 600, 128 So. 753, 754; issuance of search warrant is an adjudication that probable cause exists for the search.

"The only review of such a judicial act that is specifically provided by law is the

review sanctioned by sections 1539 and 1540 of the Penal Code. 'If the grounds on which the warrant was issued be controverted, he [the magistrate who issued the search warrant] must proceed to take testimony * * *' (§ 1539.) 'If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate [he who issued the warrant] must cause it to be restored to the person from whom it was taken.' (§ 1540.)

"When, as in this case, the defendants fail to pursue this remedy, they should be and, under the circumstances of this case, are precluded from controverting the facts stated in the affidavit upon which the search warrant was based. (Citing cases.) Additionally persuasive of this view is the majority rule that 'apart from governing statutory provisions * * * one against whom a search warrant is directed may not dispute the matters alleged in the verified complaint supporting the warrant.' 5 A.L.R.2d 396. See authorities collected at pages 396-405 of 5 A.L.R.2d, and in 1948-1957 A.L.R.2d Supp.Serv. at page 270."

In the affidavit the offense was specified, the perpetrator thereof was named, the date was set forth, the property used in the crime was described and the other grounds for the search were stated. The magistrate was satisfied of the existence of the grounds for the application, or that there was probable cause to believe their existence. See, *People v. Acosta*, 142 Cal. App.2d 59, 298 P.2d 29.

[2] A thorough reading of the reporter's transcript leads us to the conclusion that the confidential informant in this matter was neither a participant in, nor a witness to, the crimes with which the appellant was charged. The informant gave information to the police, which resulted in their investigation, and the later securing of the search warrant. The court did not have

to rely upon the informant to establish Thornton's guilt. Under such circumstances the prosecution is not required to disgorge the name of the informant (*People v. Gonzales*, 141 Cal.App.2d 604, 607, 297 P.2d 50; *People v. Wasco*, 153 Cal.App.2d 485, 488, 314 P.2d 558; *People v. Moore*, 154 Cal.App.2d 43, 46, 315 P.2d 357; *People v. Salcido*, 154 Cal.App.2d 520, 522, 316 P.2d 639.)

[3] As to the assertion that the evidence was inadequate to support the judgment, we have heretofore set forth enough of the uncontradicted evidence to show that there is no merit to such contention.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.



162 Cal.App.2d 33

Homer M. COMBS, Plaintiff and Respondent,

v.

Hazel May COMBS, Defendant and Appellant.

Civ. 9393.

**District Court of Appeal, Third District,
California.**

July 7, 1958.

Divorce proceeding wherein the Superior Court, Merced County, R. R. Sischo, J., entered interlocutory decree awarding custody of child to husband, and wife appealed. The District Court of Appeal, Warne, J. pro tem., held that evidence was sufficient to sustain finding awarding custody to husband.

Judgment affirmed.

1. Divorce $\S$ 296, 312.6(5)

In determining who should have custody of minor children of parties to divorce action, a very broad discretion is vested in the trial court, which will not be interfered with except where there is a clear abuse.

2. Infants $\S$ 19

Controlling and paramount consideration in directing its custody is the welfare of the child.

3. Divorce $\S$ 301

In custody proceeding between divorced parents, evidence was sufficient to sustain finding awarding custody to husband.

Robert D. Carter, Modesto, for appellant.

Mayes & Courtney, Merced, for respondent.

WARNE, Justice pro tem.

This is an appeal from that part of an interlocutory decree of divorce awarding custody of the five-year-old son of the parties to the respondent.

Appellant contends that the evidence shows that the appellant was in a better position to care for the child than was the respondent, and that the award of the custody of the minor child to the respondent was an abuse of judicial discretion.

[1] "It is the settled rule that, in determining who should have custody of the minor children of the parties to divorce actions, a very broad discretion is vested in the trial court. It is only when a clear case of abuse of said discretion is made out that this court will interfere with the determination of the trial court on appeal." *Prouty v. Prouty*, 16 Cal.2d 190, 191, 105 P.2d 295, 296. See, also, *Taber v. Taber*, 209 Cal. 755, 290 P. 36; *Simmons v. Simmons*, 22 Cal.App. 448, 134 P. 791; *Lefebvre, v. Lefebvre*, 48 Cal.App. 483, 192 P. 76.

In the instant case the trial court in its memorandum of opinion stated: "The court believes that the wife is to some extent emotionally unstable and the court believes that it is for the best interest of the minor child that the custody be awarded to the father * * *" And in its findings it found, among other things, that it was for the best interest of the minor child that respondent have the custody of said minor child; that the defendant was an unfit person to have the custody of the child in that she was extremely nervous and for sometime had been treated for said nervousness, and that she had mistreated the child.

[2] The controlling and paramount consideration in directing its custody is the welfare of the child, and this the trial court has decided from all the evidence in the case. *Lefebvre v. Lefebvre*, supra.

[3] Viewing the record in the light of the above rules of law, we feel that there is substantial evidence to sustain the order found in the interlocutory decree of divorce, awarding custody of the minor child of the parties to the respondent, and that the order must be affirmed.

The evidence, although conflicting, is that for a period of four or five years prior to the trial appellant had continuously quarreled and bickered with the child; that she had continuously over-corrected and punished him; that on one occasion when she lost her temper she whipped him, leaving blue marks across the small of his back; that she would slap the boy in the face without provocation; that she had attempted suicide; that she was nervous and emotional. These were issues of fact to be determined by the trial judge and are ample to support the court's findings.

Notwithstanding, we feel that it is due to the appellant to say that she made a showing that her nervous and emotional condition was due to the marriage relationship with respondent; that since their separation she had been cured of her nervousness and that she had not been unduly

severe with the child. However, this conflicting evidence was for the determination of the trial judge, and whatever might be our judgment of its weight it cannot be substituted for his.

The judgment is affirmed.

VAN DYKE, P. J., concurs.



161 Cal.App.2d 698

Bernice LUNDIN, Plaintiff and Respondent,

v.

HALLMARK PRODUCTIONS, Inc., a corporation, Defendant and Appellant.

Civ. 22785.

District Court of Appeal, Second District,
Division 1, California.

June 27, 1958.

Action for a declaration of rights with respect to an agreement for sale of a motion picture. From a judgment for the plaintiff in the Superior Court of Los Angeles County, Joseph L. Call, J., the defendant appeals. The District Court of Appeal, Fourth, J., held that the agreement was properly interpreted as an agreement of sale and purchase and that parol evidence was not admissible to resolve an alleged ambiguity.

Judgment affirmed.

1. Contracts ⇨29

Whether a contract is, in any of its terms, ambiguous or uncertain is a matter of determination, in the first instance, by the trial court.

2. Appeal and Error ⇨1008(3)

The appellate court is not bound by the trial court's determination whether a contract is in any of its terms ambiguous or uncertain, where such a determination has

been made without resort to extrinsic evidence.

3. Appeal and Error ⇨1008(3)

Where no extrinsic evidence has been introduced, interpretation placed upon contract by the trial court will be accepted by the appellate court if such interpretation is reasonable or if the interpretation of the trial court is one of two or more reasonable constructions of the instrument.

4. Evidence ⇨448

The parol evidence rule does not apply to every situation where there may seem to be an ambiguity. West's Ann.Code Civ. Proc. § 1856.

5. Evidence ⇨450(8)

Where sellers warranted that they were owners and had rights to sell a film and agreed upon payment of an amount that they would deliver the material to the buyers and provided that the purchase of the picture would be "finalized" by certain date, or if the sale was not completed by that date, the buyers would pay to the seller, the agreement was not uncertain because of the use of the word "option" so as to permit the introduction of extrinsic evidence. West's Ann.Code Civ.Proc. § 1856; West's Ann. Civ.Code, §§ 1635-1662.

6. Evidence ⇨215(3)

Under an agreement for the sale of a film, a letter not between the same parties and involving different subject matter was not admissible as evidence of an agreement made contemporaneously with the sales agreement and on ground that it would show an admission against interest. West's Ann. Civ.Code, § 1642.

7. Evidence ⇨451

Even if there was some ambiguity in an agreement for the sale of a motion picture film, where it was a patent ambiguity and not a latent one, it could not be explained by parol evidence.

8. Evidence ⇨450(8)

In action by buyer based on an agreement for sale of a motion picture, where the defendant's pleadings did not raise a question of any ambiguity in the agree-

ment, evidence relating thereto was properly excluded.

9. Sales

Where sellers warranted that they were owners and had a present right to sell a motion picture film and agreed upon payment of an amount to deliver the material to the buyers, the agreement was properly construed as one of purchase and sale and not an option.

Jerome D. Savenick, Los Angeles, for appellant.

Max Fink, Cyrus Levinthal, Emmet G. Lavery, Jr., Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from a judgment wherein the court determined that the plaintiff was entitled to a declaration of rights sought by the complaint, and a money judgment in the sum of \$3,500 together with interest and costs.

The plaintiff's action was stated in one count and prayed for declaratory relief to determine that the sum of \$3,500 was due on July 22, 1953, and that the plaintiff was entitled to have judgment for such amount. The complaint set forth that the plaintiff was the assignee of the claim against the defendant, that on April 21, 1953, an agreement had been entered into as follows:

"Hollywood, California
April 21st, 1953

"Mr. Kroger Babb, President

"Hallmark Productions, Inc.

"9100 Sunset Boulevard

"Hollywood 46, California

"Dear Mr. Babb:

"The undersigned do hereby warrant and represent that they are the sole general partners in a limited partnership known by the firm name Larry Lansburgh Productions and that as such general partners they do have the

authority to sell a certain feature-length film, tentatively entitled 'Mystery Lake'.

"We will accept your offer of \$72,500.00 in cash for world wide negative rights and complete ownership of said picture, and upon the payment of same, deliver to you the complete, finished 35 mm color (an Ansco composite), the original 16 mm negative, dubbed sound track, all individual voice, music and sound-effects tracks, etc., all dubbing units, all out-takes, except those which under contract we must return to Karl Maslowski, all still negatives, all prints thereof, all trailer negatives and tracks in their present incomplete form which we own, the answer print and a satisfactory bill of sale.

"It is our mutual understanding, attested by our signatures hereto, that your purchase of this picture will be finalized by July 22nd, 1953 or that if the sale is not complete by that date you will pay to us on July 22nd, 1953 \$3,500.00 which will entitle you to a sixty (60) day extension of this option to purchase.

"We further agree to deliver to you immediately after the completion of this sale the only other 35 mm color print of this picture in existence, at the price of \$600.00, and to warrant and guarantee that no other prints have been made or do exist.

"This agreement will run for the benefit of your transferees or assignees, whether individual or corporate.

"Very truly yours,

"Larry Lansburgh Productions

"by /s/ Larry Lansburgh
Larry Lansburgh

"/s/ Ralph Lazarus

"Ralph Lazarus

Accepted and Agreed to
"Hallmark Productions, Inc.
by Kroger Babb /s/
Kroger Babb, President"

It was then set forth in the complaint that a dispute had arisen between the parties; that the plaintiff contended that \$3,500 became due to plaintiff's assignor on July 22, 1953; that defendant contended that nothing was due plaintiff, and it was not required to pay any sum under the agreement. The court found on all issues for the plaintiff, and judgment was entered accordingly.

Appellant contends that the court erred in its construction of the agreement; that the court erred in excluding extrinsic evidence with reference to a letter from the plaintiff's assignor to the defendant, written on April 21, 1953, and all testimony of the defendant and other witnesses as an aid to construing the agreement, and that the trial court erred in failing to render judgment for the defendant upon the evidence and the pleadings.

The trial court by its judgment, in substance, interpreted the document as an agreement of sale and purchase upon the part of the respective parties; that Larry Lansburgh Productions agreed to sell and deliver to the defendant, the subject motion picture on July 22, 1953, in exchange for the payment of \$72,500 on that day by the defendant; that if the purchase of the picture was not finalized or completed by July 22, 1953, then and in such event, the defendant was to pay Larry Lansburgh Productions the sum of \$3,500, in order to secure a sixty-day extension of its obligation to pay the total sum of \$72,500.

[1,2] Whether a contract is, in any of its terms or provisions, ambiguous or uncertain is a matter of determination, in the first instance, by the trial court. This court is not bound by the trial court's determination where such determination has been made without resort to extrinsic evidence. *Stevenson v. County of San Diego*, 26 Cal.2d 842, 161 P.2d 553; *Meyer v. State Board of Equalization*, 42 Cal.2d 376, 267 P.2d 257; *Rutherford, Inc. v. Rouse*, 120 Cal.App.2d 129, 260 P.2d 808; *In re Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825.

[3] However, it is also the rule that where no extrinsic evidence has been introduced, the interpretation placed upon the contract by the trial court will be accepted by this court if such interpretation is reasonable, or if the interpretation of the trial court is one of two or more reasonable constructions of the instrument. *Adams v. Petroleum Midway Co., Ltd.*, 205 Cal. 221, 270 P. 668; *McNeny v. Touchstone*, 7 Cal.2d 429, 60 P.2d 986; *Kautz v. Zurich Gen. A. & L. Ins. Co.*, 212 Cal. 576, 300 P. 34; *City of Manhattan Beach v. Cortelyou*, 10 Cal.2d 653, 76 P.2d 483; *Teater v. Good Hope Dev. Corp.*, 14 Cal.2d 196, 210, 93 P.2d 112; *In re Estate of Northcutt*, 16 Cal.2d 683, 107 P.2d 607.

We believe the interpretation placed upon the instrument by the trial court is a reasonable one.

[4,5] Appellant asserts that because of the use of the word "option" in the third paragraph of the contract, the agreement is uncertain and ambiguous, and therefore the court should have permitted the introduction of extrinsic evidence. The parol evidence rule (Code Civ.Proc. sec. 1856) however does not apply to every situation where there may seem to be some ambiguity. The rule is well set forth in *Palma v. Leslie*, 6 Cal.App.2d 702, at pages 706-707, 45 P.2d 391, at page 393: "Merely because a contract may appear ambiguous by reason of loose phrasing, or mutually repugnant provisions, manifestly does not in every instance justify a resort to parol evidence. If the rule were otherwise, endless confusion would result. As pointed out in an early case by Justice Story, wherein he was attempting the delicate task of differentiating between patent and latent ambiguities—'if the language be too doubtful for any settled construction, by the admission of parol evidence you create, and do not construe, the contract. You attempt to do that for the party which he has not chosen to do for himself; and the law very properly denies such an authority to courts of justice.' 4 Jones' Commentaries on Evidence (2d Ed.) p. 2828. Or, as stated by

the late Justice Henshaw, in *United Iron Works v. Outer H[arbor,] etc., Co.*, 168 Cal. 81, 85, 141 P. 917, 920: "The rule is well settled that where the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous, or subsequent conversations, representations or statements will not be received for the purpose of adding to or varying the written instrument." See, also section 1625, Civ.Code; citing cases. It is rudimentary, of course, that when seeming uncertainties can be removed from a contract by the application of statutory or other established rules of interpretation, the instrument, in law, is not ambiguous."

The trial court in this case applied the rules of construction as provided in the Civil Code, secs. 1635-1662, by first ascertaining the intentions of the parties from the written instrument itself. No single word was relied upon as being controlling, but rather the court considered the whole, that is, each clause as it interpreted the others.

It was apparent and appeared reasonable to the trial court that the general intent of the agreement was one of purchase and sale, and not of an option, and such interpretation appears to us as being at least one of the reasonable constructions which can be placed upon the writing. The sellers first warrant that they are the owners and have the present right to sell the film; the sellers then agree that upon payment of the \$72,500 they will deliver the material to the buyers; the language is not that the sellers will accept the offer of an option, but the acceptance of an offer of \$72,500 in cash for the rights and ownership. Next the sellers state "your purchase of this picture will be finalized by * * * or * * * if the sale is not completed by that date you will pay to

us." In our opinion, had an option been intended, such language as above set forth would not have been used.

[6] At the trial the appellant offered in evidence a letter dated April 21, 1953, from Larry Lansburgh to the defendant. Defendant's counsel represented that it was evidence of an agreement made contemporaneously with the basic agreement, and that it would show an admission against interest. An objection was made and sustained to the introduction of such letter upon the ground that it would have a tendency to, or would attempt to vary the terms of the basic agreement. Counsel for the defendant then stated that it would explain various portions of the contract. The proffered evidence, in our opinion, did not come within the provisions of section 1642, Civil Code, for the reasons, among others, that the letter was not between the same parties, and that the subject matter is different.

[7] Even assuming that there is some ambiguity in the agreement, it would appear that it is a patent ambiguity and not a latent one, and therefore, under the circumstances, cannot be explained by parol evidence. See, *Mesick v. Sunderland*, 6 Cal. 297; *Poorman v. Mills & Co.*, 39 Cal. 345; *Brannan v. Mesick*, 10 Cal. 95; *People v. San Francisco Savings Union*, 31 Cal. 132; *Brandon v. Leddy*, 67 Cal. 43, 7 P. 33; *Cadwalader v. Nash*, 73 Cal. 43, 14 P. 385; *Hall v. Bartlett*, 158 Cal. 638, 112 P. 176.

[8] Furthermore, the defendant's pleadings do not raise the question of any ambiguity. See *Hotchkiss v. Nelson R. Thomas Agency, Inc.*, 96 Cal.App.2d 154, 214 P.2d 568.

[9] Appellant further contends that the agreement being an option, and not a contract of purchase and sale, the provision for the \$3,500 payment was a penalty and therefore void. If it was an option, as contended by the appellant, there might

well be some merit to the contention, but the trial court held, and we think properly so, that it was not an option, and we therefore are of the opinion that under the circumstances, the language in *White v. City of San Diego*, 126 Cal.App. 501, 14 P.2d 1062 is not pertinent to this case.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.



161 Cal.App.2d 712

Alice Scott BREEDLOVE, Plaintiff and Appellant,

v.

Brown BREEDLOVE, Defendant and Respondent.

Civ. 23068.

District Court of Appeal, Second District,
Division 1, California.

June 27, 1958.

Action for divorce wherein defendant filed a cross complaint. From a judgment of the Superior Court, Los Angeles County, Clarence E. Johns, J. pro tem., the plaintiff appealed, and defendant moved to correct the findings and judgment. The District Court of Appeal, Fourt, J., held that where trial judge in divorce action stated in affidavit in proceeding to correct the findings that he had signed the findings and judgment through inadvertence and excusable neglect, and that findings and judgment did not conform to his directions and orders, that part of judgment which awarded wife a certain sum as her interest in community property would be reversed with direction to trial court to ascertain the value

of the community property, if any, and then divide the same equally.

Motion denied, and judgment reversed.

1. Trial ⇨387(1)

Deliberations of the court are conclusively merged in the judgment, and the findings of fact and conclusions of law constitute the decision, which is the final, deliberate expression of the court.

2. Divorce ⇨287

Where trial judge in divorce action stated in affidavit in proceeding to correct the findings that he had signed the findings and judgment through inadvertence and excusable neglect and that findings and judgment did not conform to his directions and orders, that part of judgment which awarded wife a certain sum as her interest in community property would be reversed with direction to trial court to ascertain the value of the community property, if any and then divide the same equally. West's Ann.Civ.Code, § 146, subd. 2.

3. Divorce ⇨287

Where trial judge in affidavit in proceeding to correct findings in divorce action stated that he had signed findings and judgment through inadvertence and excusable neglect, and that findings and judgment did not conform to his directions and orders, respondent's motion on appeal to correct the findings and judgment to conform with what the trial judge ordered would be denied.

Robert W. Zakon, Los Angeles, for appellant.

Paul C. Hill, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from that portion of a judgment which awarded the plaintiff \$150 as her interest in the community property of the parties.

The plaintiff and defendant were married in June, 1948, and separated January

25, 1950. On June 29, 1955, the defendant and one described in the deed as Lennie M. Breedlove acquired an interest in certain real property as joint tenants. Subsequently, defendant obtained what purported to be a decree of divorce from plaintiff in Mexico on January 25, 1956, and on February 22, 1956, the defendant went through a marriage ceremony with Lennie Saunders. On March 6, 1957, the plaintiff filed her action in divorce, charging the defendant with wilful desertion. In this complaint she alleged that there was no community property of the parties. Defendant filed his answer to the complaint on March 14, 1957, in which he admitted the marriage and denied that he had deserted the plaintiff; further, he set forth that he had secured a Mexican divorce from plaintiff on January 25, 1956. On the same date, defendant filed a cross-complaint for an annulment, or in the alternative, a cause of action for divorce wherein he charged her with desertion. He alleged that there was no community property.

At the time of the trial it was stipulated that the husband's cause of action with reference to the annulment could be, and was stricken, and further that the wife could file an amended complaint in which it was alleged that there was some community property consisting of a 1954 Plymouth automobile and the real property situated at 119 West 113th Street, Los Angeles, California. The amended complaint contained a notation, written below the verification, "Amendment consented to Paul C. Hill," and "Amendment need not be answered H. L. Richardson." The prayer of the amended complaint requested (1) a divorce, (2) payment of the wife's attorney's fees, (3) her share of the community property and (4) costs of suit. No alimony was sought.

The court, according to the reporter's transcript, stated at the conclusion of the hearing:

"The Court: An interlocutory judgment of divorce will be granted to the Plaintiff in the action. There will be a judgment for the cross-defendant on the cross-complaint

and the answer to the cross-complaint without costs. *It will be found that the community property consists of equity in one 1954 Plymouth automobile, which is awarded to the defendant as his sole and separate property, and by way of further property division herein, and in lieu of all alimony the defendant is ordered to pay to the plaintiff \$150, payable \$15 a month, the first payment to be made on November 1, 1957.*

"Now, since there is no further award of attorneys fees, and I know Mr. Richardson is going to feel imposed upon if we require him to draw findings of fact, although I don't think we would be safe without drawing findings of fact showing *the real estate is not community property.*

"* * * Counsel for the plaintiff can draw findings of fact and conclusions of law, and also the interlocutory decree, and *submit them to counsel for defendant for written approval.* I suggest you two gentlemen consult with the title company for the purpose of clearing up the title so it will be unnecessary to bring an action to quiet title. They may require your client to execute a quit claim deed." (Emphasis ours.)

In June, 1955, while the defendant was still married to the plaintiff, the defendant became an owner as a joint tenant of the real property described in the amended complaint, and in January of 1957, became the owner of a Plymouth automobile.

Findings were prepared by counsel for the wife and signed by the judge wherein it was set forth that all of the allegations of the plaintiff's amended complaint were true. It was also found, "That there was certain community property the accumulation of this marriage consisting of a interest in one (1) 1954 Plymouth automobile and the real property situated in the City of Los Angeles, State of California, and bounded and more particularly described as follows to wit: Lot 276 of Bowen's Main, Moneta and Figueroa Tract as per Map recorded in Book 11, Page 85 of Maps, in the office of the County Recorder of Los Angeles County.

* * * * *

"The court finds that the interest of the plaintiff in and to the community property of the parties hereinabove described is of the value of \$150 dollars and it is hereby ordered that the sum of \$150 dollars be paid to the plaintiff as and for her interest in said property in equal installments of \$15 dollars per month, commencing on the 1st day of November, 1957."

The findings were prepared by plaintiff's counsel in obvious disregard and contrary to the instructions given by the judge from the bench at the conclusion of the hearing. However, the form of the findings was submitted to the attorney for the husband, and under the word "Approved" at the end of the findings, he executed his signature "Paul C. Hill as attorney for the defendant and cross-complainant."

A form of interlocutory judgment of divorce was prepared by counsel for the wife and signed by the judge wherein it was set forth:

"It Is Further Ordered, Adjudged and Decreed, that *defendant and cross-complainant be and is hereby awarded the community property real and personal of the parties hereto, as his sole and separate property* consisting of one 1954 Plymouth automobile and the real property located in Los Angeles, California and more particularly described as:

"Lot 276 of Bowen's Main, Moneta and Figueroa Tract as per map recorded in Book 11, Page 85, of Maps, in the office of the County Recorder of Los Angeles County.

"It Is Further Ordered Adjudged and Decreed, that defendant and cross-complainant pay to plaintiff and cross-defendant the sum of \$150 dollars as and for her interest in the real property of the parties hereto, payable in installments of \$15 dollars per month, commencing November 1, 1957, and continuing until the sum of \$150 has been paid." (Emphasis ours.)

The form of the judgment was submitted to the attorney for the husband, and under the word "Approved" he affixed his sig-

nature, "Paul C. Hill as attorney for the defendant."

The plaintiff now appeals from "that portion of the judgment awarding the plaintiff the sum of \$150 as her interest in the community property."

The judge made no order to the plaintiff's attorney to prepare findings which would set forth that the interest in the real estate was community property. In fact, the court stated in effect the opposite, namely, "I don't think we would be safe without drawing findings of fact showing *the real estate is not community property.*" Counsel for the husband prepared findings setting forth that the real estate was the community property of the parties. Further, the court made no direction that there should be a finding that the real estate should be awarded to the defendant as his sole and separate property.

The interlocutory judgment was drawn in a form not in accordance with the directions of the judge.

Appellant now contends that the court had no discretion in determining the amount of community property to be awarded each party because the divorce was obtained upon the grounds of desertion. Subdivision 2, section 146 of the Civil Code provides as follows:

"Two. * * * If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property shall be equally divided between the parties." See *Tipton v. Tipton*, 209 Cal. 443, 288 P. 65.

Appellant also contends that the court erred in allowing a sum of money in lieu of the community interest in the property without finding the value of the real estate and the automobile. This, in spite of the statement of the judge from the bench that the real estate was not community property. See, *Villafuerte v. Villafuerte*, 125 Cal.App.2d 466, 270 P.2d 526; *Bailey v. Bailey*, 60 Cal.App.2d 291, 140 P.2d 693.

[1] We are not unmindful of the rule to the effect that "(t)he deliberations of the

court are conclusively merged in the judgment. The findings of fact and conclusions of law constitute the decision which is the final, deliberate expression of the court. To hold that oral or written opinions or expressions of judges of trial courts may be resorted to to overturn judgments would be opening the door to mischievous and vexatious practices. Neither a juror nor a judge is permitted to impeach his verdict or judgment." *De Cou v. Howell*, 190 Cal. 741, 751, 214 P. 444, 448.

In *Neblett v. Superior Court*, 86 Cal.App. 2d 64, 66, 194 P.2d 22, 23, the court said: "(1) A minute order directing that findings and judgment be drawn does not constitute the decision of the court and is entirely immaterial. *Canadian [& American Mortgage & Trust] Co. v. Clarita [Land & Investment] Co.*, 140 Cal. 672, 677, 74 P. 301.)

"(2) Findings of fact and conclusions of law signed by the trial judge constitute the court's decision and such decision supercedes any prior minute order directed to be entered by the trial court. (*McConville v. Superior Court*, 78 Cal.App. 203, 208, 248 P. 553; *Fuhrman v. Superior Court*, 2 Cal. 2d 250, 253, 39 P.2d 802.)"

[2] This particular case presents a different situation, however, from the ordinary case where the problem has arisen. In this case the trial judge set forth in an affidavit in a proceeding to correct the findings that he had signed the findings and the judgment through inadvertence and excusable neglect and that the findings and judgment did not conform to his directions and orders.

We see no ready way to dispose of this case other than to reverse the judgment as to that part which awards the wife the sum of \$150 as her interest in the community property, and to direct the trial court to ascertain and determine the value of the community property, if any, and then divide the same equally. If it develops that the trial court finds, as apparently the judge in the original proceeding intended to and originally in effect did find, that the community property interest of the husband in the real

property is nil, then this proceeding will indeed have been an expensive one.

[3] Respondent herein has made a motion to correct the findings and judgment of the trial court to conform with what the trial judge ordered. From what has been set forth heretofore in this opinion, the motion should be denied.

Motion denied.

That part of the judgment directing the payment of \$150 to plaintiff as her interest in the community property is reversed.

WHITE, P. J., and LILLIE, J., concur.



161 Cal.App.2d 704

Matter of the ESTATE of John CONWAY,
Deceased.

Henry I. DOCKWEILER, as Administrator
of the Estate of William Burke, Deceased,
a deceased devisee, Appellant,

v.

The SALVATION ARMY and Goodwill In-
dustries of Southern California, Con-
testants and Respondents.

Civ. 22961.

District Court of Appeal, Second District,
Division 1, California.

June 27, 1958.

Rehearing denied July 22, 1958.

Hearing Denied Aug. 21, 1958.

Proceedings in the matter of a decedent's estate. From an order and decree of the Superior Court of Los Angeles County, Harold W. Schweitzer, J., an appeal was taken. The District Court of Appeal, Fourth, J., held that where decedent owned only a portion of "lot 19" and there were certain improvements on land consisting of that portion of lot 19 together with portions of lots 17 and 18 owned by decedent, will clause devising "lot 19 and

all their on" was ambiguous and subject to interpretation by extrinsic evidence.

Judgment reversed and matter remanded with directions.

1. Wills ⚡487(1)

Where 78-year-old testator "without an excess of education" was very precise in supplying information as to approximate balances in his various bank accounts together with means of ascertaining where funds were on deposit, and he set forth addresses of his beneficiaries and designated whom he desired to have in charge of his interment in grave for which he had made prior arrangements, every effort would have to be made to determine his intention and to give it effect, with aid of such extrinsic evidence as was available.

2. Wills ⚡490

Where decedent owned only a portion of "lot 19" and there were certain improvements on land consisting of that portion of lot 19 together with portions of lots 17 and 18 owned by decedent, will clause devising "lot 19 and all their on" was ambiguous and subject to interpretation by extrinsic evidence.

Dockweiler & Dockweiler, Los Angeles, for appellant.

Meserve, Mumper & Hughes, Robert A. Stewart, Jr., Cromwell Warner, Jr., Los Angeles, Snyder, O'Neil & Hancock, South Pasadena, for respondents.

FOURT, Justice.

This is an appeal from a decree of the probate court determining the persons entitled to distribution of certain real property in the Estate of John Conway, Deceased.

The decedent, John Conway, died at the age of seventy-eight years on June 11, 1952, leaving a holographic will executed approximately two weeks prior to his death. Said holographic will was admitted to probate, and its provisions are set forth in their entirety, as follows:

"May 28th-1952

"I will my lot 16 on Spence St. L.A. to Annie Burke Connors and all their on, 581 East 140 st Bronx New York

to William Burke Bronx New York, I will lot 19 and all their on.

"Too Margaret Burke Ellicott Bronx New York,

I will \$1000-00

I will 1000-00 to Kathlen Smith

80 Alghney st Buffalo N. York,

To Resurrection School opal & Lorena

\$1000-00, To Resurrection Church I will 1000-00 for masses for myself

"to Mark K. Conway sister in law

I will nothing for her aful treatment

of my brother in his last illness,

Got in security first nat bank \$7600-00

Bank america Whtt & Spence 9000.00

at Lincoln Mortgage & Loan 6 & Spring 8300-00,

what ever money is left after all

Expenses are Pd to bee given

to Salvation Army & Good will eaquely.

"To be interred by Cunningham &

O'Connor

In Calvary Cemitary Grave No. 6 Sex F No. 1628

In Conway Kelly plott with marker

"I was born April 3-1874

"John Conway

918 Spence L.A."

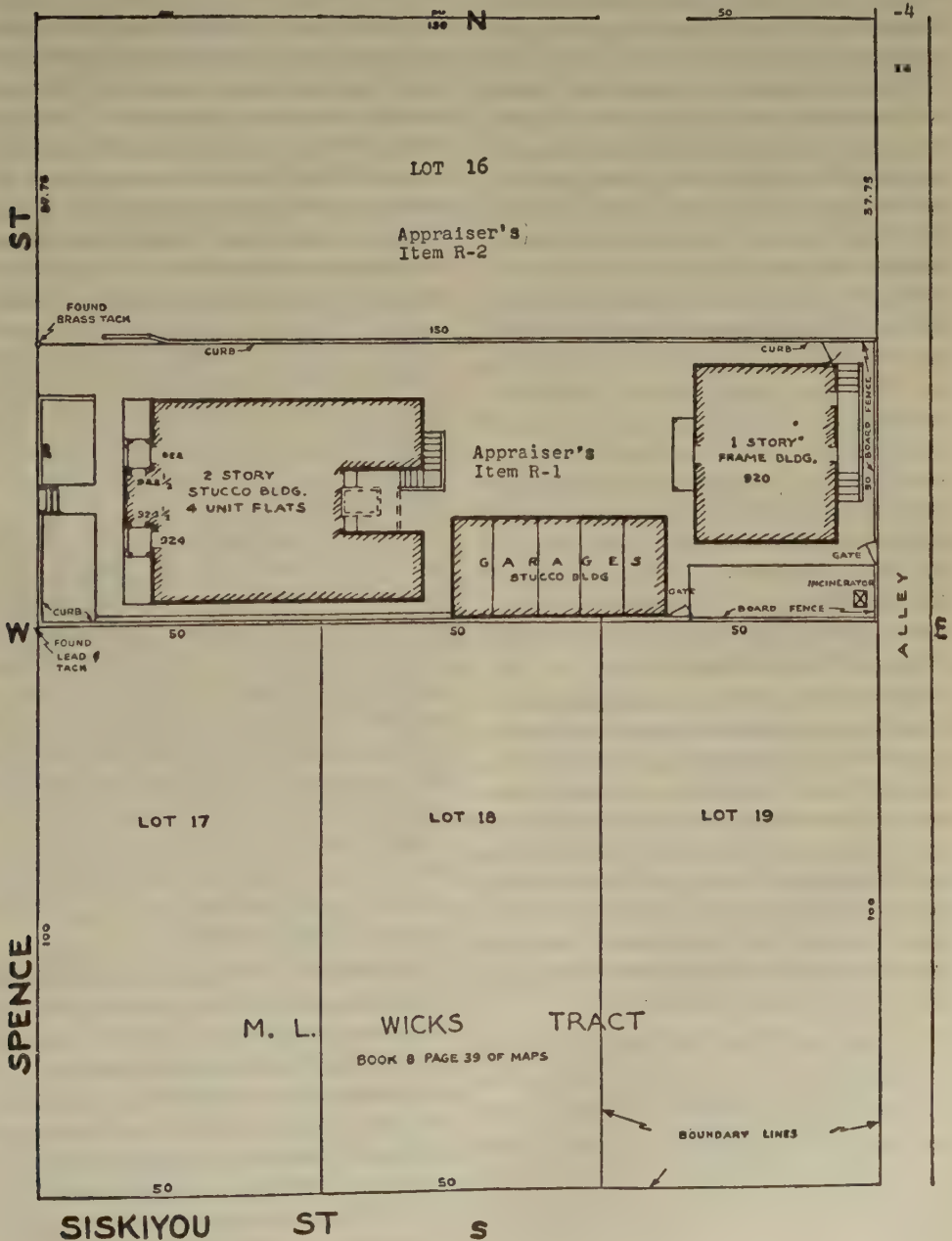
The decedent's estate was appraised at a value in excess of \$85,000, and included, among other assets, Lot 16, which was improved with a four-family flat and dwelling known as 914-918 South Spence Street, Los Angeles, which parcel was referred to in the estate inventory as Item R-2 and was appraised at \$30,000; and an adjoining parcel referred to in the estate inventory as Item R-1 and appraised at \$30,000, which parcel was similarly improved with a four-family flat and dwelling known as 922-922½ South Spence Street, Los Angeles, and was comprised of Lots 17, 18 and 19 of the M. L. Wicks Tract, except the southerly 100 feet thereof, or a total area approximately 50 feet by 150 feet.

The diagram herewith shows among other things, the dimensions and location of the

Cite as 327 P.2d 173

parcels and buildings, and their relation to each other, the extension of the boundary lines of Lots 17, 18 and 19 as they traverse across the property upon which the buildings were constructed. Further it shows the location of the board fence across the east end of the property adjoining the alley, and the general scheme, plan or layout of the property in question.

The Public Administrator, among other things, proposed distribution of said Item R-1 in its entirety to the heirs or devisees of William Burke. The charities Salvation Army and Goodwill Industries of Southern California contended that devisee Burke was entitled only to the 50 foot rear or easterly portion of Item R-1 adjacent to the alley, which was that portion of Lot 19 which



belonged to the decedent at the time of his death. The said charities further contended that the devisee Burke was not entitled to the parts of Lots 17 and 18, consisting of the 100 foot x 50 foot front portion of Item R-1 facing Spence Street, which area they contended belonged to the said charities.

At the hearing, various documents were offered into evidence by appellant, which documents included a map substantially the same as the diagram herewith, prepared by a licensed surveyor showing the lay-out of the property in question, with improvements; a title company plat of the tract wherein the property is located, showing lot lines, sizes, etc.; Los Angeles County tax bills; a copy of the deed by which decedent acquired the portions of Lots 17, 18 and 19 from another estate; a copy of the court order confirming the sale to him; copies of two quit claim deeds clarifying his title; five photos showing the physical condition of the property in question; and decedent's will dated September 5, 1951. In each instance, objection was made to the introduction of such evidence and the objection was sustained by the trial court on the basis that there was no ambiguity in the will relating to the disposition of the real property, and accordingly, extrinsic evidence was not admissible.

The trial court then determined that the terminology in the will "what ever money is left" was ambiguous, and permitted the introduction of extrinsic evidence to explain it, determined that the language used was appropriate to a residuary clause of his entire wealth and estate, and found that the decedent intended to and did dispose of the entire residue of his estate to the said charities, which residue included the northerly 50 feet of Lots 17 and 18.

It is contended on appeal that the clause devising Lot 19 was, in the circumstances, ambiguous and subject to interpretation by extrinsic evidence showing it was meant to and did pass decedent's interest in Lots 17, 18 and 19; or, if the clause devising Lot 19 did not pass decedent's interests in

Lots 17 and 18, he died intestate as to this property.

The propriety of admitting oral testimony to prove the facts and circumstances as to family relations in a petition to determine heirship was the question involved in *In re Estate of Boyd*, 148 Cal.App.2d 821, 307 P.2d 754, 756. The holographic will which disposed of an estate appraised at a sum in excess of \$62,000, was described by the late Presiding Justice Moore (148 Cal.App.2d at page 824, 307 P.2d at page 757) to have been "authored by a testatrix of 81 years without an excess of education". The court stated (148 Cal.App.2d at page 826, 307 P.2d at page 757), "It is fundamental that a will must be construed as intended by its author. (Citing authorities.) Neither a lack of rhetorical flourish nor the failure to observe grammatical rules will govern its interpretation." The court was even more explicit in its comments (148 Cal.App.2d at pages 824-825, 307 P.2d at page 756) in stating, "It is not required that in writing her own will she must be held to the strict use of technical terms and if she had used them her use would not be binding. *In re Estate of Olsen*, 9 Cal.App.2d 374, 378, 50 P.2d 70. But in such cases, the court may investigate her intention by hearing pertinent testimony. *In re Estate of Pierce*, 32 Cal.2d 265, 274, 196 P.2d 1. When an uncertainty appears on the face of the will, it is fundamental that the testator's intent be derived not only from the will itself but also from the circumstances under which it was executed. Prob.Code § 105; *In re Estate of Pierce*, supra, 32 Cal.2d 268, 196 P.2d 1; that is to say, the court should admit evidence of circumstances preceding the execution of the document."

In making its determination as to whether there was an intent to create a trust, the Supreme Court in *In re Estate of Sargavak*, 41 Cal.2d 314, 259 P.2d 897, reviewed various rules of construction and on the admissibility of extrinsic evidence. Quoting with approval from the language used in *In re Estate of Kearns*, 36 Cal.2d 531, 537, 225 P.2d 218, the Supreme Court then (41 Cal.2d at page 319, 259 P.2d at page 900) stated

the law to be that "Section 104 must be read with section 105 of the Probate Code which provides that 'when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding * * * oral declarations' of the testator as to his intentions." The court then went on to state (41 Cal.2d at pages 319-320, 259 P.2d at page 900): "As there was an 'uncertainty' on the face of the will the trier of fact may consider such matters 'as the size of the estate, the property involved in the gift, the circumstances of the parties, and their relation to each other and to the testator.' In other words, oral declarations of the testator are not admissible but circumstances may be shown where there is an uncertainty."

More recently the Supreme Court in *In re Estate of Graham*, 49 Cal.2d 333, 316 P.2d 945, 947, was called upon to determine the meaning of "personal property" as used in a will provision leaving a named person a specific bequest of money "and any part of the personal property she may desire" and naming The Salvation Army of California as the residuary beneficiary. The court, after indicating that it was only by the introduction of extrinsic evidence that it could be determined whether a testator was acquainted with the technical sense of the words used, then stated (49 Cal.2d at page 337, 316 P.2d at page 947), "We do not believe that it can reasonably be inferred that the testatrix used the phrase 'personal property' in its technical sense so that appellant could defeat the gift to the Salvation Army should she elect to do so. Had the testatrix intended to give appellant that election she would have done so directly rather than have made it dependent on the court's concluding that she intended the ambiguous phrase 'personal property' to be taken in its technical sense even though she used it in a context that clearly indicates a contrary intention. Moreover, the testatrix left to appellant only that 'part of the personal property she may desire.' Such

language is more appropriate to a gift of personal effects, furniture and furnishings, many items of which a legatee might not want, than to a gift of valuable securities, which ordinarily a legatee would not be expected to reject."

In *Halldin v. Usher*, 49 Cal.2d 749, 321 P.2d 746, 749, after reviewing substantial parol evidence introduced relative to the effect of an instrument as a contract or as a testamentary instrument, the Supreme Court commented (49 Cal.2d at page 753, 321 P.2d at page 749), "Accordingly it would seem that the words 'whole control' in the present document are not so free from ambiguity as to prevent the court from resorting to extrinsic evidence to ascertain their meaning. That evidence clearly indicates as found by the court that it was not the intention of the parties to leave the survivor destitute and without means of support as might be the case if the construction urged by the plaintiff were adopted."

[1] In the instant case, it must be remembered that we are construing a holographic will authored by a 78-year-old testator, who could well be described in the language of the late Presiding Justice Moore as "without an excess of education". The decedent had acquired substantial property during his lifetime, and in his will he was very precise in supplying information as to the approximate balances in his various bank accounts together with the means of ascertaining where his funds were on deposit. He had made prior arrangements for his grave and designated whom he desired to have in charge of his interment, and he set forth the addresses of his beneficiaries. In view of the foregoing, we are of the opinion that every effort should be made to determine the intention of the decedent, and to give it effect with the aid of such extrinsic evidence as is available.

It is true that the word "money" can be used to include real property, but it does not necessarily have to be given this meaning. It is also true that decedent owned only a portion of "Lot 19". The Inven-

tory and Appraisement indicates that there were certain improvements on Item R-1, which was comprised of the portion of Lot 19 owned by decedent, together with the portions of Lots 17 and 18 owned by decedent.

[2] We are of the opinion that the description of "Lot 19" is not so free from ambiguity under the circumstances as to prevent the court from resorting to extrinsic evidence to ascertain its meaning. The proffered extrinsic evidence could have a substantial effect upon the meaning intended by the decedent, and in our opinion, it should have been admitted.

The judgment is reversed, and the matter is remanded for further proceedings consistent with the views herein expressed.

WHITE, P. J., and LILLIE, J., concur.



James IRIART, Plaintiff, Appellant and Respondent,

v.

SOUTHWEST FERTILIZER AND CHEMICAL COMPANY, a copartnership, et al., Defendants, Respondents and Appellants.

B. F. KNAPP and Cora B. Knapp, Plaintiffs In Intervention and Appellants,

v.

James IRIART, Southwest Fertilizer and Chemical Company, a copartnership, et al., Defendants In Intervention, Respondents and Appellants.*

Civ. 5808.

District Court of Appeal, Fourth District, California.

July 2, 1958.

Rehearing Denied July 23, 1958.

Hearing Granted Aug. 28, 1958.

Action by landlord, who was to receive 25 per cent of crop as rent and who executed waiver so tenant could obtain a crop

* Opinion vacated 332 P.2d 285.

mortgage, from ginning company, against attaching creditor to determine priority to proceeds of cotton crop, which was delivered by tenant, with landlord's consent, to ginning company, which deducted amount of its crop mortgage and held the balance. From a judgment of the Superior Court, Imperial County, Elmer W. Heald, J., awarding one fourth of proceeds held by ginning company to landlord and remainder to attaching creditor, the landlord, attaching creditor and intervening mortgage lienholders, appealed. The District Court of Appeal, Griffin, Acting P. J., held that evidence sustained finding that landlord waived his interest in proceeds derived from sale of cotton to extent necessary to permit ginning company to recover its loans and advances made to or for account of tenant for financing crop, but that landlord was entitled to one fourth of the remaining proceeds.

Judgment affirmed.

1. Attachment $\S$ 308(4)

In action by landlord, who was to receive 25 per cent of crop as rent and who executed waiver so tenant could obtain a crop mortgage from ginning company, against attaching creditor to determine priority to proceeds of cotton crop, which was delivered by tenant, with landlord's consent, to ginning company, which deducted amount of its crop mortgage and held the balance, evidence sustained finding that landlord waived his interest in proceeds derived from sale of cotton to extent necessary to permit ginning company to recover its loans and advances made to or for account of tenant for financing crop, but that landlord was entitled to one fourth of the remaining proceeds.

2. Fraudulent Conveyances $\S$ 299(1)

In action by landlord, who was to receive 25 per cent of crop as rent and who executed waiver so that tenant could obtain a crop mortgage, against attaching creditor to determine priority to proceeds of cotton which was delivered by tenant, with landlord's consent, to ginning company, which deducted amount of its crop mort-

gage and held the balance, evidence was insufficient to affirmatively show, as between tenant and landlord, that there was a fraudulent transfer of title from landlord to tenant at the gin. West's Ann.Civ.Code, § 3440.

3. Appeal and Error ⇨173(1)

Ordinarily, a defense cannot be raised for the first time on appeal.

4. Attachment ⇨308(4)

In action by landlord, who was to receive 25 per cent of crop as rent, against attaching creditor to determine priority to proceeds of cotton crop, wherein holders of mortgage lien intervened claiming priority to proceeds from sale of cotton, which was harvested and removed by tenant with consent, express or implied, of holders of mortgage lien, and which was transported to gin in tenant's name and so credited on account of gin company and was marketed and sold by ginning company in tenant's name, evidence sustained finding that holders of mortgage lien, by their conduct, accepted personal obligation of tenant in place and stead of security of crop mortgage. West's Ann.Civ.Code, § 2972.

5. Assignments ⇨137

In action by landlord, who was to receive 25 per cent of crop as rent, against attaching creditor to determine priority to proceeds from sale of cotton crop by gin company, wherein holders of mortgage lien intervened claiming a priority to the proceeds, evidence was insufficient to establish an equitable assignment by tenant to holders of mortgage lien before attachment of attaching creditor was levied.

6. Assignments ⇨134

Party claiming an equitable assignment has burden of proving such an assignment. West's Ann.Civ.Code, §§ 3019-3029.

Dickenson, Sattinger & McKee, El Centro, for appellant Iriart.

Horton, Knox & Carter, El Centro, for appellant Southwest Fertilizer and Chemical Company.

Whitelaw & Whitelaw, El Centro, for appellants Knapp.

GRIFFIN, Acting Presiding Justice.

[1] Plaintiff, appellant and respondent James Iriart, hereinafter referred to as plaintiff or owner, owned about 300 acres of land in Imperial Valley. By written lease (unrecorded) dated March 17, 1953, he leased, for one year, said acreage to one H. M. Hillhouse (lessee) for the purpose of growing cotton thereon. Lessee agreed to pay all charges of growing, harvesting and ginning and immediately upon harvesting said cotton to divide it with lessor at the gin. A 25 per cent portion thereof was to be set apart to the grower as his property as and for the yearly rental. Upon the owner's request lessee was to haul his 25 per cent to the gin, free of cost. The lease also contained a provision that the owner agreed to execute a waiver so the cotton crop could be financed by lessee up to the sum of \$30,000. It appears that Hillhouse executed a crop mortgage thereon in favor of Imperial Valley Ginning Company (hereinafter referred to as Gin) to cover advances from Gin for the growing of the cotton, and that Gin reimbursed itself for said advances as each and every bale of ginned cotton was sold, up until such time as Gin was repaid all monies advanced. Iriart consented to the execution of the crop mortgage and to this agreement, and apparently waived any claim of such proceeds to this extent. As the crops matured Iriart ordered lessee to haul his one-fourth of the cotton to the gin for him, in accordance with the leasehold agreement. The last load was hauled on February 22, 1954. Iriart also authorized the sale of his one-fourth of the cotton to be sold with the cotton belonging to lessee and that it be sold in the lessee's name and that Gin credit the returns in lessee's name on the books of Gin. After deducting Gin's advances from the gross sale price of \$61,250.52, it held \$15,412.46, and said sum stood on the books of Gin under the account of Hillhouse. It further appears that Hillhouse became and was indebted to a bank at Ma-

dera in the sum of \$12,579.50 by a note due January 15, 1954, and also \$5,500 on another note secured by a trust deed due April 3, 1954. Plaintiffs in intervention and appellants B. F. Knapp and wife Cora B. Knapp endorsed said notes as guarantors so Hillhouse could obtain the money on them. In accordance therewith he executed another crop mortgage on this cotton crop dated April 3, 1953, and recorded May 4, 1953, as security, or additional security to the Knapps, as endorsers. The trust deed for \$5,500 was foreclosed and that note was paid from that source. It likewise appears that the Knapps, about January 14, 1954, contacted Hillhouse as to the payment of the \$12,579.50 to the bank when it became due, and left with Gin a copy of their crop mortgage. The bank made demand on the Knapps for payment as guarantors about March 26, 1954.

Hillhouse was indebted to plaintiff, cross-appellant and respondent Southwest Fertilizer and Chemical Company (hereinafter referred to as Southwest) for the sum of \$12,713.04, plus interest, etc., and on February 18, 1954, Southwest filed an action against him to recover it. A writ of attachment was then issued and levied upon Gin, claiming the entire sum due Hillhouse on the books of Gin. Gin filed a return stating it was holding \$13,800 pursuant to said writ, but it had no knowledge as to whether said funds belonged to Hillhouse or Iriart. Southwest took judgment and on May 20, 1955, levied an execution on said funds in the hands of Gin. On March 29, 1954, Iriart filed his complaint against Southwest to quiet title to said funds. On July 13, 1954, Knapps filed a complaint in intervention against Iriart, Southwest, Hillhouse and Gin. Iriart and Southwest filed an answer thereto and Gin filed a disclaimer. Hillhouse made no formal appearance and default was taken against him.

Generally, the issues are the relative priority of rights existing between Iriart, the landlord, the Knapps, as crop mortgagees, and Southwest, as attaching creditor, concerning the sum of \$15,412.46 held by Gin, and the rights flowing therefrom. After

trial by the court it issued a memorandum opinion and signed findings and judgment.

Generally, the court found that Iriart, as owner and landlord, was entitled to one-fourth of that sum or \$3,853.12; that Southwest, attaching creditor, was entitled to \$11,559.34; that the Knapps were not entitled to recover, mainly because they had lost their crop mortgage lien on account of the removal of the cotton from the leased property with their consent and approval; and that they accepted the obligation of Hillhouse in the place and stead of the security of the crop mortgage. Judgment was entered accordingly. Iriart appeals from the judgment in favor of Southwest. Knapps appeal from the judgment in favor of Southwest and Iriart. Southwest cross-appeals from the portion of the judgment in favor of Iriart.

Iriart's Appeal

Iriart contends that he, as lessor, obtained title to his one-fourth of the crop of cotton when it was *delivered* to him or his agent, the ginning company, at the gin, and that he was entitled to the full value thereof (citing such authority as *Clarke and Cain v. Cobb*, 121 Cal. 595, 597, 54 P. 74; *Imperial Valley Land Co. v. Globe Grain & Milling Co.*, 187 Cal. 352, 202 P. 129; and *Silveira v. Ohm*, 33 Cal.2d 272, 275, 201 P.2d 387); that accordingly he held title to one-fourth of the cotton delivered to Gin by Hillhouse without deduction by Gin; that under no theory was Southwest entitled to the proceeds of Iriart's cotton on the basis of the claim against Hillhouse; that an attaching creditor, seeking to subject the property of a debtor to the payment of his debt, obtains a lien only upon the title or interest which the debtor has, and where no actual interest is shown, the attaching creditor gets nothing by his levy; and that the attachment here was an attempted levy on the property of Iriart, citing *Kinnison v. Guaranty Liquidating Corp.*, 18 Cal.2d 256, 259, 115 P.2d 450.

The court found in this respect that the relationship between Iriart and Hillhouse

was that of landlord and tenant and his one-fourth cotton was delivered to Gin for his benefit but that the landlord agreed that Gin could sell his cotton which was subject to Gin's crop mortgage, and the landlord waived his interest in the proceeds derived therefrom to the extent necessary to permit Gin to recover its loans and advances made to or for the account of Hillhouse for financing said crop. The evidence fully supports this finding. Accordingly the award of one-fourth interest in the remainder of the profits was authorized, and the remaining credit due him was not subject to the attaching creditors of Hillhouse.

Southwest's Appeal

[2, 3] Southwest argues that even though title to the cotton did pass to the landlord at the gin, as between the tenant and landlord, such transfer was void as to his attaching creditors under section 3440 of the Civil Code, citing such authority as McKee Stair Building Co. v. Martin, 126 Cal. 557, 559, 58 P. 1044; Southern California Collection Co. v. Napkie, 106 Cal. App.2d 565, 570, 235 P.2d 434; and Callender v. McLeod, 74 Cal. 376, 16 P. 194. This claimed defense was not pleaded and not argued at the trial. It is raised for the first time on appeal, which is ordinarily not authorized. Imperial Valley Land Co. v. Globe Grain & Milling Co., 187 Cal. 352, 202 P. 129. However, the evidence shows the agreement which did exist between the parties, including Gin. The delivery of the cotton was immediate, actual, visible and apparent, and made in good faith. The facts found, and the evidence produced, do not affirmatively show an inference of fraudulent transfer under section 3440 of the Civil Code.

Knapp's Appeal

[4] It is, by them, contended that they did not lose their mortgage lien by removal of the crops under the circumstances related and accordingly the lien of Southwest and the claim of Iriart, being but a creditor, would not be superior to their rights.

Section 2972 of the Civil Code provides:

"The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, *so long as the same remains on the land of mortgagor.*" (Italics ours.)

Under this section it has been held that where the mortgagee consents to removal of the crop from the land by authorizing the mortgagor to deliver the crop to a ginning company and leaves the hauling and handling with the mortgagor, and the removal is not tortious, the crop and its proceeds are freed from the lien of the crop mortgage; that such broad authorization on the part of the mortgagee, in a practical effect, amounts to a substitution of the personal obligation of the mortgagor for the security of the mortgage. 14 Cal.Jur.2d 595, sec. 28; Valley Bank v. Hillside Packing Co., 91 Cal.App. 738, 267 P. 746; I. S. Chapman & Co. v. Ulery, 15 Cal.App.2d 452, 455, 59 P.2d 602; Consolidated Produce Co. v. Takahashi, 52 Cal.App.2d 753, 759, 127 P.2d 281; Bastanchury v. Times-Mirror Co., 68 Cal.App.2d 217, 233, 156 P.2d 488; Gates v. Tom Quong, 3 Cal.App. 443, 446, 85 P. 662.

Exception to this rule is noted where the mortgagor is to deliver the crop to be ginned, marketed and sold in the name of the mortgagee. Crosby v. Fresno Fruit Growers' Co., 30 Cal.App. 308, 158 P. 1070; 14 Cal.Jur.2d 594, sec. 27. In his opinion the trial judge pointed out this distinction in the evidence here presented and particularly noted that all cotton harvested from the leased property was harvested and removed by Hillhouse with the consent, express or implied, of the Knapps; that it was transported to the gin in his name, was so credited on the account of Gin, and was marketed and sold by Gin in Hillhouse's name. He then stated that by Knapp's conduct they accepted the personal obligation of Hillhouse in the place and stead of the security of the crop mortgage. The evidence supports this finding.

[5] It is next argued that notwithstanding this conclusion the evidence establishes an equitable assignment by Hillhouse to the Knapps of this account before the attachment of Southwest was levied, citing such authority as *Van Orden v. Anderson*, 122 Cal.App. 132, 142, 9 P.2d 572. The crop mortgage in question was given as additional security, as indicated. Apparently other security was sold and applied to the total indebtedness. There was no evidence that Knapps knew of the lease between the landlord and Hillhouse, or its terms, or that Iriart or Gin ever knew of Knapps' crop mortgage until a great portion of the cotton was sold.

Knapp testified that about January 14, 1954, he visited Hillhouse in El Centro; that at that time he first discussed with him the question of the sale of the cotton; that Hillhouse told him he still had about 180 acres to harvest and he authorized Hillhouse to go ahead and do the picking and deliver the cotton to Gin, sell it and apply the proceeds to Knapps' account on the mortgage at the bank or to give Knapp the money; that he returned in March and the harvesting was finished, the cotton delivered, and he told Hillhouse the proceeds were to be credited against his mortgage which he had delivered to Gin at the time of the previous trip to put them on notice. The bank did not call upon Knapp for payment of the note until after March 26, 1954.

Hillhouse testified Knapp did talk to him about January 14th and there was about 180 acres left to pick then; that Knapp said he was not familiar with cotton sales and did not know any buyers, and for Hillhouse to sell it as he had been doing; that he told him the cotton gin had not been repaid for their advances and that Gin would be first paid; and that Knapp said he was going to request Gin to hold the money for his account to be applied on the mortgage debt.

The manager for Gin testified that ginning companies generally adopted the pro-

cedure adopted by that company; that the owner or grower of the cotton brings it to be ginned; that the company gins, bales, and puts it out in the yard; that the ginning company carries the insurance on it; that if the owner desires the ginning company to sell it for him the company finds a buyer and informs the owner of the price, and if the owner authorizes the sale, the money received by the ginning company is placed in its general fund and the owner is paid from that fund, less certain authorized expenses; that this was what was done in the instant case; that the ginning company usually follows the owner's instructions as to the disposition of the cotton; that there was no surplus in the owner's account until February, 1954; that Knapp presented his crop mortgage to the company in January, 1954; that Iriart instructed Gin to sell his cotton with Hillhouse's cotton and to account to him for such sale; that he had no authority from Hillhouse or Iriart to make any other disposition of the proceeds in the payment of Knapps' claimed crop mortgage. There never was an account set up for Knapps on the books of the Gin company. When the attachment was levied the Gin company merely held the proceeds for determination by court action.

[6] Knapp testified his only contact with Gin was to bring the crop mortgage to it and inform it he was the mortgagee claiming under the crop mortgage. This was about all of the evidence pertaining to the claimed equitable assignment of the account to the Knapps by Hillhouse. The trial court properly held it was not sufficiently established. The burden of proving such an assignment falls on the party asserting rights thereunder. *Read v. Buffum*, 79 Cal. 77, 21 P. 555; *Gustafson v. Stockton & Tuolumne County R. Co.*, 132 Cal. 619, 64 P. 995; Secs. 3019-3029, Civ.Code.

Judgment affirmed.

MUSSELL, J., and McCABE, J. pro tem., concur.

Harold L. HOTLE, Asa G. Kazebeer and American Trust Company, as executors of the Last Will of Seymour R. Frizelle, also known as S. R. Frizelle, also known as Seymour Frizelle, Deceased, Plaintiffs and Appellants,

v.

Evelyn F. MILLER, as Special Administratrix of the Estate of Jennie Frizelle, also known as Jennie F. Frizelle, Deceased, Defendant and Respondent.*

Civ. 9296.

District Court of Appeal, Third District, California.

June 26, 1958.

Hearing Granted Aug. 21, 1958.

Action for reformation of written agreement. The Superior Court, Sonoma County, Hilliard Comstock, J., sustained general demurrer, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that where plaintiffs alleged what the real agreement was, what the agreement as reduced to writing was, wherein the writing failed to embody the real agreement, how the mistake was made, whose mistake it was, and what brought it about, complaint seeking reformation of agreement was good as against general demurrer.

Reversed.

I. Reformation of Instruments

⌚7, 13(4), 19(1)

Since statute permitting husband and wife to contract with each other concerning their interest in property permits husband and wife to change the status of property owned by them, their contract could be reformed for their mutual mistake in omitting therefrom the provision that all property then owned and thereafter acquired, regardless of record title, should be held by them as community property, and this was so even though they had executed the usual joint tenancy agreement when they opened bank account and even though the Financial Code provided that joint tenancy deposit, in absence of fraud or undue influence, was conclusive

* Opinion vacated 334 P.2d 849.

evidence of intention of depositors to vest title in the survivor. West's Ann.Financial Code, §§ 850-853; West's Ann.Civ. Code, §§ 158, 3399.

2. Reformation of Instruments ⌚17(2)

The mistake of a draftsman is a good ground for the reformation of an instrument which does not truly express the intention of the parties. West's Ann.Civ. Code, § 3399.

3. Pleading ⌚204(2)

In ruling upon a general demurrer, effect must be given to every allegation in the complaint; and the demurrer must be overruled if the complaint states, or from its averments it can be reasonably inferred, that plaintiff has a cause of action against defendant on any theory.

4. Pleading ⌚204(2)

As against a general demurrer, all that is required is that the plaintiff state facts entitling him to some relief.

5. Reformation of Instruments ⌚36(1)

Where plaintiffs alleged what the real agreement was, what the agreement as reduced to writing was, wherein the writing failed to embody the real agreement, how the mistake was made, whose mistake it was, and what brought it about, complaint seeking reformation of agreement was good as against general demurrer. West's Ann.Civ.Code, § 3399.

Donald M. Scott, Sebastopol, and Lounibos & Lounibos, Petaluma, for appellants.

Frank W. Finn, Leon J. Libeu, Sebastopol, for respondent.

PEEK, Justice.

Plaintiffs as executors of the will of Seymour Frizelle, deceased, appeal from a judgment of dismissal entered pursuant to an order of the court sustaining defendant's demurrer to plaintiffs' first amended complaint without leave to amend in an action brought against the defendant as special administratrix of the estate of Jennie Frizelle, deceased. By their

complaint plaintiffs sought reformation of a written agreement executed by Seymour and Jennie, as husband and wife, and a determination of defendant's adverse claim in a certain bank account of the decedents, and to have title quieted in said account in Seymour's estate by giving effect to alleged provisions of Seymour's will and an alleged waiver by Jennie of her rights in the community property. Defendant demurred generally upon the ground that plaintiffs' complaint did not state facts sufficient to constitute a cause of action, and that it was uncertain and ambiguous in certain particulars. In its "memorandum of order" the court stated said demurrer was sustained upon the ground that it did not state facts sufficient to constitute a cause of action.

The allegations of the first amended complaint may be summarized as follows: Seymour died testate on March 2, 1955, and on March 25, 1955, his will was admitted to probate. Plaintiffs, Harold L. Hotle, Asa G. Kazebeer and American Trust Company, were appointed the executors of the will and were issued letters testamentary. Jennie died on July 17, 1955, and on August 9, 1955, defendant Evelyn F. Miller was appointed special administratrix of her estate. On January 21, 1953, Seymour and Jennie, as husband and wife, orally agreed that all property then belonging to them which stood in the name of either, or in their names as joint tenants or as tenants in common, had been acquired by them as community property, and that all such property and all property thereafter acquired by them should be held as community property regardless of the record title, and that they would enter into a written agreement so providing. On the same day they jointly employed Asa G. Kazebeer as their attorney and instructed him to prepare a written agreement embodying all the terms of said oral agreement, and the same was executed on January 29, 1953. Through mistake, the attorney omitted the provision that all property then owned by Seymour and Jennie and any property thereafter ac-

quired, regardless of the record title, should be held by them as community property. Relying on said attorney to include all the provisions of said oral agreement, and mistakenly believing he did so, they executed said written agreement. By their mutual mistake said written agreement did not embody the actual agreement of the parties. Previously thereto, and on November 6, 1940, Seymour and Jennie had opened a bank account in the Bank of Sonoma County and deposited therein community property in the sum of \$1,438.79. At the time of making said deposit Seymour and Jennie executed the usual joint tenancy agreement with each other and with said bank. No other agreement relating to said account was thereafter made with said bank or between Seymour and Jennie other than the said oral agreement of January 21 and said written agreement of January 29. On January 21, 1953, the sum of \$32,950.50 was on deposit in said account; on January 29 there was \$30,922.84; and \$42,357.14 at the time of Seymour's death. By his will, executed on October 20, 1954, Seymour provided for the disposition of all the community property of the spouses. On the same day Jennie executed a written waiver by which she elected to accept the provisions of Seymour's will, waived all claims to her share of the community property and excepted her right to a family allowance. Said funds in said account on Seymour's death on March 2, 1955, were assets of and owned by Seymour's estate, and plaintiffs as executors are entitled to possession thereof. Defendant has no right, title or interest in said funds and claims an interest therein adverse to plaintiffs.

[1] The prayer was that said written agreement of January 29 be reformed; that all adverse claims of defendant in said account be determined; that title in said account be quieted in Seymour's estate; and that plaintiffs be given possession of said funds.

In support of the determination of the trial court defendant contends that by reason of the deposit agreement and the

specific wording of section 15a of the California Bank Act¹ as it then read, St. 1929, p. 444, the court lacked authority to reform the agreement. The pertinent portion of said section provided: “* * * The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors.”

We find no merit in such contention. Under the provisions of section 158 of the Civil Code, husband and wife may contract with each other concerning their interests in property, and by such agreement the status of any property owned by them may be changed. Since Seymour and Jennie could so contract, it necessarily follows that reformation of such contract could be had subject to the provisions of Civil Code, section 3399.

[2-5] “Our courts have repeatedly held that the mistake of a draftsman is a good ground for the reformation of an instrument which does not truly express the intention of the parties.” *Mills v. Schulba*, 95 Cal.App.2d 559, 561, 213 P.2d 408, 410. It is the further rule that “in ruling upon a general demurrer, effect must be given to every allegation in the complaint; and the demurrer must be overruled if the complaint states, or from its averments it can be reasonably inferred, that plaintiff has a cause of action against defendant on any theory.” *Beason v. Griff*, 127 Cal. App.2d 382, 386-387, 274 P.2d 47, 50; *Bracker v. American Nat. Food, Inc.*, 133 Cal.App.2d 338, 340, 284 P.2d 163. Hence, as against a general demurrer all that is required is that the plaintiff state facts entitling him to some relief. *McDonell v. American Trust Co.*, 130 Cal.App.2d 296, 301-302, 279 P.2d 138. Therefore plaintiffs, having alleged what the real agreement was, what the agreement as reduced

to writing was, wherein the writing failed to embody the real agreement, how the mistake was made, whose mistake it was, and what brought it about, the complaint was good as against a general demurrer. *Johnson v. Sun Realty Co.*, 138 Cal.App. 296, 300-301, 32 P.2d 393. Hence it follows that the allegations of plaintiffs' complaint state a sufficient cause of action for reformation of the written instrument.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY J., concur.



162 Cal.App.2d 30

SUPERIOR COLLECTORS, Inc., a corporation, Plaintiff and Appellant,

v.

Charles R. PURO, Defendant and Respondent.

Civ. 22800.

**District Court of Appeal, Second District,
Division 2, California.**

July 7, 1958.

Action on note. The Superior Court of Los Angeles County, Leon T. David, J., discharged writ of attachment for failure to comply with order increasing undertaking on attachment and discharged alias writ of attachment because it was based on undertaking already held to be inadequate, and the plaintiff appealed. The District Court of Appeal, Fox, P. J., held that where court ordered that undertaking on attachment be increased from \$1,750 to \$3,500, new bond for \$2,500 which was executed by different surety and did not refer to original bond was substitute for original bond and was inadequate to meet court's requirements.

Orders affirmed.

1. Attachment Ⓒ137

Court order increasing undertaking on attachment is final and effective when made.

2. Attachment Ⓒ137

Court has inherent power to require increase in amount of undertaking on writ of attachment.

3. Attachment Ⓒ1

Attachment proceedings are purely statutory and are to be strictly construed.

4. Attachment Ⓒ137

Where court ordered that undertaking on attachment be increased from \$1,750 to \$3,500, a new bond for \$2,500 which was executed by different surety and made no reference to original bond was a substitute for original bond and was inadequate to meet court's requirement.

5. Attachment Ⓒ227

Where after court ordered writ of attachment discharged on ground plaintiff failed to increase undertaking as ordered, plaintiff issued an alias writ of attachment based upon same undertaking which court had already held to be inadequate, discharge of alias writ of attachment was proper.

6. Process Ⓒ168

Where plaintiff's then counsel had notice that writ of attachment was discharged on ground that plaintiff failed to increase undertaking on attachment as ordered, issuing of alias writ of attachment based upon same inadequate undertaking amounted to an abuse of process.

Samuel R. Tannenbaum, Los Angeles, for appellant.

Samuel Schermer, Studio City, for respondent.

FOX, Presiding Justice.

Plaintiff brought this action to recover \$5,000 on a promissory note. It caused a writ of attachment to be issued and levied on defendant's Cadillac. The bond was in the amount of \$1,750. Defendant made a motion to increase the undertaking on the attachment. On December 12, 1956, the

court granted defendant's motion and ordered the undertaking increased from \$1,750 to \$3,500. Plaintiff having failed to comply with the order, defendant, on December 31, 1956, served notice of motion to discharge the attachment. The matter was set for hearing on January 11, 1957. Plaintiff filed nothing in opposition to the motion. But, on January 10th, plaintiff filed another undertaking in the amount of \$2,500. Counsel for plaintiff did not appear at the hearing on January 11th, but the court was informed that another bond in the amount of \$2,500 had been filed. Following the hearing, the court ordered the writ of attachment discharged on the ground that there had been a failure to comply with the previous order of the court. On January 15th plaintiff caused to be issued a "first alias" writ of attachment, and the sheriff was ordered to relevy on the automobile which was still in his possession. This writ was based on the \$2,500 undertaking previously referred to. Thereupon the sheriff sought instructions from the court as to the disposition of the car. The matter was heard on February 11, 1957. The court discharged the alias writ and ordered the sheriff to release defendant's car. Plaintiff has appealed from the order of January 11th discharging the writ of attachment and from the order of February 11th discharging the alias writ.

[1,2] Plaintiff's first contention is that the court erred in discharging the writ at the January 11 hearing for noncompliance with the order increasing the undertaking on the ground that such order was not final. There is no merit whatever in this contention. Such an order is effective when made. And it is well settled that the court has inherent power to require an increase in the amount of an undertaking on a writ of attachment. *Murillo v. Toole*, 47 Cal.App.2d 725, 727-728, 118 P.2d 895, and cases cited therein.

[3,4] Plaintiff's next contention is, apparently, that the filing of the second undertaking for \$2,500 constituted compliance with the court's order and hence it was error to discharge the attachment. This contention is likewise without merit. Attach-

ment proceedings are purely statutory and are to be strictly construed. (5 Cal.Jur.2d 598.) Plaintiff's filing of a new bond for \$2,500 did not constitute compliance with the court's order increasing the amount of the undertaking to \$3,500.

The \$2,500 bond, which was executed by a different surety, made no reference to the previous bond and in no way indicated that it was in addition thereto. The trial judge filed a memorandum concerning the proceedings below which, by stipulation of both counsel, is included in the record on appeal; in that memorandum the trial court observed that the second bond "did not purport to be in addition to other coverage." The trial court was justified in arriving at this factual conclusion because (1) the second bond did not indicate that it was an addition, and (2) the fact that the bond was for \$2,500 instead of \$1,750 justifies an inference that it was not *intended* to be an addition. Under these circumstances the second bond must be considered either an attempted amendment of the first bond or a substitute therefor. It is obvious that the second bond was not intended to be, and was not, an amendment of the first. The second bond made no mention of the first, and it was executed by an altogether different surety. Therefore, the second bond can only be a substitute for the first. As such it was wholly inadequate because it was for an amount less than that fixed by the court.

Plaintiff relies upon this court's decision in *Lachmiller v. Lachmiller Engineering Co.*, 144 Cal.App.2d 533, 301 P.2d 288, which dealt with the right to amend a defective bond on attachment or to substitute a new bond in an amount fixed by the court. That case is wholly inapplicable here. We have already pointed out that the second bond in the instant case was not an amendment of the first, and as a substitute for the first it was inadequate to meet the court's requirement of a \$3,500 undertaking. The other authorities relied upon by plaintiff are not in point because they deal with bonds

given at different stages during the course of the litigation.

[5, 6] The order of the court discharging the alias writ of attachment was proper because that writ was based upon the same undertaking which the court had already held to be inadequate. Plaintiff's counsel ** had notice of this fact and was obviously attempting to circumvent the court's previous order. In light of these facts, causing the alias writ to be issued amounted to an abuse of process.

The orders are affirmed.

ASHBURN and HERNDON, JJ., concur.



The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Gordon Travis CAMPBELL, Defendant
and Appellant.*

Cr. 6093.

District Court of Appeal, Second District,
Division 3, California.

June 18, 1958.

Rehearing Granted July 17, 1958.

For Opinion on Rehearing see 329 P.2d 82.

Defendant was convicted in the Superior Court of Los Angeles County, Edward R. Brand, J., for felony drunk driving and for failing to identify himself and render assistance to accident victim, and he appealed. The District Court of Appeal, Shinn, P. J., held that there had been no occasion whatever for trial court to take over duties of deputy district attorney in questioning of witness, but held that conduct of court in that regard could not have

* Opinion vacated 329 P.2d 82.

** Plaintiff has new counsel on appeal.

resulted in miscarriage of justice in view of overwhelming evidence of defendant's guilt.

Affirmed.

1. Automobiles ⇨332

In order to establish violation of Vehicle Code section, it must be shown (1) that accused drove a vehicle on public highway while under influence of intoxicating liquor, (2) that, in so driving, he committed an act forbidden by law or neglected a duty imposed by law, and (3) that said act or neglect was a proximate cause of bodily injury to some person. West's Ann.Vehicle Code, § 501.

2. Negligence ⇨12

The rule of sudden peril has application only to conduct which follows unexpected appearance of danger.

3. Automobiles ⇨357

In prosecution for felony drunk driving, it was not error to refuse, as unwarranted by evidence, instruction on doctrine of imminent peril. West's Ann.Vehicle Code, § 501.

4. Automobiles ⇨330

Criminal Law ⇨1173(2)

Continuing to drive automobile for two days after discovering defective condition of brakes was not only grossly negligent but nothing short of reckless; and therefore, in prosecution arising out of collision in which such vehicle became involved, it was not reversible error to refuse instruction relating to misdemeanor drunk driving. West's Ann.Vehicle Code, §§ 501, 502, 670.

5. Automobiles ⇨357

Criminal Law ⇨1172(1)

In prosecution for failure to perform statutory duties, instruction which, when considered in isolation, might have led jurors to believe that defendant was to be excused only if he had been rendered completely unconscious by collision and oblivious to his surroundings and to what had occurred, was properly to be criticized; but, in light of all of instructions given,

jury could not have been misdirected to defendant's prejudice by that instruction. West's Ann.Vehicle Code, § 480.

6. Criminal Law ⇨656(2)

It is duty of judge to render assistance, during course of production of evidence in jury trial, where assistance is needed, but he must do so in a manner that gives no indication of his inclination for or against either party.

7. Criminal Law ⇨1166½(12)

In prosecution culminating in convictions for felony drunk driving and for failing to furnish identification and assistance to accident victim, there was no occasion whatever for court to take over duties of deputy district attorney in questioning of witness; but conduct of court in that regard could not have resulted in miscarriage of justice in view of overwhelming evidence of defendant's guilt. West's Ann.Vehicle Code, §§ 482(a), 501, 510.

8. Criminal Law ⇨825(4)

In prosecution for failure to give identification and assistance to automobile accident victim, general instructions on reasonable doubt were sufficient, absent request to instruct that defendant need only raise reasonable doubt that he had been unconscious in order to be entitled to acquittal. West's Ann.Vehicle Code, § 480.

9. Automobiles ⇨354

That other motorist involved in accident had been feeling better a week after accident would not lead to inference that he had suffered no injury or that he had not appeared to be hurt; and where there was no doubt but that other motorist had been injured and that he had been in considerable pain following collision, it was not error, in prosecution for failure to furnish identification and assistance, to exclude testimony tending to show that the other motorist had suffered only a slight concussion and that he was feeling "wonderful" a week after accident. West's Ann.Vehicle Code, § 480.

10. Criminal Law ⇨649(2)

If a witness is directed that he need not appear until a certain time and court

is ready to receive his testimony before that time, it is within court's discretion to deny continuance requested for purpose of producing witness.

Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a jury trial, Gordon Travis Campbell was convicted of violating Vehicle Code, section 501 (Count I) and Vehicle Code, section 480 (Count II). He appeals from an order granting him probation and the denial of his motion for new trial.

At 12:45 a. m. on February 7, 1957, Mario Salcedo was driving his Plymouth automobile south on San Vicente Boulevard in Beverly Hills. The posted speed for automobiles traveling south on San Vicente at that point was 25 miles per hour. Salcedo stopped for a red light at the intersection of San Vicente and Wilshire Boulevard. While he was waiting for the signal to change, a Lincoln automobile, also going south on San Vicente, struck the rear end of the Plymouth, damaging both vehicles and causing severe injuries to Salcedo, who sustained a fractured skull. The Lincoln was registered to "Gordon T. or Elizabeth Campbell." Salcedo was taken to the hospital where he remained for 10 days. At the time of trial, he was still under a doctor's care.

One Porche, who was waiting for the signal in the lane to the right of Salcedo, testified that defendant got out of the Lincoln immediately after the collision, approached to within a few feet of Salcedo, who was lying on the front seat of the Plymouth, and then started to walk west on Wilshire Boulevard without giving his name or exhibiting his driver's license. Porche's passenger, a Mrs. Le Sassier, testified that defendant asked her what had happened and that she replied: "Can't you

see what happened? Didn't you just hit this man?"; without saying anything further, defendant walked away.

William Fairlee, a police officer, testified that he drove Porche up Wilshire Boulevard in a police car to look for defendant. They found Campbell standing on the northwest corner of Wilshire and La Cienega, which was three blocks away. Fairlee asked defendant for some identification and defendant replied that he did not have to give any identification since he had not done anything. Upon being asked by the officer why he had left the scene of the accident, Campbell answered that he didn't know anything about any accident. When asked to accompany the officer, defendant refused to go. Fairlee forcibly placed Campbell in the car and returned to the scene where they met another officer, Marvin Sullivan.

Upon being questioned further by the officers at the scene, Campbell admitted having had two drinks of scotch at the Red Snapper Restaurant. He told the officers that he was in the Lincoln when the collision occurred, but he was not driving. The driver was a man he had met at the Red Snapper; he did not know the man's name. When the officers asked him whether he had been injured, defendant replied that he had not been hurt; he had no visible injuries. Officer Fairlee stated that defendant's breath smelled of alcohol, his eyes were watery and his face had a bloated appearance. The officers gave him a sobriety test. In their opinion, Campbell was under the influence of intoxicating liquor.

Sullivan testified that he observed 44 feet of skid marks on the street; the marks terminated at the point of impact. In his opinion, the Lincoln had been traveling in excess of 40 miles per hour at the time of the collision; he based his opinion upon the skid marks, the damage to both vehicles and the distance Salcedo's car had been pushed forward by the collision.

Defendant, testifying in his own behalf, denied having been intoxicated. He spent the earlier part of the evening of February

6 with a Miss McNally and a Mrs. Auchincloss. Around 8 p. m. he went to the Red Snapper Restaurant on La Cienega, where he had dinner with the proprietor, a Mr. Herd, who was a friend. He ordered one drink of Scotch at the bar and took it to the dinner table. Defendant sat talking with Herd until 11 or 11:15 when Herd left. Campbell remained for another 45 minutes. He had nothing further to drink before leaving the restaurant. Mr. Herd and Daniel De Blasio, a bartender employed at the Red Snapper, testified that Campbell had only the one drink at the restaurant.

Defendant testified further that after leaving the Red Snapper he drove "very normally, down San Vicente towards Wilshire." Just north of the intersection, Salcedo's car veered suddenly into his lane of traffic from the parking lane to his right. Campbell applied his brakes but they did not hold; he applied the emergency brake, but was unable to stop. He swerved to the right but was unable to avoid striking Salcedo's car. Campbell stated that his chin hit the steering wheel and he could not recall any of the events that happened subsequently or any of the statements that were made by the other witnesses or that were attributed to him. His first recollection was of being in jail, feeling cold, and asking for some blankets. Two of his false teeth were broken off and he received a bruise on the right side of his jaw that was visibly red for several days afterward.

On cross-examination, defendant admitted that he probably walked up Wilshire from "instinct" to get help at a service station located on the northwest corner of La Cienega and Wilshire where he often bought gasoline. He had not been aware that there was an all night restaurant located on the south side of Wilshire at its intersection with San Vicente and an all night service station on the northeast corner of Wilshire and La Cienega.

William Welsh, a private investigator called by the defense, testified that he examined the area nine days after the collision and did not see any skid marks. Miss

McNally and Mrs. Auchincloss appeared for the defense and corroborated Campbell's statement that he had not had any drinks while in their company.

Dr. R. W. Hayward, a dentist called by defendant, stated that he examined Campbell's teeth on March 26 and found that two teeth on the right side of his denture had been broken off. In his opinion, it would have taken considerable force to break off the teeth.

Ernest Bence, a witness for defendant, testified that he operated a service station in Brentwood. Two days before the collision, defendant drove into the station in the Lincoln using the emergency brake. Bence testified that he put in some brake fluid and told Campbell to have the master cylinder fixed "as soon as possible." Some time after the accident, defendant took his car to a repair shop operated by one Safady. A week or ten days after the car was brought in Safady tested it and found that the brakes did not hold. He took the car to a brake specialist, who opened the master cylinder and told him that the cylinder was leaking. In Safady's opinion, the leak was due to wear and tear; he had not examined the brakes and his opinion was based upon his previous experience in the repair business.

In urging a reversal of the judgment and order, defendant argues numerous assignments of error. It is not contended that the evidence was insufficient to support the verdicts.

With respect to Count I of the information which charged Campbell with felony drunk driving, defendant requested and the court refused to give an instruction on the doctrine of imminent peril and an instruction on misdemeanor drunk driving.

The first mentioned instruction was a proper statement of the rule that one who, without negligence on his part, is suddenly confronted with unexpected and imminent danger, is expected to exercise only the care that an ordinarily prudent person would exercise if confronted with the

same unexpected danger under the same circumstances.

[1] In order to establish a violation of Vehicle Code section 501, it must be shown that the accused drove a vehicle on a public highway while under the influence of intoxicating liquor, that, in so driving, he committed an act forbidden by law or neglected a duty imposed by law, and that said act or neglect was a proximate cause of bodily injury to some person.

It was the theory of the defense that the proximate cause of the collision, and of injury to Salcedo, was the danger created by Salcedo's turning into defendant's lane of traffic and defendant's inability to stop in time, due to the failure of his brakes to operate.

It appears that the southbound section of San Vicente at the location in question is a one-way street with four lanes. Campbell testified that he was traveling in lane four and he saw a car in lane three and "Well, I thought the car veered slightly to the left. I thought he was in the third lane. He changed from the third—I say he—as we approached here, he seemed to go from Lane 3 to Lane 4."

[2,3] This testimony, although somewhat nebulous, would have been sufficient to require an instruction on imminent peril if that doctrine was applicable under the evidence and to meet a claim by the People that Campbell was guilty of negligence after he observed the movement of the other car. The People made no such contention. They sought to prove that the car was being driven at 40 miles per hour; there was evidence that it left 44 feet of skid marks which ended at the point of the accident. There was also expert opinion evidence based upon the skid marks and the force of the collision that the car was traveling at 40 miles per hour when the brakes were applied. The contention of the People that defendant's speed was such that it was impossible for him to stop in time after he saw the other car was directly contrary to any contention that he could have stopped after he discovered

the danger and that he failed to exercise care in the interval preceding the accident. The rule of sudden peril has application only to conduct which follows the unexpected appearance of danger. The testimony of defendant that he was traveling at a safe rate of speed and made every effort to stop, if believed by the jury, would have eliminated any theory that he was guilty of negligence after he perceived the danger. There was no evidence whatever, nor was it contended by the People, that defendant committed any act of negligence after he discovered that it was necessary for him to stop or turn aside in order to avoid an accident. Defendant's own evidence respecting his defective brakes introduced the further question whether he was guilty of negligence in driving his car with his brakes in that condition. There was no basis in the evidence for an instruction on imminent peril. Such an instruction, if given, would only have diverted the minds of the jurors from the question they had to decide, namely, whether defendant was driving negligently before he observed the position of the other car. It would have introduced a false issue. Since the rule stated had no application to the evidence, either that of the People or of the defendant, the instruction was properly refused.

[4] The next contention is that the court committed error in failing to give the instruction which related to misdemeanor drunk driving, a lesser and necessarily included offense (Vehicle Code, § 502). Under this instruction defendant would have been acquitted of violation of section 501 if the jury determined that he was not guilty of violation of law which was a proximate cause of the accident.

We do not doubt that despite the evidence respecting the skid marks and the force of the collision the jury could have found that defendant was not driving at an unlawful rate of speed. In that view of the evidence, and absent evidence of any other violation of law, it would have been proper to give the instruction.

But it appeared from the evidence of the defendant that he was driving his car in violation of law. Section 670 of the Vehicle Code requires that automobiles when driven upon a highway must be equipped with brakes "adequate to control the movements of and to stop and hold such vehicle, * * *." Admittedly the car was being driven in a condition which was in violation of this section. For the purpose of our decision we may read into the section the word "knowingly" upon the assumption that in some circumstances failure to discover the defective condition of brakes would be legally excusable. This is not such a situation. Defendant knew his brakes were defective. Two days before the accident he was informed that the fluid had leaked out of the braking system and that he had no brakes except the emergency brake. He was told to have the condition repaired as soon as possible. He paid no attention to that admonition. He did not know and he made no effort to find out whether the brakes would continue to operate for hours or days or weeks. So far as he knew the leak might have been such as would have depleted a supply of brake fluid at any moment. He was utterly indifferent to the danger that was involved and he apparently intended to continue driving until his brakes failed altogether. This is precisely what happened. In view of his knowledge of their condition, his continuing to drive the car for two days after discovering that condition was not only grossly negligent but nothing short of reckless. His claim that the accident was proximately caused by the defective condition of his brakes was no defense at all to the charge of negligence. Had he been ignorant of their condition and had he advanced some reasonable cause for his ignorance the case would have been quite different. But in view of the evidence of his knowledge, his reckless disregard of the possible consequences of his neglect to have the brakes repaired was utterly inexcusable. The claim of error is asserted, in part, upon the theory that if the instruction had been given the jury

might have found that defendant was not guilty of violation of law in driving the car without adequate brakes. We are convinced that the jury could not reasonably have reached that conclusion. It is, in our opinion, entirely improbable that the jury would have found defendant to have been guiltless of negligence. Being convinced that the verdict of violation of section 501 would have been the same had the instruction been given, the failure to give it furnishes no ground for reversal of the judgment as to Count I of the information.

[5] With respect to Count II, which charged him with failing to stop, identify himself and render assistance to Salcedo, defendant requested the following instruction: "Before you can find the defendant guilty as charged, his failure to perform one or more of the duties imposed upon him must have been wilful; and if you believe that he himself was so injured by the collision as not to be in possession of his faculties and his failure was due to that condition, then he should not be convicted." The proposed instruction was refused. At the People's request, the court instructed the jury as follows: "A vehicle driver who is rendered unconscious by an accident may not be held criminally liable for a failure to perform any duty defined in the foregoing law [Vehicle Code, section 480] while he is thus incapacitated." Defendant contends that the instruction given by the court was a misleading and inadequate statement of the law applicable to his defense that he was not guilty of a conscious failure to perform the duties imposed by the statute. He also contends that the court committed error in refusing to give the instruction proposed by him.

We cannot agree that the jury was misdirected to Campbell's prejudice by the instruction given at the People's request. That instruction, when considered in isolation, is properly to be criticized. If, defendant argues, the instruction means what it says, and no more, the jury might well have been led to believe that Campbell was to be excused only if he had been rendered

completely unconscious by the collision, and oblivious to his surroundings and to what had occurred. But in the light of other instructions given on the issue of criminal intent, we do not think the jury could have been so misled. The jurors were told that the duties imposed by the code apply to persons "knowingly" involved in an accident and that the "wilful" failure of a driver to perform any of those duties is a criminal offense; that the statute is applicable to a driver who "knows" that he has been involved in an accident and that his failure to stop, identify himself and render assistance must be "wilful" and in another instruction, given at Campbell's request, that knowledge of the infliction of injury upon another person is an essential element of the offense. A fourth instruction stated that Campbell's conduct was not culpable unless it was knowing and wilful.

The instructions made it clear that inability to know what was going on or what had occurred would be a good defense, even though defendant's mental condition fell short of complete oblivion. In fact, the instructions that were given stated the law in much better form than it was stated in the refused instruction, which would have invited the jury to consider whether defendant was "in possession of his faculties." The instruction could well have been refused upon the ground of ambiguity. We do not doubt that the jurors understood they were to acquit Campbell on the second count if they believed his testimony respecting his mental incapacity.

[6,7] Defendant's brief specifies many instances of alleged misconduct on the part of the court. With minor exceptions they relate to interruption of the proceedings by the trial judge by propounding questions to witnesses for the People during the course of their examination by the deputy district attorney. It would unduly prolong this opinion to give the full text of the questioning. A brief summary will suffice. In 15 or more instances, the court interrupted the examination of the People's witnesses by the deputy district attorney by questions which were calculated to and did elicit

testimony seriously adverse to the defendant. The court asked a witness whether defendant said anything to anyone immediately after the accident, whether he gave his name and address or showed his operator's license to anyone, whether the officers' car was painted black and white, whether a witness who was testifying to a conversation with the defendant had made any observation with respect to defendant's sobriety, whether he smelled defendant's breath and what he observed, whether he had questioned the defendant respecting his drinking. When another witness was testifying to the condition of the surface of the highway, the court interrupted to ask whether the witness had an opinion as to defendant's sobriety. In other instances, the court cross-examined witnesses for the defendant in a manner that was abrupt and critical.

The interrogation of the witnesses by the deputy district attorney on direct and cross-examination was orderly and efficient. The questions propounded by the court were only those which would naturally have been asked by the prosecutor. Nothing was overlooked or likely to be overlooked in the elicitation of all relevant testimony. There was no hesitation upon the part of any of the witnesses to testify freely and no uncertainty whatever in their testimony. There was no occasion whatever for the court to take over the duties of the deputy district attorney in the questioning of the witnesses, and yet this is what the court did persistently.

There can be no doubt as to the duty of a judge to render assistance during the course of production of evidence in a jury trial, where assistance is needed. A witness may be evasive and his answers incomplete or uncertain, important matters may be overlooked by counsel, and in these and similar instances, it is entirely proper for the court to intervene in order to aid in the elicitation of clear and comprehensive testimony. This, of course, must be done in a manner that gives no indication of the court's inclination for or against either party. But for the court in a criminal case to interrupt the orderly and efficient interro-

gation of the People's witnesses by the prosecutor and to take over the latter's duties repeatedly, as was done in the present case, can scarcely fail to have some influence upon the minds of the jurors adverse to the defendant.

Judges have been admonished time and time again of their duty to maintain a strictly judicial attitude and to refrain from comment or other conduct which borders upon advocacy. We deem it appropriate to quote in part the remarks of the Supreme Court in *People v. Mahoney*, 201 Cal. 618, 626-627, 258 P. 607-610: "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant. It is unnecessary to cite the cases bearing on this subject. It is a fundamental principle underlying our jurisprudence." When the trial judge officiously and unnecessarily usurps the duties of the prosecutor by taking over the questioning of witnesses and in so doing creates the impression that he is allying himself with the prosecution, harm to the defendant is inevitable. We do not see how any judge could fail to recognize that fact. *People v. Long*, 63 Cal.App.2d 679, 685, 147 P.2d 659.

Our question is not whether the court's conduct was harmful to the defense; we are certain that it was. The difficult question is whether the invasion of the defendant's rights was of so serious a nature as to have resulted in a conviction which otherwise, in all probability, would not have occurred. Our conclusion is that the conduct of the court did not result in a miscarriage of justice. With respect to an alleged violation of section 501 of the Vehicle Code, the evidence, both direct and circumstantial, firmly established the fact that defendant was intoxicated. With respect to his having been operating his car in violation of law, we have already expressed the view that in driving it with brakes which he knew to be defective he was acting not only

negligently but recklessly, endangering not only his own safety but that of others. There was also persuasive evidence that he was driving at a speed which endangered the safety of persons and property in violation of section 510 of the Vehicle Code. There was, of course, no doubt that Mr. Salcedo was seriously injured as a proximate result of defendant's conduct. There was also convincing evidence of a violation of section 482(a) of the Vehicle Code consisting of the failure of defendant to give his name, address, registration number of his vehicle and name of the owner to Mr. Salcedo and the failure to render assistance to him. The only excuse offered by defendant for failure to identify himself and for leaving his car in the street while he departed the scene was that he was rendered unconscious in the sense that he did not know what had happened or understand what he was doing following the accident. His testimony to that effect had but slight, if any support in the nature of his injuries or in his conduct. There was no evidence that he received a concussion or a blow which was severe enough to seriously impair his mental faculties or which required medical care. He testified that he left the scene of the accident to find a telephone for the purpose of making a report of it. His conversation following the accident was lucid and his physical actions were normal except for the symptoms of intoxication. There was ample evidence that the injuries he received did not render him unable to understand what had happened and what he was doing thereafter. We are of the opinion that under the evidence and the proper inferences the question of defendant's guilt under either count was not a close one, and we do not doubt that if the interruptions and interrogation of witnesses by the court had not occurred, the verdict would have been the same.

[8] Defendant also contends that the court erred in failing to instruct the jury that he need only raise a reasonable doubt that he was unconscious in order to be entitled to an acquittal. A sufficient answer to this contention is that defendant did

not request such an instruction. In the absence of such a request the general instructions on reasonable doubt were sufficient.

[9] The court did not commit error in excluding testimony which defendant proposed to give respecting a conversation he had with Salcedo and Salcedo's physician at the hospital about a week after the accident. Counsel offered to prove that Dr. Laurion told defendant that his patient had suffered a slight concussion, but was about cured, and that Salcedo said he was feeling "wonderful." Defendant's argument is that evidence of the conversation was admissible to impeach the testimony of Salcedo and Dr. Laurion that the former had been seriously hurt and also to prove that Salcedo had suffered no apparent injuries, hence Campbell was not under a duty to assist him. The argument is without merit. Salcedo's condition following the collision was described by Porche and the two police officers and it cannot be doubted that he was injured and in considerable pain. The fact, if it be a fact, that Salcedo was feeling better a week after the accident would not lead to an inference that he had suffered no injury or that he had not appeared to be hurt.

[10] The court likewise did not commit error in refusing defendant a continuance in order to produce an absent witness who was not under subpoena. Counsel informed the court that he had miscalculated the time necessary to present his case, that he wished to call a certain doctor to the stand, but that he had told the doctor to be in court at 2 p.m. It was then late morning. The court refused a continuance and the defense rested.

If a witness is directed that he need not appear until a certain time and the court is ready to receive his testimony before that time, it is within the court's discretion to deny a continuance requested for the purpose of producing the witness. *People v. Morhar*, 78 Cal.App. 380, 386, 248 P. 975. Counsel did not disclose the name of the witness and made no showing that the doctor's testimony would be material. Had counsel deemed the witness to be vital to

the defense, he could have made a motion to reopen his case at 2 p.m., even though the cause was then being argued to the jury. *People v. Morgan*, 140 Cal.App.2d 796, 804, 296 P.2d 75. The court did not abuse its discretion in denying a postponement of the trial. *People v. Franklin*, 41 Cal.App.2d 669, 670, 107 P.2d 500; *People v. Sherman*, 139 Cal.App.2d 429, 431-432, 293 P.2d 809.

From a consideration of the entire evidence, we are convinced that the judgment and order should be affirmed.

The judgment and order are affirmed.

PARKER WOOD, J., and NOURSE, J.
pro tem., concur.



161 Cal.App.2d 653

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, Petitioner,

v.

SUPERIOR COURT of the State of California IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Civ. 18171.

District Court of Appeal, First District,
Division 2, California.

June 26, 1958.

Hearing Denied Aug. 21, 1958.

Prohibition proceeding. The District Court of Appeal, Draper, J., held that in action arising out of collision of municipal bus with plaintiffs' automobile, where bus driver delivered to his dispatcher a memorandum bearing names and addresses of two passengers on bus and memorandum was forwarded to city attorney, the names and addresses were not within the attorney-client privilege, and municipality would be required to answer interrogatory seeking such names and addresses.

Writ denied and alternative writ discharged.

1. Appeal and Error ⇨104**Prohibition** ⇨3(3)

An order to answer interrogatories is not appealable and prohibition is the proper remedy. West's Ann.Code Civ.Proc. § 2030.

2. Prohibition ⇨18

Where trial court decided that defendant should answer interrogatories and minute order was entered, the mere fact that application for writ of prohibition preceded formal signing of written order did not prevent recourse to remedy of prohibition. West's Ann.Code Civ.Proc. § 2030.

3. Witnesses ⇨198(1)

The purpose of the attorney-client privilege is to encourage complete disclosure by client to attorney.

4. Witnesses ⇨198(1)

Since the attorney-client privilege suppresses relevant facts, the privilege is strictly construed.

5. Discovery ⇨90

In action arising out of collision of municipal bus with plaintiffs' automobile, where bus driver delivered to his dispatcher a memorandum bearing names and addresses of two passengers on bus and memorandum was forwarded to city attorney, the names and addresses were not within the attorney-client privilege, and municipality would be required to answer interrogatory seeking such names and addresses. West's Ann.Code Civ.Proc. §§ 1881, subd. 2, 2030 and subd. (a).

6. Statutes ⇨226

The provision that the discovery act shall not be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction does not bar consideration by California courts of decisions of other jurisdictions; rather, the provision merely negatives application of the usual rule that, when a statute of another jurisdiction is adopted in California, it is presumed to have been adopted with the construction given to it by the judicial decisions of that jurisdiction. West's Ann.Code Civ.Proc. § 2016(b).

Dion R. Holm, City Atty., William E. Mullins, Deputy City Atty., San Francisco, for petitioner.

Hoberg & Finger, San Francisco, for respondent (real party in interest).

DRAPER, Justice.

This petition for writ of prohibition deals with discovery proceedings in a pending action for personal injuries. In that action, Mr. and Mrs. Giorgi (real parties in interest herein) are plaintiffs and petitioner city and county is the sole defendant. The complaint alleges that a municipal bus was so negligently operated as to cause it to collide with the Giorgi automobile from the rear, injuring Mrs. Giorgi and damaging the car. The answer denies negligence and alleges contributory negligence.

Plaintiffs took the deposition of the bus driver, who is not a party to the action. He testified that immediately after the accident he took the names and addresses of two passengers on the bus and, at the end of the day, delivered to his dispatcher the memorandum bearing these names and addresses, which was later forwarded to the city attorney. At the time of his deposition, the driver did not remember either the names or the addresses. Plaintiffs served upon defendant written interrogatories (Code Civ.Proc. § 2030) concerning these two witnesses. Defendant filed its written objections (Code Civ.Proc. § 2030(a)) to the interrogatories upon the sole ground that the information sought is within the attorney-client privilege (Code Civ.Proc. § 1881(2)). After hearing, the court announced that it would make its written order directing defendant to answer one interrogatory, that seeking the names and addresses of the two passenger-witnesses. The minutes recite "ordered (defendant) to answer questions." Before written order was signed, defendant filed this petition for writ restraining enforcement of the order.

[1,2] An order to answer is not appealable and prohibition is the proper reme-

dy. *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722. Where, as here, the question has been determined and minute order entered, the mere fact that application for the writ preceded formal signing of a written order does not prevent recourse to the remedy of prohibition. See *Lankton v. Superior Court*, 5 Cal.2d 694, 697, 55 P.2d 1170.

[3, 4] The purpose of the attorney-client privilege is to encourage complete disclosure by client to attorney. *Holm v. Superior Court*, supra. But, since the privilege suppresses relevant facts, it is strictly construed. *City and County of San Francisco v. Superior Court*, 37 Cal.2d 227, 234, 231 P.2d 26, 25 A.L.R.2d 1418, and cases cited therein.

[5] The order here in question does not require inspection of any statement, nor does it direct revelation of the contents of the statement of any witness or party. It requires only that defendant give to plaintiffs the names and addresses of two witnesses.

It is conceded that the information sought would not be privileged if remembered by the bus driver who secured it. It seems equally obvious that, if he refreshed his recollection by looking at his own memorandum now in the hands of the city attorney, he could be compelled to answer from such refreshed recollection. At this stage of the proceedings, we must assume some merit in plaintiffs' claim that they suffered injury as a result of the busman's driving deficiencies. We see no reason to hold that prosecution of their case should also suffer because of his defects of memory.

Defendant relies strongly upon *Holm v. Superior Court*, supra, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722. But that case is readily distinguishable. There a plaintiff sought the right to examine defendant bus driver's statement to the attorney representing both him and the city, his employer, in the pending litigation, and also sought to view photographs taken by city agents following the accident. The driver's statement sets forth "his version of the accident"

(42 Cal.2d at page 504, 267 P.2d at page 1027) and thus clearly is at the very heart of the attorney-client privilege. Obviously, the photographs were treated as within the same category. There plaintiff sought to have the communications themselves opened to his full inspection. In the case at bar, plaintiffs do not seek to examine any communication. They ask nothing about any mental process or rationalization, favorable or unfavorable, communicated by the city's employee to the city attorney. They seek only a simple fact, wholly unrelated to any observation, thought process or admission of the driver relating in any way to the occurrence of the accident. Thus the content of the memorandum is wholly distinct from that in *Holm*, and here, unlike the situation in *Holm*, there is no attempt to secure or inspect the communications as such.

We conclude that the names and addresses of the two bus passengers are not privileged. Thus, it is unnecessary to consider petitioner's contention that there is conflict between the provision permitting discovery of "the identity and location of persons having knowledge of relevant facts" (Code Civ.Proc. § 2016(b), as incorporated by reference in § 2030(b)), and the final sentence of the same section prescribing construction of the act "to change the law of this State with respect to the existence of any privilege." Since the names and addresses are specifically within the scope of the inquiry authorized by the statute, and are not privileged, the trial court properly ordered defendant to answer the interrogatory.

[6] At oral argument, petitioner leaned heavily upon the provision that the discovery act shall not be construed to "incorporate by reference any judicial decisions on privilege of any other jurisdiction" (§ 2016(b)), apparently arguing that this language bars consideration by California courts of decisions of other jurisdictions. We do not so construe the act. Rather, this provision merely negatives application of the usual rule that, when a statute of another jurisdiction is adopted in Cali-

fornia, it is presumed to have been adopted with the construction given to it by the judicial decisions of that jurisdiction. 23 Cal.Jur. 794-795. Thus the language does not bar consideration of the reasoning of other courts. It provides only that their decisions shall not be binding in California, and leaves our courts free to consider those decisions for such persuasive value as their reasoning may have.

With apparent inconsistency, petitioner also argued that the effect of the statute is to adopt the decisions of one jurisdiction which broadly extends the attorney-client privilege. This argument is answered by the very statutory language relied upon by petitioner. We have reviewed the Ohio decisions cited by petitioner and the federal cases cited by real party in interest. We do not find it necessary to discuss those cases, as we find the decision of our own Supreme Court in *Holm v. Superior Court*, supra, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722, adequate to dispose of the issue raised upon the particular facts of the case at bar.

The writ is denied and the alternative writ discharged.

KAUFMAN, P. J., DOOLING, J., concur.



161 Cal.App.2d 683

John M. WOOLEY, Plaintiff and Respondent,
v.

A. J. SCHILDER, Mendocino Motors, a corporation, Defendants and Cross-Complainants,

A. J. Schilder, Appellant.
Civ. 9373.

District Court of Appeal, Third District,
California.

June 26, 1958.

Action against dealer, who sold owner's tractor and trailer, for amount of proceeds from sale allegedly due owner. The

Superior Court, Mendocino County, Hale McCowen, J., rendered judgment for owner, and dealer appealed. The District Court of Appeal, Warne, J. pro tem., held that evidence sustained findings that parties entered into oral agreement whereby dealer, in consideration of reasonable commission, would sell tractor and trailer and would deliver proceeds to owner, that dealer sold them for \$2900, that reasonable commission was \$290, that dealer was entitled to credit sum on an open book account and amount paid by dealer for redemption of tractor from bank which had repossessed it, and that despite repeated demands dealer failed to make any payments whatsoever on account of such sale.

Affirmed.

1. Appeal and Error ⇐1010(1)

In action against dealer who sold owner's tractor and trailer for amount of proceeds from sale allegedly due owner, it was province of trial court to adopt any theory supported by evidence and adoption of owner's version of facts was not improper.

2. Factors ⇐42

In action against dealer who sold owner's tractor and trailer for amount of proceeds of sale allegedly due owner, evidence sustained finding that parties entered into oral agreement whereby dealer, in consideration of commission, would sell tractor and trailer and would deliver proceeds of sale to owner, that dealer sold tractor and trailer for \$2,900, that reasonable commission was \$290, that dealer was entitled to amount due him on open book account and to credit the amount paid by him for redemption of tractor after it was repossessed by bank, and that despite repeated demands dealer failed to make any payments whatsoever on account of such sale.

3. Appeal and Error ⇐1010(1)

Where there was substantial evidence to support findings of trial court, District Court of Appeal was bound by such findings.

4. Appeal and Error ⇨1012(1)

It is exclusive province of trier of facts to judge and weigh facts.

5. Evidence ⇨177

In action against dealer, who sold owner's tractor and trailer, for amount of proceeds from sale allegedly due owner, wherein dealer introduced purported summary of its records relating to cost of repairs on vehicles and losses incurred in sale, instead of books of account showing charges, summary was properly disregarded where it included items for repossession fees of attorneys although dealer had not repossessed and nothing was paid by dealer to bank which had repossessed and had transferred tractor to dealer.

6. Customs and Usages ⇨12(1)

Rule that when there is a general usage of trade, persons carrying on trade are deemed to have contracted in reference to usage, unless contrary appears, and that usage forms a part of contract is not operative against one who is not a member of trade or profession unless he knows or has reason to know usage, even though transaction is one that regularly occurs within trade or profession.

7. Customs and Usages ⇨12(1)

Where trucker placed tractor and trailer with dealer for sale, trucker was not member of automobile business and it was not shown that he knew of usage or custom of taking in trade-ins when a nonmember of automobile business delivers motor vehicle to dealer as his agent with instructions to sell vehicle for him, dealer was not entitled to any credit for trade-ins in determining amount of proceeds from sale due trucker.

8. Factors ⇨8

Where owner left tractor and trailer with dealer with instructions to sell them, deduct commission for making sale, satisfy account which owner owed dealer and deliver balance of proceeds to owner, dealer, who made repairs on tractor and trailer and truck, which was accepted as trade-in without consent of owner and who claimed that

there was nothing due owner but that as result of dealer's selling truck and trailer, making repairs and suffering loss on one of trade-ins, owner owed dealer an amount, exceeded his authority.

Preston, Falk & Johnson by Harry W. Falk, Jr., Ukiah, for appellant.

T. G. Fitzgerald, San Rafael, for respondent.

WARNE, Justice pro tem.

This is an appeal from a money judgment rendered in favor of plaintiff. The case was tried by the court sitting without a jury.

In May of 1952, the plaintiff, as buyer, and the defendant doing business as Mendocino Motors Sales, as seller, entered into an installment sales contract for the purchase of a 1950 Ford F-8 tractor, upon which there was an unpaid balance of \$1,590 payable in monthly installments. Defendant assigned this contract to the Bank of America National Trust and Savings Association. Plaintiff was also the owner of a 1945 Reliance log trailer which he used in conjunction with the tractor.

In June of 1952, the plaintiff was having marital difficulties, and in an attempt to secure funds to comply with the court order for the support of his wife he left the tractor and trailer with the defendant with instructions to sell the same, deduct a commission for making the sale, satisfy an account which respondent was then owing appellant, and then to deliver the balance of the proceeds from the sale to the plaintiff.

Plaintiff failed to pay the June and July installments on the contract to the Bank of America, and in due course the bank made demand upon him for payment. Plaintiff mentioned the matter to the defendant and asked him if he, plaintiff, should make the payments, to which defendant replied, "no, it would take care of itself." It appears that the bank exercised its right of repossession on September 27, 1952, and trans-

ferred the tractor to the defendant in exchange for \$1,577.50.

In March of 1953, defendant sold the tractor for the sum of \$2,500, and as part payment accepted a Reo truck as a "trade-in" at an agreed value of \$976. Thereafter, defendant sold the Reo and the plaintiff's Reliance trailer for the sum of \$1,695. In this deal a Diamond T truck was traded in on the purchase price at an agreed value of \$376. The Diamond T truck was later disposed of and a Ford panel truck accepted as part payment at a value of \$100. The Ford panel truck was "presumably" sold for \$100. Repairs were made on the Ford tractor, the Reliance trailer, and the Reo truck by the defendant while the vehicles were in his possession, without the consent of the plaintiff. After the final "washout sale" defendant claimed there was nothing coming to plaintiff, but that as a result of defendant's selling plaintiff's truck and trailer, making repairs and suffering a loss on one of the trade-ins plaintiff owed defendant the sum of \$265.76.

The trial court specifically found that the plaintiff entered into an oral agreement with the defendant wherein it was agreed by the defendant that he would sell, in consideration of a reasonable commission to be paid to him, the said tractor and trailer, and that he would deliver the proceeds of the sale to the order of the plaintiff; that pursuant to said agreement plaintiff delivered the Ford tractor and Reliance trailer to defendant; that defendant sold the truck and trailer for the sum of \$2,900; that a reasonable commission to be allowed to defendant on account of the off-set sale and pursuant to a stipulation of the parties is the sum of \$290; that there is due and owing to the defendant, on an open book account, the sum of \$96.73, and further that the defendant is entitled to credit against plaintiff in the sum of \$1,577.50, being the amount paid by him for redemption of the Ford tractor; that despite repeated demands made upon him, the defendant failed and refused to make any payments whatsoever on account of such sale, and that insofar as the allegations and denials set

forth in defendant's answer to plaintiff's complaint conflict with the foregoing they were untrue.

[1-3] The trial court concluded that plaintiff was entitled to judgment against the defendant for the sum of \$935.77, with interest thereon from the second day of June, 1953, at the rate of 7 per cent per annum, and his costs and disbursements. Judgment was entered accordingly and this appeal followed. Defendant first contends that the trial court, in its findings, erroneously adopted plaintiff's version of the facts. There is no merit in this contention. It was the province of the trial court to adopt any theory supported by the evidence, and as there is substantial evidence to support the findings this court is bound by said findings. *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 45 P.2d 183.

Defendant next contends that the trial court erred in disallowing any credit for the repairs made to the Ford tractor and the Reliance trailer, and losses made on the trade-ins and for repairs made to the Reo trade-in.

[4, 5] As to the repairs and losses, defendant asserts that the trial court disregarded a summary of defendant's records relating to the costs of repairs on the vehicles and the losses incurred arising out of the sale of plaintiff's tractor and trailer. Even so, the trial court had a right to reject this evidence. It is the exclusive province of the trier of the facts to judge and weigh the facts. *Thompson v. City of Long Beach*, 41 Cal.2d 235, 246, 259 P.2d 649. In commenting upon the summary in its "Order for Findings" the trial court said:

"Even though instructions to repair had been given, the Court would be loathe for two reasons to fix any definite amount as the costs of repairs because of the unsatisfactory evidence present in support thereof. First, the evidence received was not the best evidence. Instead of the books of account showing the charges, a purported summary (Defendant's Exhibit 'B') was

presented from which the inference arises that the books would have been adverse. * * * Secondly, a grave doubt of the integrity of the summary springs from the item 'charges on commissions on Diamond T, Ford Panel and repossession fees of attorneys, \$150.00.' [Emphasis added.] The defendant did not repossess and nothing was paid by him to the bank for such a service. In some circles this is euphemistically referred to as 'padding'."

[6,7] Defendant contends next that the trial court erred in disallowing any credit for trade-ins. It is his claim that taking a "trade-in" is customary in the automobile business, and that such custom and usage of the trade is an element of the contract. "It is the general rule that when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage unless the contrary appears; *that the usage forms a part of the contract.*" *Correa v. Quality Motor Co.*, 118 Cal.App.2d 246, 257 P.2d 738, 741. However, the rule is not operative against one who is not a member of the trade or profession "unless he in fact knows it or has such reason to know it that the member reasonably believes that he knows it. This is true even though the transaction is one that regularly occurs within the trade or profession." (3 *Corbin on Contracts*, p. 139, sec. 557.) In the instant case plaintiff was a trucker, not a member of the automobile business, and there is no evidence that he knew of the usage or custom of taking in "trade-ins" when a nonmember of the automobile business, as seller, delivers a motor vehicle to a dealer as his agent, with instructions to sell the vehicle for him. We find no merit in defendant's contention.

[8] It seems clear to us that the defendant clearly exceeded his authority and that the trial court's judgment is sustained both on the facts and the law.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v. _____

Norman Elton STICE, Defendant and
Appellant.*

Cr. 6164.

District Court of Appeal, Second District,
Division 3, California.

June 24, 1958.

Hearing Denied Aug. 21, 1958.

Defendant was convicted of violation of Penal Code, § 288. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., rendered judgment, and order denying new trial, and defendant appealed. The District Court of Appeal, Vallée, J., held that witnesses for the prosecution could not be impeached by cross-examination as to specific acts of unchastity.

Affirmed.

1. Witnesses ⇨344(2)

In prosecutions under Penal Code, § 288, witnesses for the people may not be impeached on cross-examination by questions as to specific acts of unchastity. *West's Ann.Pen.Code*, § 288.

2. Criminal Law ⇨1168(2)

In prosecution for violation of Penal Code, § 288, record failed to sustain defendant's contention that jury had been prejudiced against him through unnecessary repetition of sordid and heinous acts attributed to him. *West's Ann.Pen.Code*, § 288.

3. Criminal Law ⇨519(8)

Violation of statutory mandate that a defendant be taken before a magistrate without unnecessary delay, absent coercion, does not render a confession inadmissible. *West's Ann.Pen.Code*, § 825.

4. Criminal Law ⇨531(3)

Record on appeal from conviction for violation of *West's Ann.Pen.Code*, § 288 failed to reveal that confession was the result of any physical or psychological coercion. *West's Ann.Pen.Code*, §§ 288, 825.

5. Criminal Law ☞99

There is no principle which denies the right to prosecute merely because a defendant was arrested unlawfully. West's Ann. Pen.Code, § 836.

6. Criminal Law ☞322

In absence of showing to contrary, it must be presumed that officers who arrested a defendant had reasonable cause to believe that he committed a felony as charged, in view of statutory presumptions that duty has been regularly performed and that law has been obeyed. West's Ann.Code Civ. Proc. § 1963(15, 33); West's Ann.Pen. Code, § 836.

7. Witnesses ☞79(2)

In prosecution for violation of Penal Code, § 288, determination of whether children who testified should have been examined by psychiatrist was within discretion of trial judge. West's Ann.Pen.Code, § 288.

8. Criminal Law ☞1134(10)**Mental Health** ☞444

Sexual psychopathy proceedings are not criminal actions but are special proceedings of a civil nature, and an order committing the defendant found guilty of violation of Penal Code, § 288, as a potential psychopath for observation was not reviewable on appeal of order denying new trial in criminal prosecution. West's Ann.Code Civ.Proc. § 963; West's Ann.Pen.Code, § 288.

Russell J. Moss, Hawthorne, for appellant.

Edmund G. Brown, Atty. Gen., and Albert Bianchi, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

By information defendant was charged in two counts with violations of Penal Code, section 288. In a jury trial he was convicted on both counts. His motion for a new trial was denied. The court found defendant is a potential sexual psychopath and committed him to a state hospital for

observation. Defendant appeals from the order denying his motion for a new trial.

No purpose would be served in detailing the revolting facts. Suffice it to say the evidence supports the verdict as to both counts. Defendant first attacks the credibility of the two children who testified against him. He says they lied. Since the jury impliedly found they had not, that question is not open to review.

[1] On cross-examination of Junior, the child named in count I of the information, he was asked whether he had ever had "an experience like this before." He said he had not. He was also asked on cross if some two years before he had not committed an improper act with a young girl. The boy answered, "No." On cross-examination, Kathy, the child named in count II, was asked whether "anything like this" had happened to her with anyone else, to which she replied, "No." On cross Kathy was also asked whether at some time prior to the time the acts charged against defendant were alleged to have been committed her aunt had asked her why she told "these stories" about defendant and whether she had said "I don't know why." The answer was "no" to both questions. Kathy was also asked whether she had not told her aunt at that time that "Daddy had told me to say those things" and that "Daddy has played with me," to both of which questions Kathy answered, "No."

On motion of the People the foregoing testimony of Junior and Kathy was stricken and the jury instructed to entirely disregard it. Defendant asserts error. The ruling was correct. In *People v. Whalen*, 70 Cal. App.2d 142, 160 P.2d 560, a prosecution under sections 288 and 288a of the Penal Code, this court held that a witness for the People may not be impeached on cross-examination by questions as to specific acts of unchastity.

[2] Defendant says the jury was prejudiced against him "thru unnecessary repetition of sordid and heinous acts attributed to defendant." The prosecution was endeavoring to elicit from a 9-year-old boy

and a 7-year-old girl accurate statements of what had occurred. We find nothing that was prejudicial.

[3, 4] A deputy sheriff testified to a confession made by defendant. It is contended the confession was obtained unlawfully after an unnecessary delay in taking defendant before a magistrate and that the court erred in admitting it in evidence. Defendant was taken into custody about 10 p. m. on July 16, 1957. About 10 a. m. on July 17 defendant confessed. The deputy sheriff testified defendant's statements were made freely and voluntarily, that no promise of reward or immunity was made, and that no force was used. The record does not show when defendant was taken before a magistrate. Defendant says he was released on bail about 3 p. m. on the 17th. He was in custody about 17 hours. Violation of the mandate that a defendant be taken before a magistrate without unnecessary delay (Pen.Code, § 825) without coercion does not render a confession inadmissible. *People v. Speaks*, 156 Cal.App. 2d 25, 319 P.2d 709. There is no evidence of any physical or psychological coercion. It was not error to admit the confession in evidence.

[5, 6] Defendant says his arrest was unlawful. We are cited to no law and have found none that says a defendant may not be prosecuted for a criminal offense because he was arrested unlawfully. Moreover, there is no showing that the arrest was unlawful. A peace officer may arrest a person without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a felony. Pen. Code, § 836. In the absence of any showing to the contrary, it must be presumed the officers who arrested defendant had reasonable cause to believe he had committed a felony. Code Civ.Proc. § 1963(15, 33).

[7] It is asserted the court erred in denying defendant's motion to have the two children examined by a psychiatrist. No authority is cited nor argument made in support of the assertion. The matter was one within the discretion of the trial judge.

[8] Finally, defendant asserts the court erred in finding that he was a potential psychopath and committing him to a state hospital for observation. The order made in this respect is not reviewable on the appeal from the order denying defendant's motion for a new trial. Sexual psychopathy proceedings are not criminal actions but special proceedings of a civil nature. An original order of commitment as a sexual psychopath is appealable as a final judgment in a special proceeding under section 963 of the Code of Civil Procedure. *People v. Gross*, 44 Cal.2d 859, 860, 285 P.2d 630. The appeal here is solely from the order denying the motion for a new trial.

The order denying a new trial is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



161 Cal.App.2d 650

Larry Wayne PRICE, a Minor, by George McGee, his Guardian ad litem,
Petitioner,
v.

SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF CONTRA COSTA and the Mount Diablo Unified School District, Real Party in Interest, Respondents.

Civ. 18199.

District Court of Appeal, First District,
Division 2, California.

June 26, 1958.

Mandamus proceeding brought to require court to order inspection in personal injury action. The District Court of Appeal, Draper, J., held that where other participant in wrestling match giving rise to action against school district gave his statement in reliance upon representation that it would be made available to any party to

action, he could not have intended statement to be confidential; and that its transmission to school district's attorney could not vest it with privilege; and held that, therefore, even if such statement were deemed communication from client to attorney, it was unprivileged, because element of confidentiality was lacking.

Order accordingly.

1. Witnesses ⇐205

Privilege attaches to communication from client to attorney only when communication is made in confidence, and when client does not intend his statement to be confidential, it is not privileged. West's Ann.Code Civ.Proc. § 2031.

2. Witnesses ⇐205

Where other participant in wrestling match giving rise to action against school district gave his statement in reliance upon representation that it would be made available to any party to action, he could not have intended statement to be confidential; and its transmission to school district's attorney could not vest it with privilege; and, therefore, even if such statement were deemed communication from client to attorney, it was unprivileged, because element of confidentiality was lacking. West's Ann. Code Civ.Proc. §§ 1881, subd. 2, 2031(a).

David N. Bortin, Clyde D. Bird, Jr.,
Concord, for petitioner.

Francis W. Collins, Dist.Atty., Charles L. Hemmings, Deputy Dist.Atty., Martinez,
for respondent.

Schofield & Cunningham, Oakland, for
real party in interest.

DRAPER, Justice.

This mandamus proceeding arises out of an action by petitioner-plaintiff, a minor, against Mount Diablo Unified School District, the real party in interest in the present proceeding. Plaintiff was injured in the course of a wrestling match with a fellow student, Manual Gouveia, and apparently asserts negligence of defendant's physical

education instructor in supervision of the match, and some negligent defect in the condition of the cover of the mat upon which the match was held.

After the action was filed Gouveia made a statement to a representative of defendant, who preserved it by means of a tape recorder. Petitioner moved, under Code of Civil Procedure section 2031, for an order permitting inspection of a transcript of this recorded statement. Gouveia's affidavit avers that the person who took his statement told him that it "would be made available to any party requesting it" in this action, and that "it would therefore be unnecessary for me to make any other statement to any person"; that he relied upon this representation, and that he is "unwilling to give a statement to any party at this time, covering the same subject matter." Defendant does not in any way deny these averments, but alleges only that the statement was procured by an agent of defendant at the request of one of the attorneys for defendant, for transmission to defendant's counsel to assist them in preparing for trial. The trial court denied the motion for inspection, solely upon the ground that the statement is privileged. Petitioner seeks mandamus requiring respondent court to order the inspection as requested.

[1,2] Petitioner's claimed right of inspection arises under the new discovery provisions (Stats.1957, Chap. 1904). The court may "order any party to produce and permit the inspection and copying * * * of any designated * * * papers * * * not privileged * * *" Code Civ.Proc. § 2031(a).

Defendant's sole contention is that the written statement, or the tape recording from which it was written, is a communication from client to attorney, and thus is privileged. Code Civ.Proc. § 1881, subd. 2. It is not necessary to determine whether the statement by Gouveia to an "agent of the defendant" acting in some unspecified capacity becomes, when transmitted by that agent to defense counsel, a communication by defendant to its attorney within the meaning of *Holm v. Superior Court*, 42 Cal.

2d 500, 267 P.2d 1025, 268 P.2d 722 and City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26, 25 A.L.R.2d 1418. We are satisfied that, even if deemed a communication from client to attorney, the statement is unprivileged because the element of confidentiality is lacking.

The privilege attaches to a communication from client to attorney only when the communication is made in confidence. *Holm v. Superior Court*, supra, 42 Cal.2d 500, 507, 267 P.2d 1025, 268 P.2d 722; *City and County of San Francisco v. Superior Court*, supra, 37 Cal.2d 227, 235, 231 P.2d 26, 25 A.L.R.2d 1418; *McKnew v. Superior Court*, 23 Cal.2d 58, 65-66, 142 P.2d 1; *Mitchell v. Towne*, 31 Cal.App.2d 259, 265, 87 P.2d 908; 8 *Wigmore on Evidence* (3rd ed.) 531. When the client does not intend his statement to be confidential, it is not privileged. *Mission Film Corp. v. Chadwick Pictures Corp.*, 207 Cal. 386, 390, 278 P. 855; 8 *Wigmore on Evidence* (3rd ed.) 600.

Here the client's agent for the taking of Gouveia's statement, who performed this task at the request of defense counsel, told Gouveia that it would be made available to any party to the action, and Gouveia gave his statement in reliance upon this representation. It follows that the statement was not intended by the client to be confidential, and that its transmission to defendant's attorney cannot vest it with a privilege which was expressly negated or waived as an inducement to Gouveia to make it.

Although the memorandum decision of the trial court suggests some question as to materiality of the evidence, a letter by the trial judge to both counsel states that the motion was denied solely on the ground that the statement is within the attorney-client privilege. In any event, it seems clear that the statement does "constitute or contain evidence * * * within the scope of the examination permitted by subdivision (b) of Section 2016" (Code Civ.Proc. § 2031), and thus is properly the subject of inspection.

Let a peremptory writ of mandamus issue, requiring respondent court to set aside its order denying inspection, and to issue an appropriate order of inspection with the right to take a copy.

KAUFMAN, P. J., and DOOLING, J., concur.



161 Cal.App.2d 404

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Louis Anthony ROMERO, Defendant
and Appellant.**

Cr. 1354.

**District Court of Appeal, Fourth District,
California.**

June 18, 1958.

Defendant was convicted of possession of heroin. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment, and defendant appealed. The District Court of Appeal, Griffin, Acting P. J., held that where police received information from reliable informant, who had previously given them accurate information, that prostitution was being carried on at certain residence occupied by defendant, his wife, and codefendant, and, while officers had residence under surveillance, they saw certain person drive up in alley behind residence, and when such person was questioned by officers, he informed them that he was going to see the codefendant, who had invited him over, and codefendant asked such person to enter the residence, and the officers went in with him, without objection, and officers saw defendant with hypodermic needle marks on his arm, and pupils of his eyes were constricted, and eyedropper and bulb were removed from defendant's exposed shirt pocket, and heroin was found in pocket

of codefendant, entry of residence by officers showed at least a passive invitation, and probable cause for search was sufficiently established.

Judgment affirmed.

1. Poisons ☞4

Where several persons are charged with possession of the same narcotic, exclusive possession need not be shown. West's Ann.Health & Safety Code, § 11500.

2. Poisons ☞9

In prosecution for possession of heroin, question whether defendant had joint possession and control of the heroin, which was found in the immediate possession of codefendant, was properly left for determination of jury under adequate instructions. West's Ann.Health & Safety Code, § 11500.

3. Poisons ☞9

Evidence sustained conviction of defendant for possession of heroin, which was found in the immediate possession of a codefendant. West's Ann.Health & Safety Code, § 11500.

4. Searches and Seizures ☞7(20)

Where police received information from reliable informant, who had previously given them accurate information, that prostitution was being carried on at certain residence occupied by defendant, his wife, and codefendant, and, while officers had residence under surveillance, they saw certain person drive up in alley behind residence, and, when such person was questioned by officers, he informed them that he was going to see codefendant, who had invited him over, and codefendant asked such person to enter residence, and officers went in with him, without objection, and officers saw defendant with hypodermic needle marks on his arm, and pupils of his eyes were constricted, and eyedropper and bulb were removed from defendant's exposed shirt pocket, and heroin was found in pocket of codefendant, entry of residence by officers showed at

least a passive invitation, and probable cause for search was sufficiently established. West's Ann.Health & Safety Code, § 11500.

Harold D. Cornell, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Acting Presiding Justice.

Defendant-appellant was charged with and convicted by a jury of the crime of possession of a narcotic (heroin) in violation of section 11500 of the Health and Safety Code. A prior conviction of a felony (burglary) was admitted. Defendant appeals from the judgment, contending unlawful search and seizure, and that the evidence was not sufficient to establish a joint possession of the narcotic when it was found in the immediate possession of a co-defendant.

The evidence shows the police had received information from a confidential informant regarding prostitution activities at a certain residence in San Diego occupied by one Judy Scott, the defendant, and his wife. The testimony was that this informant was known to the officers and had previously given them accurate information regarding such general morals violators and such information had proved to be accurate.

On the evening of September 27th the police had the house under surveillance. One Smith drove up the alley behind the home. He was stopped by the officers and inquiry was made of his mission. He said he was going to see "Judy" and "the girls that she furnishes"; that he had telephoned her earlier and was told to come over. By arrangement with Smith they entered the house with him. Judy invited Smith in and the officers went in with him, without objection. There they saw defendant with hypodermic needle marks on his arm. The pupils of his eyes were constricted, and an eye dropper and bulb were removed from his exposed shirt pocket.

A further search of his person was made. One officer asked Judy to empty her pockets on the table. Articles such as a match folder containing a bindle of brown powder substance, as well as a piece of folded tissue paper, were found on the floor near her. There was also a rubber contraceptive with brown powder inside of it. The contents of both containers were later identified as heroin. Cotton and Hypodermic needles were taken from her pocket. The dropper in defendant's pocket, on chemical analysis, proved to have evidence of heroin (an opium alkaloid). Subsequent examination by a doctor indicates that defendant was under the influence of narcotics at the time.

Defendant admitted to the officers he had previously and on that evening used narcotics and repeated these statements at the trial. He claimed he was an unwelcome guest at that home, had paid Judy approximately \$46 during his stay there, but said he had no knowledge that the money paid was to be used for heroin for their joint use; that he knew of a kit or outfit that was being used and that Judy and his wife produced the heroin whenever it was used but he did not know where it was kept; that as to the bulb dropper found in his pocket, it was being used by him for medication of his cat's irritated ears, although Judy used it for narcotics.

[1-3] Exclusive possession need not be shown where several parties are charged with possession of the same contraband. The question as to whether defendant had joint possession and control of the narcotics was properly left for the determination of the jury under adequate instructions. The evidence was sufficient to support the finding against defendant's claim. Numerous cases have recognized that constructive possession of a narcotic constitutes a violation of section 11500, *supra*. *People v. White*, 50 Cal.2d 428, 325 P.2d 985; *People v. Rodrigues*, 25 Cal.App.2d 393, 394, 77 P.2d 503; *People v. Graves*, 84 Cal.App.2d 531, 191 P.2d 32; *People v. Van Valkenburg*, 111 Cal.App.2d 337, 340, 244 P.2d 750.

[4] The entry of the premises showed at least a passive invitation to the officers to enter the home, and probable cause for the search was sufficiently established. *People v. Simon*, 45 Cal.2d 645, 648, 290 P.2d 531; *People v. Brown*, 45 Cal.2d 640, 642, 290 P.2d 528; *People v. Boyles*, 45 Cal.2d 652, 656, 290 P.2d 535.

Upon the application of defendant for the appointment of an attorney, the same attorney who represented him at the trial was appointed to represent him on appeal. From his report, in lieu of an opening brief, he recites his familiarity with the evidence and law of the case, that in his opinion there were no errors of law committed by the trial court constituting prejudicial error, and that the evidence supports the verdict. From an examination of the entire record, we are in accord with this conclusion.

Judgment affirmed.

MUSSELL, J., and McCABE, J. pro tem., concur.



161 Cal.App.2d 814

Irving HAHN, Plaintiff and Appellant,
v.

C. R. REICHEL ENGINEERING CO., Paul
Mandeville, et al., Defendants and
Respondents.
Civ. 17914.

District Court of Appeal, First District,
Division 2, California.

July 3, 1958.

Action for personal injuries sustained by plaintiff when defendant's truck backed into plaintiff's taxicab while it was at rest. The Superior Court, City and County of San Francisco, Herman A. van der Zee, J., rendered judgment for plaintiff, but in an amount deemed inadequate, and plaintiff ap-

pealed. The District Court of Appeal, Draper, J., held that jury could justifiably find from evidence that plaintiff's special damages and lost earnings were small and that \$2,000 would adequately compensate him for those items, as well as for pain and suffering from back injury.

Affirmed.

1. Appeal and Error ⇐1004(1)

If plaintiff's special damages and loss of earnings exceeded amount awarded to him in personal injury action, reversal would be required.

2. Appeal and Error ⇐932(1)

On plaintiff's appeal from allegedly inadequate award in personal injury action, facts most favorable to defendant on issue of damages would have to be considered.

3. Damages ⇐208(1)

In personal injury action, questions with regard to damages were, on conflicting evidence, for jury.

4. Damages ⇐130(4)

In action for personal injuries sustained by plaintiff when defendant's truck backed into plaintiff's taxicab while it was at rest, jury could justifiably find from evidence that plaintiff's special damages and lost earnings were small and that \$2,000 would adequately compensate him for those items as well as for pain and suffering from back injury.

Delany, Fishgold & Freitas, John T. Conway, Matthew M. Fishgold, San Francisco, for appellant.

Boyd & Taylor, Fredric G. Nave, San Francisco, for respondents.

DRAPER, Justice.

This is a personal injury action. Plaintiff's taxicab was stopped. A panel truck owned by defendant corporation and driven by the individual defendant backed into the cab. Plaintiff sued for damages, alleging that his back was injured. Jury verdict was in favor of plaintiff for \$2,000. Plain-

tiff appeals, urging only that the award of damages is inadequate.

[1] Plaintiff contends that the evidence shows without contradiction that special damages (doctor's fees, physiotherapy, etc.) amount to \$950.23, and that loss of earnings as a result of the injury is at least \$2,036. If this contention is sustained by the record, these damages alone, without any award for pain and suffering, would exceed the amount awarded. In such case, reversal would be required. *Bencich v. Market St. Ry. Co.*, 20 Cal.App.2d 518, 67 P.2d 398. Defendant, however, argues that special damages were but \$336.51, and that loss of earnings amounted to only a few weeks at \$55-\$65 per week.

[2] The issue turns upon the extent of plaintiff's injury and the length of time he suffered from it. In reviewing the record the facts most favorable to respondent on the issue of damages must be considered. *Gersick v. Shilling*, 97 Cal.App.2d 641, 645, 218 P.2d 583. Here there is evidence that the impact of the collision of September 17, 1954, was minor; that plaintiff immediately after the accident said he was uninjured; and that he did not seek any medical attention for some three weeks. There is also evidence that the physician then attending him told him to return to work October 25. The same doctor testified that by May 12, 1955, plaintiff had recovered from the lumbar back strain he suffered in this accident. Plaintiff himself conceded that a substantial part of his absence from work was without the permission and against the orders of his doctor.

[3, 4] Of course, there was much evidence contrary to that summarized above, and some of the evidence we have summarized is subject to contrary inferences. These questions, however, were for the jury (*Sassano v. Roullard*, 27 Cal.App.2d 372, 373, 81 P.2d 213), which impliedly resolved them against plaintiff. Upon the view of the facts which the jury could justifiably adopt, the special damages and lost earnings were small, and the excess of the award over these items was adequate to

cover damages for pain and suffering. The issue was presented to the trial court on motion for new trial which was denied. We find no ground for holding that the amount of the award was the result of passion or prejudice, and we therefore have no reason to disturb the judgment.

Judgment affirmed. Purported appeal from order denying new trial dismissed.

KAUFMAN, P. J., and DOOLING, J., concur.



161 Cal.App.2d 674

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

James Ronald RICKS, Defendant and
Appellant.
Cr. 6095.

District Court of Appeal, Second District,
Division 2, California.

June 26, 1958.

Prosecution on two counts of robbery, the commission of which was admitted by defendant who entered a plea of not guilty by reason of insanity. The Superior Court of Los Angeles County, Stanley Mosk, J., entered judgment of conviction and order denying motion for new trial and defendant appealed. The District Court of Appeal, Fox, P. J., held that instruction of court on issue of insanity embodying the "right and wrong" test, correctly stated law, and defendant was not deprived of effective aid of counsel in violation of constitutional rights because deputy public defender who represented him failed to subpoena certain witnesses.

Affirmed.

I. Criminal Law ☞773(2)

In prosecution for robbery, wherein defendant admitted offenses but entered a plea

of not guilty by reason of insanity, court's instruction respecting defense of insanity and stating the "right and wrong test" was proper.

2. Criminal Law ☞641(1)

In prosecution for robbery, record failed to disclose that defendant, represented by deputy public defender, was deprived of effective aid of counsel in violation of his constitutional rights, merely because counsel failed to subpoena certain witnesses.

3. Criminal Law ☞641(1)

Where accused is represented by counsel and basis of his claim is that he received poor advice, indicative of poor judgment on part of his attorney, and acted thereon to his detriment, those facts, even if substantiated, do not amount to denial of right of representation, and handling of defense by counsel will not be declared inadequate except in rare cases where counsel displays such a lack of diligence and competence as to reduce trial to a farce or a sham.

4. Criminal Law ☞1023(10)

Purported appeal from verdict was unauthorized and would be dismissed.

Robert Barnett, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Morris Schachter, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was charged with two counts of robbery. He admitted commission of the offenses charged but entered a plea of not guilty by reason of insanity. Also he was charged with and admitted a prior conviction for burglary.

Defendant robbed a store, operated by a Mr. Feldman, and also one of its customers. The robbery took place at approximately 7:00 p. m. Donald, a son of the proprietor, first noticed defendant at the drug counter while he was waiting on a customer. Defendant was standing there with his hands behind him, holding himself against the case and appeared to be "wobbling." After a

couple of minutes he moved over to the frozen food cabinet, which was close by, and put his hands on it. During this latter period of about three minutes his head was moving "in circles." Defendant then started walking around the store with his arms outstretched and his hands dangling. He stopped at the open air ice box, leaned against it and appeared to be holding onto it while he was looking into it.

After Feldman finished waiting on the customer he heard someone come behind the counter. He turned to face defendant, who was about eight feet away. Defendant pulled a gun and said, "This is a stickup * * *. If you move I will shoot you." From defendant's expression and voice he appeared to be "mad." When defendant walked toward the cash register, Feldman, being frightened, took a step backward, whereupon defendant said, "If you move once more I will kill you." While defendant took the money out of the cash register he held his gun on Feldman. Upon defendant's demand, Feldman tossed his wallet to him. Defendant caught it and "Shoved it in his pocket." Mrs. Spitzer, unaware of what was going on, placed a quart of milk on the counter near defendant. He turned around, pointed his gun at her, and said: "Give me your purse." He grabbed it, admonished her and Feldman to "Give me five minutes before you call" the police, and then ran out of the store. According to Mrs. Spitzer, defendant seemed frightened and had a crying voice.

A police officer testified that when he arrested defendant a few minutes after the robberies he did not appear to be under the influence of intoxicating liquor but he thought defendant might possibly be under the influence of narcotics.

Defendant testified that in the afternoon, prior to the robberies, he had a few drinks and then went to a drug store where he purchased a bottle of Pasitabs, which contain bromides that tend to make one sleepy and depressed. Defendant took three of these tablets for nervousness and tension. This was approximately the middle of the afternoon. The tablets did not seem to do him

any good so he went to see his friend, Ray Allen. There he took from six to eight more Pasitabs. Defendant remembered sitting on the bed at his friend's house and that he felt very relaxed. The next thing he remembered was waking up next morning in jail. Defendant further testified that he did not have a gun when he visited his friend, Allen, and did not know where he obtained the gun introduced in evidence, which was the gun he used in committing these robberies.

Defendant was examined by three psychiatrists, who also heard the testimony at the trial. They were unanimous in their opinion that defendant was sane at the time of the commission of the offenses.

[1] On the issue of insanity the court instructed the jury as follows:

"Insanity, as the word is used in these instructions, means such a diseased and deranged condition of mental faculties of a person as to render him incapable of knowing the nature and quality of his act and of distinguishing between right and wrong in relation to the act with which he is charged.

"The test of accountability is this: Did the party have sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another, and in itself wrong? If he had the capacity thus to appreciate the character and to comprehend the probable or possible consequences of his act, he was sane under the law, and is responsible to the law for the act thus committed."

The psychiatrists applied these standards in forming their opinions as to defendant's sanity. The foregoing instruction, sometimes referred to as the "right and wrong" test, correctly states the law in this state. In fact, these principles are firmly imbedded in our jurisprudence. *People v. Slop-er*, 198 Cal. 238, 245-246, 244 P. 362, 365; *People v. Kimball*, 5 Cal.2d 608, 610, 55 P. 2d 483; *People v. Coleman*, 20 Cal.2d 399, 409, 126 P.2d 349; *People v. Wells*, 33 Cal. 2d 330, 351, 202 P.2d 53; *People v. Berry*, 44 Cal.2d 426, 433, 282 P.2d 861.

Defendant, however, makes the unper-
suasive contention that the "right and
wrong" test is scientifically inadequate and
often invalid and irrelevant in determin-
ing criminal responsibility. A somewhat
similar attack was made on the "right and
wrong" test in the Sloper case, *supra*.
Specifically, it was there charged that the
"right and wrong" test was "antiquated
and unscientific." In answer to this chal-
lenge the Supreme Court stated: "* * *
The rule has the approval of the highest
judicial tribunals known to the Anglo-
Saxon race, and no reason, resting upon
experience or known to legal or medical
science, has been pointed to which would
justify the abolition of a test founded upon
necessity and approved by experience, and
which prescribes, with reasonable regard
for the frailties and weaknesses of man-
kind, the degree, kind, and quality of men-
tal incompetency or derangement that must
be shown to exist to relieve a person of
the consequences of his act which other-
wise would be punished as a crime."

In *People v. Berry*, *supra*, defendant
contended, as does the defendant at bar,
that "the long-established legal standard
of sanity based on the knowledge of 'right
and wrong' should be re-examined." In
the *Berry* case, the doctors testified that
defendant was sane, according to the ac-
cepted theory of insanity. He argued, as
does the defendant here, that the test
should have been whether he was respon-
sible for his actions at the time and not
whether he knew right from wrong when
he committed the assault. In answering
this contention the Supreme Court stated
(44 Cal.2d at page 433, 282 P.2d at page
865): "* * * However, regardless of
the doubtful merit of defendant's sug-
gestion as a generally workable test, if any
change is to be made in the accepted
standard for determining criminal guilt in
relation to the insanity plea, the arguments
for such change should be addressed to the
Legislature rather than to the courts.
People v. Daugherty, 40 Cal.2d 876, 893-
894, 256 P.2d 911."

[2, 3] Defendant's final contention is
that he was deprived of the effective aid
of counsel in violation of his constitutional
rights. He bases this argument on the
asserted failure of the deputy public de-
fender who represented him at the trial to
subpoena Dr. Arnold Levin, and Ray Allen,
who was with defendant a few minutes
before the robberies. Defendant asserts
that Dr. Levin would have testified that
he examined defendant just prior to the
commission of the offenses and found him
not to be a narcotic addict, and that Allen
would have testified that defendant was not
under the influence of narcotics while they
were together. The answer to defendant's
contention is succinctly stated in *People v.*
Logan, 137 Cal.App.2d 331, 290 P.2d 11.
At page 335 of 137 Cal.App.2d at page 13
of 290 P.2d the court said: "But where
an accused is represented by counsel and
the basis of his claim is that he received
poor advice, indicative of poor judgment
on the part of his attorney, and acted
thereon to his detriment, those facts, even
if substantiated, do not amount to a denial
of the right of representation. [Cita-
tions.]" The handling of the defense by
counsel will not be declared inadequate
except in those rare cases where "counsel
displays such a lack of diligence and com-
petence as to reduce the trial to a 'farce
or a sham.'" *People v. Wein*, 50 Cal.2d
383, 326 P.2d 457. There is no pretense
of such a showing in this case.

Furthermore, as the trial judge point-
ed out, the testimony of these witnesses
would fortify the People's contention that
defendant was in full possession of his
faculties when he committed the offenses.

[4] The purported appeal from the
verdict is dismissed (*People v. Abrams*,
108 Cal.App.2d 584, 585, 239 P.2d 75).

The judgment and order are affirmed.

ASHBURN and HERNDON, JJ., con-
cur.

161 Cal.App.2d 644

David Michael GROVER, a Minor, by Ray Grover, his Guardian ad litem,
Petitioner,

v.

SUPERIOR COURT OF The State of California IN AND FOR The COUNTY OF SAN MATEO, Respondent.

Civ. 18154.

District Court of Appeal, First District,
Division 2, California.

June 26, 1958.

Mandamus proceeding brought to require respondent court to order delivery of copy of report of physical examination or, in the alternative, to permit taking of deposition of doctor making such examination. The District Court of Appeal, Draper, J., held that under statute providing expressly that upon request of person examined opposing party shall deliver to him a copy of examining physician's report, any privilege against disclosure of medical report is waived by preparing physical examination upon which that report is based.

Order accordingly.

1. Witnesses ⇨198(1)

Purpose of attorney-client privilege is to encourage client to make full disclosure to his attorney without fear that others may be informed. West's Ann. Code Civ.Proc. § 1881, subd. 2.

2. Witnesses ⇨185

Attorney-client privilege serves to suppress relevant facts and, therefore, must be strictly construed. West's Ann. Code Civ.Proc. § 1881, subd. 2.

3. Witnesses ⇨199(1), 204(1)

It is communication between client and his own attorney which is privileged, and it was doubtful that transmission to defense counsel of results of unprivileged examination, made of plaintiff in personal injury action by doctor conducting independent practice, would clothe report with attorney-client privilege. West's Ann. Code Civ.Proc. § 1881, subd. 2.

4. Witnesses ⇨219(5)

Under statute providing expressly that upon request of person examined opposing party shall deliver to him a copy of examining physician's report, any privilege against disclosure of medical report is waived by preparing physical examination upon which that report is based. West's Ann.Code Civ.Proc. §§ 2016(b), 2032(b) (1).

5. Evidence ⇨65

Where legislative consideration of State Bar's proposal, for statute requiring opposing party to deliver copy of examining physician's report to person examined upon request therefor, was widely publicized among lawyers, and statute was included in printed statutes and code amendments delivered to Bar long before date of examination of plaintiff in personal injury action, counsel in that action would be deemed to have had full knowledge of statute when they stipulated to physical examination of plaintiff and to have entered that stipulation with complete cognizance that further proceedings in action, taken on or after effective date of statute, would be governed by it. West's Ann.Code Civ. Proc. §§ 2016(b), 2032(b) (1).

6. Damages ⇨206(5)

Statute providing that, upon request of person examined, opposing party should deliver to him a copy of examining physician's report, was procedural only, and it affected no vested substantive right in its operation, after its effective date, upon procedures to be followed in actions theretofore filed. West's Ann.Code Civ.Proc. §§ 2016(b), 2032(b) (1).

7. Damages ⇨206(5)

Under statute requiring examining party to deliver, upon request, copy of physician's report to the party against whom an order was made "or the person examined", even one who submits voluntarily to examination by his adversary's physician, without requiring a formal order therefor, is entitled to copy of examining physician's report. West's Ann.Code Civ.Proc. § 2019(b, d).

Miller, Francis, Miller & Osborne, San Mateo, for petitioner.

Sullivan & West, San Mateo, for respondent (real party in interest).

DRAPER, Justice.

This mandamus proceeding concerns application of discovery procedures authorized by 1957 amendments to the Code of Civil Procedure (Stats.1957, Chap. 1904, pp. 3321-36).

Petitioner, as plaintiff, filed a personal injury action April 1, 1957 against Paddock Engineering Co., the real party in interest in the present proceeding. Counsel for plaintiff and defendant stipulated that Dr. O'Connor, acting for defendant, could conduct a physical examination of plaintiff. The examination was had December 5, 1957. At some unspecified date thereafter, Dr. O'Connor prepared and delivered to defendant's counsel his written report of that examination. At pre-trial conference January 7, 1958, plaintiff orally and in writing requested a copy of the report. His request was refused. His noticed motion to require such delivery was heard and denied January 24, 1958. Plaintiff then served upon Dr. O'Connor a subpoena to take deposition. Before the date noticed for the deposition, defendant sought, and after hearing obtained, an order of respondent court that the deposition not be taken. (Code Civ.Proc. § 2019(b).) At the same time, the court denied plaintiff's noticed motion to inspect and take a copy of Dr. O'Connor's report. (Code Civ.Proc. § 2031(a).) Plaintiff now seeks writ of mandamus requiring respondent court to order delivery of a copy of the report or, in the alternative, to permit taking of the deposition of Dr. O'Connor.

Defendant contends, first, that Dr. O'Connor's report is within the attorney-client privilege, and thus cannot be reached either by inspection of his report or by taking his deposition; and, second, that the discovery procedures do not, in any event, apply here because the physical examination was had before January 1,

1958, the effective date of the discovery amendments (Stats.1957, p. 3336).

[1, 2] "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: * * * 2. Attorney and client. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him. * * *" Code Civ.Proc. § 1881. The purpose of the privilege is to encourage a client to make a full disclosure to his attorney without fear that others may be informed. *Holm v. Superior Court*, 42 Cal.2d 500, 506-507, 267 P.2d 1025, 268 P.2d 722. Since the privilege serves to suppress relevant facts, it is to be strictly construed. *City and County of San Francisco v. Superior Court*, 37 Cal.2d 227, 234, 231 P.2d 26, 25 A.L.R.2d 1418.

[3] It is communication between the client and his own attorney which is privileged. Here the communication by the plaintiff was to a physician engaged by opposing counsel. In such case, the necessary element of attorney-client relationship, as well as the essential feature of confidential intent in revealing information, is lacking. The fact that a plaintiff's submission to examination by a doctor employed by defense counsel is adversary, rather than confidential, is emphasized by the right of plaintiff's counsel to insist upon being present at such examination. *Sharff v. Superior Court*, 44 Cal.2d 508, 282 P.2d 896.

The case at bar is readily distinguished from *City and County of San Francisco v. Superior Court*, supra, 37 Cal.2d 227. There plaintiff was examined by a physician engaged by plaintiff's own attorney to enable the attorney to be informed of his client's condition. As pointed out by the court, communication by the client to his counsel required "the assistance of a physician to interpret the client's condition" to his attorney (37 Cal. 2d at page 237, 231 P.2d at page 31). The

client's submission to examination by the intermediary acting for his attorney clearly was confidential. Thus the physician's transmission of plaintiff's communication was privileged quite as much as would be that of an interpreter translating the client's statements to an attorney who does not speak the client's language. But it is the fact of communication from client to attorney, rather than the mere use of an interpreter as intermediary, which brings the privilege into existence. Here the client's communication is not to his own attorney, but to opposing counsel.

It is doubtful that transmission of the results of this unprivileged examination by the doctor to defense counsel clothes the report with the attorney-client privilege. There is no showing that Dr. O'Connor is an employee of defendant, and the memoranda of the parties appear to concede that he is conducting an independent practice. Thus there is grave doubt that his report can be classed as a communication "between corporate employees" for transmission to the corporation's attorney, so as to bring it within the rule of *Holm v. Superior Court*, supra, 42 Cal.2d 500, 508, 267 P.2d 1025, 1029, 268 P.2d 1418. Since the communication by plaintiff was not to his attorney, and the communication to defendant's attorney probably was not by his client, it would be difficult to hold that the medical report is within the attorney-client privilege defined by our statute. But we do not find it necessary to pass upon this question, as we have concluded that, even if the privilege exists, it was waived.

[4] Defendant relies heavily upon the provision of the amendatory statute that:

"This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction." Code Civ. Proc. § 2016(b).

Section 2032(b) (1) provides expressly that upon request of the person examined

the opposing party shall deliver to him a copy of the examining physician's report. Assuming that the report is privileged, it is contended that the two sections are in conflict. Of course, to treat Section 2032(b) (1) as eliminating a privilege heretofore existing would be to create direct conflict between this section and the above-quoted language of Section 2016(b), thus necessitating holding one or the other of these simultaneously adopted provisions to be inoperative. But a statute should be so construed as to give effect to each and every part thereof. (23 Cal.Jur. 758.) To construe Section 2032(b) (1) as providing that any privilege against disclosure of the medical report is waived by procuring the physical examination upon which that report is based is in accord with this basic principle. Thus construed, Section 2032(b) (1) does not "change the law of this State with respect to the *existence* of any privilege," but provides only that, if there be a privilege whose continuing existence is recognized, nonetheless the privilege is waived. We adopt this construction.

[5, 6] Defendant argues, however, that this section cannot apply to the report of a medical examination conducted December 5, 1957, because the amendatory act provides that it "shall not become operative until January 1, 1958, and shall govern proceedings in actions brought on or after said date and also further proceedings in actions pending on said date." We see no reason to curtail the operation of the statute as defendant suggests. The Legislature obviously considered the discovery procedures desirable and beneficial. Their action merits liberal construction of the act by the courts. The legislative determination was not hurried or precipitate. The federal courts and a number of states have had comparable discovery procedures for many years. Our statute was proposed by the State Bar of California, and this fact and the legislative consideration of the proposal were widely publicized among lawyers. The statute was approved by the Governor July 6, 1957, and was included

in the printed statutes and code amendments delivered to the bar long before December 5, 1957, the date of the examination here in question. Counsel in this case must be deemed to have had full knowledge of the statute when they stipulated to the physical examination of plaintiff, and to have entered that stipulation with complete cognizance that further proceedings in the present action, taken on or after January 1, 1958, would be governed by it. Defendant argues that such a holding would give retrospective effect to the statute. But this statute is procedural only. *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 24 P. 648; *Steinbauer v. Bondesen*, 125 Cal.App. 419, 14 P.2d 106; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479. It affects no vested substantive right in its operation, after its effective date, upon procedures to be followed in actions theretofore filed. The act does govern the proceedings here in issue.

[7] Defendant argues that plaintiff is not entitled to a copy of the report because the examination of plaintiff was made pursuant to stipulation, rather than order. Section 2032(a) authorizes a court to order physical examination at the instance of the opposing party. Section 2032(b) (1) provides that the examining party shall, upon request, deliver a copy of the physician's report to "the party against whom an order is made * * * or the person examined." The comparable federal rule (35(b)), *Fed. Rules Civ. Proc.* 28 U.S.C.A. does not contain this alternative, but provides only for supplying a copy to "the person examined." It can be argued that the alternative stated in our statute specifically requires delivery to the party examined even if no order had been made for his examination. But, even under the federal rule, the decisions are uniform that one who submits voluntarily to examination by his adversary's physician, without requiring a formal order therefor, is entitled to a copy of the examining physician's report. *Kelleher v. Cohoes Trucking Co.*, D.C., 25 F.Supp. 965; *Keil v.*

Himes, D.C., 13 F.R.D. 451; *Dumas v. Pennsylvania R. Co.*, D.C., 11 F.R.D. 496; *Lipshitz v. Bleyhl*, D.C., 5 F.R.D. 225. A contrary ruling would but consume the time of trial court and counsel by encouraging formal motions to be made and determined in situations where there is no real objection by plaintiffs to physical examination.

Under subdivisions (b) and (d) of Section 2019, the trial court is given a broad discretion to prohibit the taking of a deposition or to limit its scope. Plaintiff offers no evidence to show abuse of this discretion in the order that the deposition not be taken, but in fact concedes that his legitimate request will be fully satisfied by an order for inspection of the medical examiner's report. Accordingly, we do not disturb the order that the deposition not be taken.

Let a peremptory writ of mandate issue requiring respondent court to set aside its order denying petitioner an inspection of the medical examiner's report in question, and to issue an appropriate order for delivery to petitioner of a true copy thereof.

KAUFMAN, P. J., and DOOLING, J., concur.



161 Cal.App.2d 687

Ken W. BAIRD and Gale R. Traver,
Plaintiffs and Respondents,

v.

Carl HODSON, Defendant and Appellant.
Civ. 5832.

District Court of Appeal, Fourth District,
California.

June 26, 1958.

Hearing Denied Aug. 21, 1958.

Action for specific performance of a contract for the sale of certain realty owned by defendant-vendor. The Superior Court, San Diego County, Arthur L. Mundo, J., entered judgment adverse to defendant and

he appealed from such judgment and from an order denying new trial. The District Court of Appeal, McCabe, J., pro tem., held that evidence presented a question for the court as to whether agreed price was a fair and reasonable consideration.

Judgment affirmed.

1. Trial ☞9(1)

Rules for pretrials were designed to relieve members of legal profession and members of the judiciary from legal technicalities, trivia, details, and unessentials, and to have cases tried at an early date upon the real and substantial issues involved.

2. Trial ☞9(1)

Where a pretrial conference order reflected contentions made by all parties to the action and definitely set forth the issues in an action for specific performance of a contract for sale of realty as being the dates of execution and due delivery of certain documents, and as whether or not a certain document in question was an option or an offer to purchase, and vendor-defendant did not request a modification of such pretrial conference order, such order controlled the subsequent course of the case, and issues raised by the pleadings were superseded, including issue as to reasonableness and adequacy of the consideration. Superior Court Rules, rules 8.7 and subd. (b), 8.8.

3. Evidence ☞43(1)

It is common knowledge that on occasions parties to an action will specify grounds on a notice of motion for new trial and abandon them.

4. Appeal and Error ☞173(6), 882(3)

Where in an action for specific performance of a contract for sale of certain realty defendant-vendor did not raise issue of adequacy of consideration at the trial, nor request a modification of pretrial conference order limiting issues to questions other than adequacy of the consideration, defendant-vendor would not be allowed to raise such issue for the first time on appeal

even though he mentioned it as a ground in his motion for a new trial.

5. Specific Performance ☞123

In action for specific performance of a contract for the purchase and sale of certain realty owned by defendant-vendor, evidence presented a question for the court as to whether agreed price was a fair and reasonable consideration.

6. Appeal and Error ☞110

A purported appeal from an order denying a motion for new trial would be dismissed since no appeal may be taken from such an order.

Jesse E. Fluharty, Sacramento, for appellant.

Allan Lame, San Diego, for respondents.

McCABE, Justice pro tem.

Plaintiffs brought an action for specific performance of a contract for the purchase and sale of certain real property owned by defendant. Judgment was entered in favor of plaintiffs. From this judgment and from an order denying the motion for new trial, the defendant appeals.

The real property, subject of the action, had been purchased by defendant approximately two years before he entered into the agreement with plaintiffs, at a price of \$16,000. During the period of two years no improvements were made on the property. The agreement between plaintiffs and defendant provided for a total purchase price of \$24,000. A pre-trial conference was held and on February 9, 1957, a pre-trial order was signed. This order was filed February 15, 1957.

The only contention raised by defendant on this appeal is that the finding that the consideration was fair and reasonable is not supported by the evidence. Plaintiffs (respondents) contend (1) the finding is supported by the evidence, and (2) defendant has waived his right to raise the issue because it was not raised at the pre-trial conference or at the trial on the issues, or at the hearing of the motion for new trial.

Plaintiffs' argument is that they pleaded the reasonableness and adequacy of the consideration, which was denied in defendant's answer, but at no time subsequent to the filing of the answer did defendant raise this issue until this appeal was taken from the judgment.

The amendments to Rules for the Superior Courts pertaining to pre-trial conferences are set forth in 47 Cal.2d 3 et seq. These amendments to the rules became effective January 1, 1957.

Rule 8 provides that a pre-trial conference shall be held in every civil case with certain exceptions noted which are inapplicable to this case. Rule 8.2 provides:

"Each party appearing in any case shall attend the pre-trial conference by counsel, or if none, in person, and shall have a thorough knowledge of the case, be prepared to discuss it and * * * They shall confer before the date assigned, for this conference to reach agreement upon as many matters as possible. They shall prepare jointly, or each shall prepare, and submit to the pre-trial conference judge at or before the conference, a written statement of the matters agreed upon. Each shall be prepared to state orally the factual and legal contentions to be made as to the issues remaining in dispute. * * *

Rule 8.4(a) (1) provides:

"The written statements submitted under Rule 8.2, and the statements of the factual and legal contentions made as to the issues remaining in dispute".

Rule 8.6(a) provides:

"The pre-trial conference judge shall prepare and sign a pre-trial conference order * * *. This order shall contain: (1) A concise and descriptive statement of: * * * (iii) the factual and legal contentions made by each party as to the issues remaining in dispute; * * *".

Rule 8.7 provides:

"(a) The clerk shall serve a copy of the pre-trial conference order by mail

upon each attorney in the case * * *

(b) Within five (5) days after such service of the copy of the pre-trial conference order any attorney may serve upon all other attorneys in the case, and file with the clerk, a request for correction or modification of this order * * * After the five-day period, or after disposition of a request for correction or modification * * * the pre-trial order shall be filed in the case."

Rule 8.8 provides:

"When filed, the pre-trial conference order becomes a part of the record in the case and, where inconsistent with the pleadings, controls the subsequent course of the case. * * *

[1] A review of legal history reveals innumerable rules, regulations, laws and processes introduced into the law by which there is a more efficient and effective handling of cases. In each instance not only was it necessary, but progress in the law demanded it. Another of such progressive steps is now part of California law, which may be referred to as Pre-trial Procedure. A review of the rules for pre-trials clearly reveals the reasons behind them. Obviously, the rules were designed to relieve the members of the legal profession and the members of the judiciary from legal technicalities, trivia, details, unessentials, and to have the case tried at an early date upon the real and substantial issues in the case. This is a most laudable and meritorious purpose. In *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 388, 91 L.Ed. 451, in discussing federal court pre-trial, it is said:

"The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of

facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

To satisfy the purposes and obtain the full effectiveness of pre-trial procedure it is necessary not only that the practitioner observe the rules, but that the courts observe them. In the instant case, the pre-trial conference order reflects the contention made by all parties to the action and definitely and numerically sets forth the "Issues" as "(1) The dates of execution and the due delivery of the documents in evidence; and (2) whether or not the document Exhibit 2 is an option or an offer to purchase." Further, the order states: "All discovery proceedings are complete, and the issues are joined." No action was taken by defendant as allowed to him under Rule 8.7 (b).

[2] This pre-trial conference order then controlled the subsequent course of the case in accordance with Rule 8.8 and the issues raised by the pleadings were superseded. The pre-trial judge, the trial judge and plaintiffs had the right to rely upon that posture of the case. Particularly is this true because defendant did not request a modification of the pre-trial conference order, which he had a right to request under Rule 8.7.

[3] At the trial defendant did not raise the issue now sought to be raised nor request a modification of the pre-trial conference order. There is nothing in the record to indicate that defendant raised this issue in his argument on his motion for new trial. In his notice of intention to move for new trial defendant stated, as one of his grounds for seeking a new trial, "(1) Insufficiency of evidence to justify the decision and judgment," but no argument was presented to the trial court on the issue. It is common knowledge that on occasions parties to an action will specify several grounds on a notice of motion for new trial and abandon them.

[4] In *Johnson v. Glassley*, 118 Ind. App. 704, 83 N.E.2d 488, 490, a pre-trial conference had been held and the issues defined. The Appellate Court, in determining whether a party could raise for the first time an issue on appeal, said:

"But the parties chose their weapons in the court below. They agreed that a decision of this case properly turned on the answers to the questions above set out. That was the case presented and tried below, and that is the case we are reviewing. By its judgment the court below answered the questions submitted. It was not required to go further. Nor may we create new issues and decide this case on an entirely new and different theory. The subsequent course of an action is controlled by agreements made at pre-trial conference so long as they remain unmodified." See, also, *State ex rel. Wm. Eckelmann, Inc. v. Jones*, 4 N.J. 207, 72 A.2d 322, 325; *Frank v. Giesy*, 9 Cir., 117 F.2d 122, 126.

The defendant will not be allowed to raise this issue for the first time on appeal.

Section 3391, Civil Code, provides in part:

"What Parties Cannot Be Compelled To Perform. Specific performance cannot be enforced against a party to a contract in any of the following cases:

"1. If he has not received an adequate consideration for the contract;

"2. If it is not, as to him, just and reasonable;"

Section 1605, Civil Code, provides:

"Good Consideration, What. Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

[5] Upon a review of the record there is some evidence upon which the trial court could find that the price of \$24,000 agreed to between plaintiffs and defendant is, as to defendant, adequate consideration and as to defendant is just and reasonable. It would serve no useful purpose in this opinion to recite the evidence nor the numerous cases in support of the law on this subject.

[6] The purported appeal from the order denying the motion for new trial is dismissed since no appeal may be taken therefrom. *Kenney v. Kenney*, 220 Cal. 134, 30 P.2d 398.

Judgment affirmed.

MUSSELL, Acting P. J., and GRIFFIN, J., concur.



161 Cal.App.2d 668

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Daniel Boone HYMES, Defendant and
Appellant.

Cr. 5928.

District Court of Appeal, Second District,
Division 2, California.

June 26, 1958.

Defendant was convicted in the Superior Court, Los Angeles County, LeRoy Dawson, J., for burglary in the first degree, attempted rape and rape, and he appealed. The District Court of Appeal, Herndon, J., held that having invoked beneficent provisions of Sexual Psychopath Law, and having sought hoped-for benefits of observation, care and treatment thereby accorded him, defendant could not be heard to question constitutionality of such Law in criminal case to which sexual psychopathy proceedings were collateral.

Affirmed.

1. Criminal Law 1134(10)

Where no appeal was taken from any of orders made in sexual psychopathy proceedings, such orders became final, and were not reviewable upon appeal from judgments in criminal case to which such proceedings were collateral. West's Ann. Welfare & Inst.Code, §§ 5500 et seq., 5501(a).

2. Constitutional Law 43(2)

Having invoked beneficent provisions of Sexual Psychopath Law, and having sought hoped-for benefits of observation, care and treatment thereby accorded him, defendant could not be heard to question constitutionality of such law in criminal case to which sexual psychopathy proceedings were collateral. West's Ann. Welfare & Inst.Code, §§ 5501, 5504.

3. Mental Health 444

Sexual psychopathy proceedings are civil in nature and are collateral to criminal proceedings. West's Ann. Welfare & Inst.Code, §§ 5512, 5517(a-c), 5519.

4. Criminal Law 1111(5)

Question as to whether reporter's transcript, showing that judge had found defendant sane as of time judgment was rendered, or clerk's minutes, reciting that court had found defendant sane as of time offenses were committed, was controlling would have to be determined from a consideration of circumstances under which proceedings had been had; and, considered in light of those circumstances, it was obvious that reporter's transcript accurately reflected court's determination. West's Ann. Welfare & Inst.Code, § 5512.

Russell E. Parsons, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

Appellant was convicted of the crimes of burglary in the first degree, attempted

rape, and rape. He appeals from the judgments and from the order denying his motion for a new trial. He raises no question concerning the regularity of the criminal proceedings, the fairness of his trial, or the sufficiency of the evidence to justify the jury's verdict of guilt. Appellant seeks a reversal herein solely upon the basis of contentions to the effect that he was denied substantial constitutional and statutory rights in connection with proceedings taken under the provisions of section 5500 et seq. of the Welfare and Institutions Code, resulting in his commitment and confinement for some seventeen months as a sexual psychopath.

Having been convicted (upon evidence so clear and convincing that its sufficiency could not reasonably be questioned) of two violent sex crimes of a most serious nature, and involving distressing harm to the innocent victims, appellant himself invoked the provisions of the Sexual Psychopathy Act¹ by filing an affidavit in which he requested the institution of sexual psychopathy proceedings against him and expressed his need of psychiatric treatment.²

Immediately upon the filing of said affidavit, the court acting in conformity with the provisions of sections 5501 and 5504,³ appointed two psychiatrists to examine appellant and report. Appellant's application for the institution of sexual psychopathy proceedings was set for hearing on June 28, 1955. Appellant and his counsel were

present at this hearing, and after the court's statement that it had read and considered the report of the court-appointed doctors, both sides rested. The court thereupon found appellant a probable sexual psychopath, and ordered him committed to Atascadero State Hospital for a period of not more than ninety days for observation and diagnosis pursuant to section 5512. Criminal proceedings were adjourned.

On September 20, 1955, following the ninety-day period of observation and diagnosis, the court found appellant to be a sexual psychopath on the basis of the report of the superintendent of the Atascadero State Hospital. An order was thereupon made committing appellant to that hospital for an indeterminate period and criminal proceedings were adjourned. A copy of said original commitment was personally served on appellant within five days after the making of the order, as required by section 5512. It does not appear that appellant made any demand for a hearing in court as to the question of sexual psychopathy within ten days after the service of the order of commitment, as he had a right to do under the provisions of section 5512.

On March 23, 1956, at the request of appellant and pursuant to section 5519, the court ordered the superintendent of the state hospital to submit within thirty days his opinion under subdivision (a), (b), or (c) of section 5517,⁴ including a report,

1. Section 5501(a) of the Welfare and Institutions Code provides that proceedings under the Act may be initiated by the trial judge on his own motion, on motion of the prosecuting attorney "or on application by affidavit by or on behalf of the defendant."

2. Appellant also addressed a letter to the trial judge under date of September 20, 1956, explaining the motivation of his crimes as follows: "I felt very persecuted and rejected in favor of my wife's mother. My crimes were the force raping of elderly women. My mother in law is an elderly woman. These women I raped were symbolic of my mother in law. So my crimes were a sublimation for the desire to fight, will to power, (hostility)."

3. All statutory references are to the Welfare and Institutions Code unless otherwise stated.

4. § 5517. "Whenever a person who is committed for an indeterminate period to the department for placement in a state hospital as a sexual psychopath (a) has recovered from his sexual psychopathy to such an extent that in the opinion of the superintendent the person is no longer a menace to the health and safety of others, or (b) has been treated to such an extent that in the opinion of the superintendent the person will not benefit by further care and treatment in the hospital and is not a menace to the health and safety of others, or (c) has not recovered from his sexual psychopathy, and in the opinion of the superin-

diagnosis and recommendation concerning appellant's future care, supervision or treatment. On the basis of the superintendent's report under subdivision (c) of section 5517 the court on May 2, 1956, found that appellant had not recovered from his sexual psychopathy and was still a menace to the health and safety of others and denied his request that he be returned for further hearing. On November 5, 1956, a similar report was again ordered at appellant's request. The opinion of the superintendent under subdivision (c) was filed, and on the basis thereof appellant was ordered returned for further proceedings. After hearing on January 29, 1957, the appellant being present with his counsel, judgment was pronounced, and appellant was sentenced to state prison for the crimes of which he had theretofore been found guilty.

The major premise of appellant's argument on this appeal is that the proceedings under the Sexual Psychopathy Act are essentially criminal in nature. From this premise appellant argues that he was denied certain constitutional and statutory rights in the proceedings by which he was committed and maintained in custody as a sexual psychopath. More specifically, appellant contends that (1) he was deprived of the right to a jury trial on the issue of sexual psychopathy; (2) he was committed for an indeterminate period on hearsay evidence without a hearing; and (3) he was denied the statutory right (Penal Code, § 686, subd. 3) to confront the medical witnesses on whose statements the court found him to be a sexual psychopath. The following excerpts from appellant's opening brief indicate the substance of his contentions:

tendent the person is still a menace to the health and safety of others, the superintendent of the hospital shall file with the committing court a certification of his opinion under (a), (b), or (c), as the case may be, including therein a report, diagnosis and recommendation concerning the person's future care, supervision or treatment. If the opinion

"The commitment of the defendant for an indeterminate period on hearsay evidence, without a hearing, was unconstitutional, and deprived the defendant and appellant of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States."

"We realize the heft of the laboring oar were we to attack the constitutionality of this Act, but we respectfully urge that this Court should carefully consider the decisions that have gone before, both by appellate courts and the Supreme Court just hereinabove cited, for it would appear that where a man is deprived of his liberty, that the proceeding is criminal in nature, especially in view of the fact that this defendant and appellant had been tried by a jury on charges of criminal offenses, namely, burglary and rape, which are denounced by the penal code. It needs no argument here that those are criminal offenses, with severe penalties attaching thereto. This proceeding arose out of, and was held in connection with, the criminal proceeding and is an integral part of it, we here contend. Therefore, the rules which apply to criminal proceedings must of necessity control in the proceedings in this case."

Even if appellant's contentions were not directly contrary to the law as declared in recent decisions of the Supreme Court of this state, appellant would be in no position to advance them successfully on this appeal, which is taken only from the judgments of conviction and from the order denying his motion for a new trial in the criminal proceedings.

so certified is under (a) or (b), the committing court shall forthwith order the return of the person to said committing court and shall thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge. * * *

In the first place, it has been recently decided that "An original order of commitment as a sexual psychopath is appealable as a final judgment in a special proceeding under section 963 of the Code of Civil Procedure, and subsequent orders re-determining his condition made under section 5519 are appealable under subdivision 2 of section 963 as special orders after final judgment." *People v. Gross*, 44 Cal. 2d 859, 860, 285 P.2d 630, 631; *Gross v. Superior Court*, 42 Cal.2d 816, 821, 270 P.2d 1025.

[1] In the instant case appellant has not appealed from any of the orders made in the sexual psychopathy proceedings, which are civil in nature and collateral to the criminal case. *Gross v. Superior Court*, supra, 42 Cal.2d 816, 820, 270 P.2d 1025; *People v. Bachman*, 130 Cal.App.2d 445, 447-448, 279 P.2d 77. Hence all these orders have become final and are not reviewable upon this appeal from the judgments in the criminal case.

[2] In the second place, it is to be remembered that appellant himself initiated the sexual psychopathy proceedings. Having invoked the beneficent provisions of the law, and having sought the hoped-for benefits of the observation, care and treatment thereby accorded him, appellant cannot be heard to question the constitutionality of the law. *Tracy v. MacIntyre*, 29 Cal.App.2d 145, 150, 84 P.2d 526; *Foster v. Superior Court*, 26 Cal.App.2d 230, 234, 79 P.2d 144; *Zeibak v. Nasser*, 12 Cal.2d 1, 18, 82 P.2d 375.

[3] In the third place, all of appellant's arguments are based upon the false premise that the sexual psychopathy proceedings are criminal in nature. That such proceedings are civil in nature and are collateral to the criminal proceedings is, of course, a well settled principle of law. *Gross v. Superior Court*, supra, 42 Cal.2d 816, 820, 270 P.2d 1025; *People v. Bachman*, 130 Cal.App.2d 445, 447-448, 279 P.2d 77, and cases cited.

In the fourth place, with respect to appellant's complaints that he was committed

without a hearing and upon hearsay evidence and that he was denied a jury trial, it is to be emphasized that appellant at no time requested a jury trial, nor did appellant demand a hearing in court after the original order of commitment within the time allowed by section 5512. This is not surprising in view of the fact that the court in making the order of commitment was simply following the clearly prescribed procedures which appellant's application for the institution of the proceedings necessarily contemplated.

[4] The only suggestion of error in the criminal proceedings relates to the determination of appellant's sanity which was made on January 29, 1957, immediately before judgment was pronounced. Previously, on January 8, 1957, the trial judge had declared a doubt as to appellant's present sanity, and appointed a psychiatrist to make an examination and report. The doctor's report was filed promptly thereafter and expressed the opinion that as of the date of the report (January 17, 1957) the appellant was sane. It contains the following expression: "In my opinion, this man understands the nature of the proceedings against him and is able to cooperate with his attorney in the preparation and conduct of his case." The reporter's transcript of the proceedings at the time judgment was pronounced reflects the following statements of the trial judge: "Pursuant thereto the Court appointed at your request a doctor to make examination to see whether or not at the present time you were sane or insane. Dr. McNeil made the examination and made the report that you are at the present time sane in his opinion. The Court adopts that opinion as its own."

The Clerk's minutes for January 29, 1957, recite: "The Court finds that the defendant was sane *at the time each offense in each information was committed.*" Thus, as appellant points out, there is a conflict between the clerk's minutes and the reporter's transcript. The question " * * * as to which of the two records is con-

trolling * * * is to be determined from a consideration of the circumstances under which the proceedings were had." *People v. Washington*, 95 Cal.App.2d 454, 456, 213 P.2d 70, 71; *In re Evans*, 70 Cal. App.2d 213, 216, 160 P.2d 551. In the circumstances here presented, the answer is clear. It is obvious that the reporter's transcript accurately reflects the court's determination of appellant's sanity at the time judgment was pronounced.

The judgments and order appealed from are affirmed.

FOX, P. J., and ASHBURN, J., concur.



161 Cal.App.2d 830

Stella M. BUCK and Albert H. Buck,
Plaintiffs and Respondents,

v.

F. K. CARDWELL, Eloise Cardwell, Card-
well Corporation, Defendants,

F. K. Cardwell and Cardwell Corporation,
Appellants.

Civ. 5831.

District Court of Appeal, Fourth District,
California.

July 3, 1958.

Action to quiet title, for specific performance and declaratory relief in which tenants sought to have rights and obligations of the parties to a lease of a restaurant determined. The Superior Court, San Diego County, L. N. Turrentine, J., entered judgment adverse to landlords and they appealed. The District Court of Appeal, Mussell, J., held that where a husband-cotenant assigned his interest in lease to his cotenant-wife merely as a settlement of community property rights, made effective by the court in an interlocutory

decree of divorce, covenant in lease against assignment would not be deemed to have been broken.

Judgment affirmed.

1. Pleading Ⓒ369(1)

It is proper practice to ask for inconsistent remedies, and when the evidence is all in, it is for the court to say to which remedy, if any, plaintiff is entitled. *West's Ann.Code Civ.Proc.* § 427.

2. Pleading Ⓒ369(1)

In action to quiet title, for specific performance and declaratory relief, wherein tenant sought to have rights and obligations of the parties to lease of a restaurant determined, trial court did not err in failing to require tenants to elect which cause of action they relied upon for relief, but tenants were entitled to introduce evidence upon each and all of such causes of action, and the election of the decision as to which of them, if any, was sustained, was, after taking of the evidence, a matter for the judge or jury. *West's Ann.Code Civ.Proc.* § 427.

3. Landlord and Tenant Ⓒ28(2)

Where both a husband and wife were named in a lease as tenants, and it was not provided therein that leased restaurant should be operated by husband alone, and landlords knew soon after execution of lease that husband was not taking an active part in the management of the business and that it was being operated by his wife, and landlords elected to receive the rents, and consented to the operation of the business by wife, landlords, over five years later, could not claim fraud in the execution of the lease.

4. Landlord and Tenant Ⓒ76(2)

Where a husband-cotenant assigned his interest in a lease to his cotenant-wife, merely as a settlement of community property rights, made effective by the court in an interlocutory decree of divorce, covenant in lease against assignment would not be deemed broken.

5. Landlord and Tenant ⚖️88(3)

In action to quiet title, for specific performance and declaratory relief, in which tenant sought to have rights and obligations of the parties to a lease of a restaurant determined, evidence sustained finding that tenants had not failed to perform terms and conditions of the lease upon which their right to a renewal existed.

6. Landlord and Tenant ⚖️83(1)

In construing provisions of lease relating to renewals, if there is any uncertainty, the tenant rather than the landlord is to be favored.

7. Landlord and Tenant ⚖️88(3)

In action to quiet title, for specific performance and declaratory relief, in which tenant sought to have rights and obligations of the parties to a lease of a restaurant determined, evidence sustained court's judgment that lease was renewed for five year term provided by original lease or that a new lease was executed and agreed upon by the parties containing the same terms and conditions as the original lease.

Cameron & Foushee, San Diego, for appellants.

Buttermore & Lightner, San Diego, for respondents.

MUSSELL, Acting Presiding Justice.

This is an action to quiet title, for specific performance and declaratory relief in which plaintiffs seek to have the rights and obligations of the parties to a lease of a restaurant in San Diego determined. The written lease involved was executed on May 1, 1950, by and between F. K. Cardwell and Eloise Cardwell, parties of the first part, and Albert H. Buck, and Stella M. Buck, parties of the second part. Parties of the first part agreed therein to lease the restaurant involved to second parties for a term of five years, commencing May 1, 1950, at a monthly rental of \$300, plus an additional sum of five per cent. on all gross sales over \$4,000 per month. There was a provi-

sion against subletting and the making of alterations without the written consent of first parties and second parties agreed to keep the property in good order and condition. The lease also contained the following provision: "The first parties shall pay all taxes on property, equipment and fixtures covered by this lease, *for the first five (5) years and thereafter during the life of this lease* but the second party shall pay all taxes in excess of the amount assessed on the first five years." (Italics ours.) The lease further provided: "An additional five year lease at the same rental and terms as this lease will be granted provided all the terms and provisions of the above lease have been complied with."

Second parties took possession of the restaurant and operated it under the lease and thereafter until on or about December 5, 1956, when the Cardwell Corporation caused to be mailed to second parties a notice that their lease had terminated and a demand for surrender and possession of the premises in thirty days from the date of receipt of said notice. Second parties then filed the present action for a determination of their rights under the agreement.

The trial court rendered judgment decreeing that the lease involved was in accordance with the terms thereof renewed and extended from May 1, 1955, for a term as therein provided, to wit, to and including April 30, 1960. Cardwell Corporation (the successors in interest of defendants F. K. Cardwell and Eloise Cardwell) and F. K. Cardwell appeal therefrom. The principal question to be here decided is whether the judgment extending and renewing the lease to April 30, 1960, is supported by the record.

During the month of February, 1948, Albert Buck commenced operation of the restaurant involved on a month to month basis. Shortly prior to May 1, 1950, Albert contacted defendant F. K. Cardwell regarding the leasing of the premises for a period of five years and, after several discussions, the lease here involved was executed.

Prior to May 1, 1950, Albert and his wife Stella had been having marital difficulties and on May 18, 1950, Stella brought a divorce action against him. Thereafter Albert assigned his interest in the lease to Stella and the lease was awarded to her in the interlocutory decree of divorce which she obtained. Shortly after the divorce action was commenced Albert discontinued his management of the restaurant and thereafter Stella, with the knowledge and consent of F. K. Cardwell, operated and conducted the business until on or about December 5, 1956.

Prior to the expiration of the first five year term of the lease Stella several times requested of defendant F. K. Cardwell an assurance that she would be granted the additional five year term provided for in the lease. She testified in this connection that Cardwell did not refuse to give her a new lease, that "All he ever said was, 'We will discuss it later, Stella, I haven't much time right now.', or, 'We will make some arrangements later on'"; that she continued to ask Cardwell for a lease after May, 1955, and continued to occupy the premises, paying the same monthly rental as provided in the lease of May 1, 1950, all with the knowledge and consent of Cardwell.

The record shows that on or about November 19, 1951, defendant Eloise Cardwell transferred all her right, title and interest in and to the leased premises to defendant F. K. Cardwell, who then, on September 12, 1955, transferred his interest therein to defendant Cardwell Corporation, one of the appellants herein.

The first point raised by appellants is that the court prejudicially erred in its rulings on the pleadings. The complaint herein contains three causes of action, stated in separate counts: the first, to quiet title, the second, for specific performance, and the third, for declaratory relief, and it is contended that the cause of action to quiet title and the cause for specific performance were completely contradictory; that the court erred in overruling defendants' demurrer and motion to

strike; and that plaintiffs should have been compelled to elect which cause of action they desired to proceed upon when the demurrer was overruled. We find no reversible error in this connection.

[1] Section 427 of the Code of Civil Procedure permits the joinder of causes of action arising out of contracts, express or implied, or based on claims arising out of the same transaction, or transactions connected with the same subject of action. In the instant case all causes of action arise out of the written contract of lease between the parties. Ownership by plaintiffs of the leasehold is alleged, the adverse claims thereto by defendants are therein set forth, and the existence of the controversy as to the proper interpretation of the lease is also alleged. It is proper practice to ask for inconsistent remedies and when the evidence is all in, it is for the court to say to which remedy, if any, plaintiff is entitled. In *Tiedje v. Aluminum Taper Milling Co.*, 46 Cal.2d 450, 452, 296 P.2d 554, the amended complaint contained three counts: (1) for declaratory relief; (2) to quiet title; and (3) for voiding an illegal sale of stock. It was there held that these counts relied upon the same facts as the basis for plaintiff's claimed right to recover certain corporate stock and accordingly they were treated as one. In the instant case the same facts are relied upon by plaintiffs to obtain the relief sought and no prejudicial error resulted in the rulings of the trial court.

[2] The argument that the court erred in failing to require plaintiffs to elect which cause of action they relied upon for relief is without merit. In *Tanforan v. Tanforan*, 173 Cal. 270, 274, 159 P. 709, it was held that since inconsistent causes of action may be pleaded, it is not proper for the judge to force upon the plaintiff an election between those causes of action which he has a right to plead; that plaintiff is entitled to introduce his evidence upon each and all of these causes of action, and the election or the decision as to which of

them is sustained, is, after the taking of the evidence, a matter for the judge or jury.

Appellants claim that the court denied their right to cross-examine plaintiff Stella Buck concerning the issues raised by the pleadings. However, an examination of the record shows that appellants presented all of their affirmative defenses and that Stella Buck was extensively cross-examined with reference thereto.

[3] Appellants argue that plaintiffs' fraud bars their recovery. This contention is likewise without merit. The trial court found that "It is not true that said lease or the execution thereof was induced by fraud or misrepresentation on the part of the plaintiffs, or either of them." This finding is supported by substantial evidence. Appellants' argument in this connection is that the Cardwells were led to believe that Albert Buck would operate the business under the lease. However, both Albert and Stella were named in the lease as lessees and it is not provided therein that the restaurant should be operated by Albert alone. Moreover, the Cardwells knew soon after the execution of the lease that Albert was not taking an active part in the management of the business and that it was being operated by his wife. The Cardwells elected to receive the rents and enjoy the benefits of the lease during the term thereof and consented to the operation of the business by Stella Buck. Appellants cannot now claim fraud in the execution of the lease agreement of May 1, 1950.

[4, 5] Appellants claim that the plaintiffs' right to a renewal of the lease could only exist provided all the terms and conditions of the lease were performed and that plaintiffs failed to perform the terms and conditions thereof in several particulars. In this connection appellants claim that there was an assignment of the lease by Albert contrary to its terms. However, the assignment was simply a settlement of community property rights as between Albert and his wife, made effective by the court in the interlocutory decree of divorce. Under these conditions the covenant against

assignment was not broken. *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 344, 182 P.2d 182. Appellants claim that Albert abandoned the lease and that there was no consideration to support it. However, the record shows that the rent was paid and accepted during the entire time the property was occupied by plaintiffs and while Albert did not manage the business, it was operated efficiently by his wife. While there was a conflict in the evidence as to a breach of the lease in some particulars, the trial court found that the leased premises were not abandoned; that alterations were not made without the consent of the lessors; that it was not true that necessary repairs were not made as contemplated by the lease; that it was not true that the dining room was operated in an untidy or unsanitary manner; that it was not true that satisfactory monthly reports to the lessor were refused; and that it was not true that the payment of increased taxes, if any, had been refused. These findings are supported by substantial evidence and cannot be disturbed.

[6, 7] It is argued that the payment of the rent did not automatically renew the lease. There is some uncertainty in the terms of the lease as to whether a new lease was contemplated at the expiration of the first five year term. In one part of the lease the parties provided for the payment of taxes "for the first five years and thereafter *during the life of this lease* and in another part it provides that "An additional five year lease at the same rental and terms as this lease will be granted provided all the terms and conditions of the above lease have been complied with." (*Italics ours.*) It is generally held that in construing provisions of a lease relating to renewals, if there is any uncertainty, the tenant rather than the landlord is to be favored. *Erickson v. Boothe*, 79 Cal.App.2d 266, 272, 179 P.2d 611. The court impliedly found that all of the terms and conditions of the original lease had been performed and, whether the original lease was renewed or a new lease executed, the

same terms and conditions in each event were agreed upon by the parties. The trial court's judgment that the lease "was in accordance with the terms thereof renewed and extended from May 1, 1955, for a term as therein provided, to wit, to and including April 30, 1960" is supported by the record.

Judgment affirmed.

GRIFFIN, J., and McCABE, J. pro tem., concur.



161 Cal.App.2d 823

EMPIRE REDWOOD COMPANY, a corporation, Plaintiff and Appellant,

v.

S. J. HALL, J. Oille Edmunds, S. E. Fogelberg and Alvin M. Boldt, Dessie M. Hall, Emily B. Edmunds and Julie Fogelberg, Defendants and Respondents.

S. J. HALL, J. Oille Edmunds, S. E. Fogelberg, Dessie M. Hall, Emily B. Edmunds and Julie Fogelberg, partners under the firm name and style of Gualala Redwoods, Cross-Complainants and Appellants,

v.

EMPIRE REDWOOD COMPANY, a corporation, and Alvin M. Boldt, Cross-Defendants and Respondents.

Alvin M. BOLDT, Cross-Complainant and Appellant,

v.

S. J. HALL, J. Oille Edmunds, S. E. Fogelberg, Dessie M. Hall, Emily B. Edmunds and Julie Fogelberg, partners under the firm name and style of Gualala Redwoods, and Empire Redwood Company, a corporation, Cross-Defendants and Respondents.

Civ. 9205.

District Court of Appeal, Third District, California.

July 3, 1958.

As Modified July 8, 1958.

Rehearing Denied Aug. 1, 1958.

Proceeding for declaratory relief. The Superior Court, Mendocino County, Hale McCowen, J., entered a judgment from

which all parties appealed. The District Court of Appeal, Schottky, J., held that where under agreement assigning rights in contract to purchase land and timber thereon, assignor was given exclusive right for 25 years to log and manufacture all old growth timber in return for which it was to pay assignee certain percentages of amount realized by it and the parties agreed that once in every five years question of percentages of sales for stumpage should be revised, provision for revision was fairly susceptible of two constructions and evidence concerning circumstances under which and negotiations by means of which parties arrived at written agreement which they executed was admissible.

Judgment reversed.

1. Evidence $\S$ 448, 461(1)

Where the language used in a contract is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify terms of agreement but to aid court in ascertaining true intent of parties, and to show what they meant by what they said.

2. Contracts $\S$ 169

Where any doubt exists as to the purport of the parties' dealings as expressed in wording of their contract, the court may look to circumstances surrounding its execution, including the object, nature and subject matter of agreement.

3. Evidence $\S$ 450(5)

Where under agreement assigning rights in contract to purchase land and timber thereon, assignor was given exclusive right for 25 years to log and manufacture all old growth timber located on land in return for which it was to pay assignee certain percentages of the amount realized by it and the parties agreed that once in every five years question of percentages of sales for stumpage should be revised, provision for revision was fairly susceptible of two constructions and evidence concerning circumstances under which and negotiations by means of which

parties arrived at written agreement which they executed was admissible.

4. Declaratory Judgment 301

Under agreement assigning rights in contract to purchase land and timber thereon, assignor's lessee, who was actually doing the logging, was proper party to action to determine new price to be paid assignee for timber.

Falk, Johnson & Cleland, Ukiah, for Empire Redwood Co.

Kasch & Cook, Ukiah, for Boldt.

Chas. R. Bell of Mannon, Brazier & Bell, Ukiah, and Walker Lowry, of McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, for Gualala Redwoods and others.

SCHOTTKY, Justice.

In 1949 Empire Redwood Company (referred to hereafter as Empire) held a contract to purchase 26,000 acres of land and the timber thereon. On August 20th of that year Empire and S. J. Hall simultaneously executed several documents pertaining to the land and timber, all as part of one transaction. Empire assigned all of its rights in the purchase contract to Hall. He paid Empire \$150,000 and agreed to pay the balance payable under the land purchase contract. Empire was given for a period of 25 years the exclusive right to log and manufacture all old growth timber located on the land. It was to pay Hall 10 per cent of the amount realized by it for redwood and pine lumber and 8 per cent of the amount realized for fir lumber. The tenth paragraph of the agreement also provided:

"It is recognized by the parties hereto that 25 years covers a long period of time, that the percentages of stumpage to sales value may change with the years and they agree that once in every five years in the life of this contract the question of percentage of sales for stumpage shall be revised by

mutual agreement. If no agreement can be reached, the question shall be submitted to arbitration. * * *

Empire conducted logging operations until 1953, at which time it leased its mill to Alvin M. Boldt and gave him the right to log the timber on the property. The agreement provided that Boldt would get "all the benefits and privileges" of the cutting contract between Empire and Hall.

In 1954 Hall, acting for Gualala Redwoods, a partnership which had succeeded to Hall's interest, hereinafter called Gualala, began correspondence with Empire regarding a revision of the stumpage-sale percentages. These negotiations failed to result in any agreement, and Hall then proposed arbitration. Hall proposed that the arbitrators fix a revised percentage for the period August 20, 1954, to August 19, 1959, that is, for the second five-year period of the contract. Each party named one arbitrator, but were unable to agree on a third, and the proposed arbitration failed.

In October, 1954, Empire filed a complaint for declaratory relief. Boldt, who was named as a defendant, cross complained, as did Gualala. The cause was tried and the court entered a judgment from which all the parties have appealed.

The major question determined by the court was the new price to be paid Gualala for the timber. During the trial of this issue Empire sought to introduce parol evidence of the proceedings leading up to the execution of the documents to explain what the parties meant by the provision that "once in every five years in the life of this contract the question of percentage of sales for stumpage shall be revised. * * *" The trial court refused to accept parol evidence because the court did not believe the agreement was uncertain. The court ruled that Empire was attempting to vary the terms of an integrated agreement in violation of the parol evidence rule. The court said in its order for findings:

"The tenth paragraph of Exhibit 'B' provides 'that the percentages of

stumpage to sales value may change with the years, and they agree that once in every five years in the life of this contract, the question of percentage of sales for stumpage shall be revised by mutual agreement'.

"When construed by itself, the meaning of this language is fairly discernible, and when provisions elsewhere in the contract are considered with it, the meaning is clear.

"In paragraph three of Exhibit 'B', it is provided that 'the stumpage for said timber shall be 10% of the amount realized by the assignor for all redwood and pine lumber, and 8% of the amount realized by assignor for all fir lumber, F.O.B. mill, less discounts and selling commissions * * * calculated on the rough green price. * * *'. If we let 'x' represent the stumpage price, and 'y' the lumber price, the proposition may be expressed algebraically as follows:

$$\frac{x}{y} = 10\% \quad (\text{In the case of redwood})$$

Using the same terms, the present problem is expressed as $\frac{x}{y} = z\%$. To determine the value of 'x', the present values of 'X' and 'Y' are necessary."

In accordance with this construction the court took evidence of the present market value of stumpage and of lumber in order to determine the new percentage of sales which Empire was to pay Gualala until that percentage should again be revised.

[1,2] The parties agree that the admissibility of parol evidence is governed by the rule, well stated in *Barham v. Barham*, 33 Cal.2d 416, 422, 202 P.2d 289, 293;

"* * * When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties [citation], * * * to show 'what they meant by what they

said' [citation]. Where any doubt exists as to the purport of the parties' dealings as expressed in the wording of their contract, the court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement."

[3] We think that the language used in paragraph ten is fairly susceptible of another construction. The contract differs from the usual stumpage contract. Gualala acquired the land and timber for a total cash outlay of about \$400,000. Empire in turn reserved the right to cut and manufacture into lumber the old growth timber. Gualala was not to be paid a flat price for the timber removed. Rather, Gualala was given as its return a percentage of the price obtained by Empire for rough green lumber. The percentage payments to Gualala would result in a fluctuating return. As the price of green lumber increased Gualala's return would increase, and as the price of green lumber dropped Gualala's return would decrease. Gualala was sharing with Empire in the proceeds by receiving a percentage thereof. If the price of green lumber was \$50 per thousand board feet and if there were 300,000,000 board feet of harvestable timber as estimated by the parties, then under the percentage fees agreed to Gualala would receive about \$1,000,000 above its initial cash outlay. On the contrary, depressed lumber prices might seriously decrease Gualala's receipts. But being a part of Empire's total returns from harvesting, hauling, milling and selling, receipts would move to Gualala unless from economic shifts Empire would be driven to stop harvesting and go to the basis of minimum payments fixed at \$17,500 a year.

According to the court's interpretation of the contract the parties intended to say that once in 5 years they would arrive at a new percentage of sales to be paid Gualala and they would do this by ascertaining the market value of the remaining standing harvestable timber on the land involved,

by ascertaining the existing price of lumber on the market and by then dividing the ascertained price of lumber into the ascertained market value of the timber, thus arriving mathematically at a new percentage of lumber prices which Empire would pay to Gualala from that time on until and unless a new revision was made. Carrying out this interpretation, the trial court limited the evidence to expert opinion testimony as to the existing market value of the remaining standing timber, conditions of terrain and contract harvesting conditions considered. Empire contends that this was the wrong approach and resulted in writing a new contract for the parties. It contends that the parties never intended periodically to ascertain market value of timber and lumber, but were concerned with an economic relationship between timber costs on the one hand and all other costs on the other, such as harvesting, hauling, milling and selling. It says and sought to prove that the parties negotiated the contract from the point of view that they anticipated a sharp rise in lumber prices over a considerable period of time, perhaps for the full life of the contract; that while Empire had purchased the timber at an advantageous price it had turned out that Empire was under-financed for the extensive operations involved, including such matters as the construction of access roads, this being a tract where favorable logging had been done for a very long time, including also shifting costs of operating a large mill. It says the parties considered that ordinary banking loans based on interest returns were proving unavailable and that resort must be had to what it terms equity financing, and that the parties were negotiating for and intended to agree upon something in the nature of a joint interest in the profits to be had from manufacturing that timber stand into lumber and selling the same, Empire to furnish the mill, the equipment and to stand all the direct expense of the operation, while Hall, predecessor to Gualala, was to advance immediately for Em-

pire's existing needs the sum of \$150,000 and to undertake to make the contract payments required under Empire's purchase contract. Empire sought, by proving the negotiations of the parties, to prove that such was the reason for the provision of the contract that Gualala's return should represent a percentage of lumber sales. It wanted to prove also that the revision clause came into being at the close of negotiations upon the suggestion that the economic ratio or relationship between timber costs and all other costs might so shift that the initial sharing ratio would become unfair and unresponsive to their basic intent; that the parties discussed the possibility, not unknown to the industry, that new equipment and mechanical improvements in either the harvesting end or the milling end, and new changes in labor costs and labor supply, could upset the existing economic relationship so as to render the contemplated plan of sharing receipts unfair to one party or the other. It insisted in the trial court, and here insists, that the parties were concerned with these possibilities and that the parties did not fix upon the shares of each with reference to the then market value of the timber. In this connection Empire points to provisions in the contract as made wherein adjustments for overages or shortages in the estimated total stand of 300,000,000 board feet were based upon an agreed stumpage price of around \$2, whereas, taking agreed percentages of lumber prices at that time, Gualala would receive approximately \$6 per thousand board feet for the timber cut. Empire sought to prove that the suggestion of periodical revision was agreeable and that the attorney for Hall drafted the revision provision, attempting to express therein the wishes of the parties concerning revision; and that even the language used bears indications that Empire's contentions are valid. It says "percentages of stumpage to sales" refers to the economic relationship between the value of standing timber or its cost to a lumbering enterprise and all other costs.

It points out that the word "percentage" means a ratio of one factor to another, expressed in hundreds or percentages. It says that the percentages initially fixed on for sharing the returns of the entire operation were intended to fix the share of each in the returns of the enterprise, not merely to state an existing ratio between timber value and all other costs. Their repeated requests that they be allowed to go into the negotiations between the parties were refused and the evidence was limited as above indicated.

The parties were equally in disagreement as to the interpretation of that portion of the tenth paragraph which provided for revision: "* * * once in every five years in the life of this contract * * *" This disagreement also is reflected in the trial court's order for findings, from which we quote: "It is Hall's contention that this figure [the revised percentages] is retroactive to August 20th, 1954 [that is, that it is to cover the second 5 year period of the life of the contract], while Empire contends that it becomes operative when the Judgment to be entered herein becomes final. The Court cannot concur with either of these views. The contract provides that the percentage shall be revised 'once in every five years in the life of this contract'. To give this language the meaning contended for by Hall, would require the substitution of the words 'at the end of' for the words 'once in', every five years. When once determined, the percentages cannot again be reviewed during that quinquennium and will continue to the end thereof. Immediately thereafter, or at any time during the next five years, the prices may again be reviewed. The percentages to be fixed by the Judgment herein, shall be effective as of the entry of the Judgment, * * *"

With respect to the stated disagreements as to the proper interpretation of the contract it appears to us that a case is presented where under the stated rules the court was required to receive evidence concern-

ing the circumstances under which and the negotiations by means of which the parties arrived at the written agreement which they executed.

There were other disagreements, but they were minor in comparison with those we have reviewed, and it is unnecessary to discuss them here since if the required evidence be taken they may be readily resolved. Distinct from, but related to, Empire's contentions as to interpretation is a contention advanced by it that the contract is invalid in so far as the percentage of sales that Gualala is to receive is concerned, the argument being that, aside from the processes of arbitration which the parties have turned away from, the contract affords the court no workable standard for a revision. But this contention, too, may very well be affected by the interpretation of the contract when it is arrived at by the use of parol testimony. As we see it, the only permissible order that can be made on appeal is an order reversing the judgment appealed from.

[4] The only contention of Alvin M. Boldt which requires an answer is whether the trial court erred in determining that he was not a proper party to the litigation. Boldt as the lessee of Empire's mill and as the party who was actually doing the logging was an interested party since under his agreement with Empire his payments to it would increase as Empire's payments to Gualala would increase. He would be affected by the determination of the issues involved in the Empire-Gualala controversy and was a proper party to the action.

No other issues presented require determination by this court at this time.

The judgment is reversed. Appellants Empire Redwood Company and Boldt to recover costs on appeal.

VAN DYKE, P. J., concurs.

161 Cal.App.2d 816

Sara GUTTMAN, Plaintiff and Appellant,

v.

Jacques J. CIVET, Defendant and
Respondent.

Civ. 22606.

District Court of Appeal, Second District,
Division 3, California.

July 3, 1958.

Hearing Denied Aug. 28, 1958.

Action for damages for personal injuries resulting from an automobile collision. Judgment for the defendant in the Superior Court, Los Angeles County, Wilbur C. Curtis, J., and the plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that the questions of negligence and contributory negligence were for the jury and that the alleged improper rulings at trial were not prejudicial.

Attempted appeal from order denying motion for new trial dismissed. Judgment affirmed.

1. Witnesses ⇨287(1)

In action for injuries sustained in an automobile accident, where plaintiff answered in the negative on cross-examination, whether she had been in an accident of any kind since the accident involved, and it was shown that she was involved in a personal injury suit in New York arising out of a subway accident and her counsel on redirect sought to show that she had misunderstood the question, objections were properly sustained to the plaintiff's appraisal of her own testimony.

2. Appeal and Error ⇨201(2), 1046(5)

In action for injuries sustained in an automobile accident, where it was shown that subsequent to the injury the plaintiff had filed suit for another injury sustained in New York remark of trial court during plaintiff's redirect examination of a physician regarding personal injuries "is the plaintiff going to change her testimony" was not prejudicial error in view of corrective action by the trial court and the

fact that at the trial the plaintiff did not assign the remark as misconduct.

3. Appeal and Error ⇨201(2), 1046(5)

In action for injuries sustained in an automobile accident where plaintiff had sustained a subsequent injury in an accident in New York, remark of the trial judge that he would have sustained an objection to the question as asked under any circumstances but that plaintiff could proceed with her purpose in mind and attempt a new question was not prejudicial where the question was objectionable and at trial the plaintiff did not assign the remark as misconduct.

4. Evidence ⇨533(2)

Hypothetical question to a physician was objectionable where it did not describe the injuries concerning which an expert opinion was sought.

5. Appeal and Error ⇨201(2), 1046(5)

In action for personal injuries where plaintiff asked for the file in the case, alleged act of the trial judge in "throwing the file" at the plaintiff's counsel in full view of the jury was not shown to be prejudicial where the plaintiff's counsel by his statement indicated that the act of the judge was an inadvertence and at trial the plaintiff did not assign the act as misconduct.

6. Trial ⇨140(1)

Questions as to the weight and credibility of the witnesses are for the jury.

7. Automobiles ⇨245(15, 81)

In action for injuries sustained by plaintiff when automobile in which she was riding was struck from the rear by the automobile of the defendant where there was a conflict in evidence as to whether the plaintiff's automobile was stopped at an intersection or whether the plaintiff stopped her automobile suddenly without giving a signal near another intersection, questions of negligence and contributory negligence were for the jury.

8. Appeal and Error ⇨110

An order denying the plaintiff's motion for new trial was not appealable.

Paul Hill, Hollywood, and Max L. Herzig, for appellant.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action for damages for personal injuries allegedly resulting from an automobile collision. Judgment upon a verdict was in favor of defendant. Plaintiff appeals from the judgment.

Appellant asserts that the court erred (1) in rulings as to the admissibility of evidence; and (2) in making certain remarks in the presence of the jury.

There was testimony on behalf of plaintiff that on July 21, 1954, defendant drove his automobile against the back of plaintiff's automobile while plaintiff's automobile was stopped at the entrance to an intersection where a red signal light required plaintiff to stop her automobile; and that plaintiff, who was in the driver's seat of her automobile, sustained personal injuries.

Defendant testified that when plaintiff stopped her automobile at the intersection, he stopped his automobile behind plaintiff's automobile; when the signal light changed to green, plaintiff proceeded across the intersection; defendant followed about "half a car length behind" plaintiff's automobile; when plaintiff's automobile had gone about 70 feet beyond the intersection and was at a place near the next intersection, plaintiff stopped her automobile suddenly without giving a signal; then defendant's automobile struck the rear of plaintiff's automobile; the impact moved plaintiff's automobile approximately one foot.

Appellant contends that the court erred "in not permitting a proper showing [by plaintiff] of the psychosomatic injuries of plaintiff below, resulting in her amnesia and consequent inability to recollect clearly the sequence of events and her prior conditions." Appellant does not refer specifically to the questions, objections, and rulings which are involved in this contention, but she cites three pages of the re-

porter's transcript. In order to more clearly understand this contention, certain testimony of appellant on cross-examination should be referred to. It appears that, as a result of such cross-examination, the matter of appellant's credibility was brought into question. On cross-examination, appellant was asked if she had been in an accident of any kind since the accident involved here. She answered in the negative. Counsel for appellant asked her if it was a fact that she had filed a lawsuit in New York for damages for personal injuries arising out of an accident in April, 1955 (a date after the accident involved here). She answered in the affirmative. She stated further that she had misunderstood him (counsel for defendant) and she thought he was referring to a car accident—that the accident in New York was in a subway. Then counsel for defendant referred to her deposition (in the present action) and asked her if she had testified therein that she had not been in any accident since July 21, 1954 (the date of the accident involved here). She replied that she had so testified. Then counsel for defendant referred to an affidavit which appellant had made in connection with her claim against the New York Transit Authority, and he asked her if she had stated therein (after the accident involved here) that she had never been involved in any other accident in which she was injured or in which she made a claim against anyone by reason of an injury to herself. She answered that question in the affirmative.

As above stated, appellant does not refer specifically to the questions, objections, or rulings which are involved in the above-mentioned contention to the effect that she was not permitted to make a proper showing as to the cause of her alleged inability to remember the sequence of events. In addition to referring generally to three pages of the reporter's transcript, she states that a reading of the transcript will convince the court that at the time of the trial plaintiff "had not fully regained her memory, due to traumatic amnesia and shock treatments

that were administered to her in the Psychiatric Hospital in Philadelphia about one year after she was injured at Los Angeles, consequently she was still confused and frustrated on the witness stand about the various details and incidents that took place or intervened after she was first injured."

[1] The three pages of the transcript, referred to by appellant, show that appellant's counsel asked her questions, on redirect examination, regarding injuries she received in an accident in New York in 1955; and regarding the medical treatment she received for those injuries. In answer to those questions, appellant testified to the effect that she was in an accident in New York in April, 1955; that directly after that accident, as far as she could recall, she was treated "for hysteria, nervous insomnia and shock"; that she was not injured physically in that accident, but was injured emotionally and mentally, and that her arm was hurt "in the manner" in which she was caught in a subway door (her pocketbook was caught in the door, causing her to fall on her knee), and directly after that accident she suffered pains in her arm and the lower part of her back; that she was treated for hysteria and was given shock treatments in a hospital in Philadelphia. There was no objection or ruling with respect to those questions or answers. The above-mentioned transcript references also show that on redirect examination, appellant's counsel asked her as follows: "Now, you at no time intended to hide or conceal any occurrence in New York to this jury, have you?" Defendant objected to the question on the ground that it assumed something that was not in evidence and it was contrary to the evidence. The objection was sustained on the ground that it called for a conclusion. Then her counsel asked her: "When you were under direct examination the only accident I asked you about was the one that took place in Los Angeles on July 21st, 1954 and you restricted your answers to that accident; is that correct?" Defendant objected to the question on the ground that it was leading. The judge said: "Sustained. I think the record will

show what questions were asked her and the jurors will rely on their own memory in that respect." It thus appears that appellant was not precluded from presenting evidence regarding the happening of the New York accident or regarding the medical treatments she received. The two questions, as to which objections were sustained, related to appellant's appraisal of her own testimony. The court did not err in sustaining objections to those questions.

[2] Appellant also contends that the judge erred in remarking, as follows: "Is the plaintiff going to change her testimony?" Appellant does not state the circumstances under which the remark was made. Immediately preceding the making of the remark, counsel for appellant had asked a physician questions, on redirect examination, which purported to be hypothetical questions regarding personal injuries. One of those questions was in substance, as follows: If plaintiff sustained an injury to the soft tissue of her back on July 21, 1954, "and later on some other injury took place" such as falling on a subway platform in New York and there was an added injury to that part of the back, "would they be related in any way or connected, or would they be aggravated by the second injury?" Defendant objected to the question on the ground that the hypothesis was incomplete. The objection was sustained. Counsel for appellant asked the judge, as follows: "Am I to understand * * * that * * * a later injury could not aggravate a pre-existing condition?" The judge said that there would be no change in the ruling. Counsel for appellant said: "It has been intimated in this courtroom that an injury took place after this particular accident we have here. We know such an accident took place. Now, I am merely trying for the benefit of clearing up this matter, for the jury to evaluate, which part of this could be separated from the original injury and which could not." Then the judge said: "Is the plaintiff going to change her testimony?" After a further statement was made by counsel for appellant, wherein he referred again to July 21, 1954, the judge

said that he (judge) had been under a misapprehension as to the year the New York accident occurred (he thought it was prior to July, 1954). Thereupon the judge permitted counsel for appellant to proceed with the redirect examination in the manner counsel had formerly proceeded. Under such circumstances it does not appear that the remark by the judge, regarding a change of testimony, was prejudicial error. Furthermore, at the trial, appellant did not assign the remark as misconduct.

[3,4] Appellant also contends that the judge erred in remarking, as follows: "You can try again, but the Court would have sustained an objection to the question as you asked it under any circumstances, but you may proceed with your purpose in mind and attempt a new question." Appellant does not state the circumstances under which the remark was made. That remark was made immediately after the colloquy, above referred to, regarding the date of the New York accident. The remark, referred to, was the statement of the judge wherein counsel for appellant was given permission to proceed with the redirect examination. The question referred to in the statement was the hypothetical question that had been asked, as hereinabove shown. The question was objectionable. It did not describe the injuries concerning which an expert opinion was sought. The judge did not err in stating that he would have sustained the objection to that question under any circumstances. It is to be noted that, immediately preceding that statement, the judge said that he was under a misapprehension as to the date of the New York accident. The expression "under any circumstances," as used in the statement, apparently meant that even if the judge had not been under such a misapprehension the objection would have been sustained. Furthermore, at the trial, appellant did not assign the remark as misconduct.

[5] Appellant contends further that the judge "erred in throwing the file at plaintiff's counsel in the full view of the jury, being a prejudicial attitude, thus depriving

her of a fair trial." Appellant does not state the circumstances upon which she allegedly bases this assertion. Counsel for appellant had asked the defendant if he had passed a certain street (intersection) before the accident. Defendant replied that he did not know where the street was located. Then counsel for appellant asked for the file in the case. The judge said that he did not see the purpose of the questioning, since no one claimed the accident happened at that street. Counsel for appellant said that it was in the answer, and he wanted to ask defendant if his signature was on the answer. Counsel for defendant said that he would stipulate that it was defendant's signature. Counsel for appellant said that he would rather have the witness answer whether it was his signature. The judge said that undoubtedly it was his signature and it is presumed to be his signature, "So let's get on." Thereupon, as shown by the transcript, the following statements were made:

"Mr. Hill [counsel for appellant]: I want to know if it's his signature on that pleading.

"The Witness [defendant]: I can't see it.

"Q. By Mr. Hill: May I ask, are you sure that—is this— A. I would like to see it.

"The Court: I didn't mean to throw it at you.

"Mr. Hill: It's a slip, that's all, Judge. (The Court hands Mr. Hill the file.) (Mr. Hill hands file to the witness.)

"The Witness: Yes.

"Q. By Mr. Hill: That's your signature? A. Yes."

The statement by counsel for appellant, that it was "a slip," indicates that he regarded the act of the judge as an inadvertence. At the trial, counsel for appellant did not assign the act as misconduct. This contention is not sustainable.

[6,7] Appellant contends further that the verdict was against the weight of

the evidence. She argues that defendant failed to show that plaintiff was guilty of contributory negligence. The questions as to the weight and credibility of the witnesses were for the determination of the jury. There was a conflict in the evidence as to whether appellant's automobile was stopped at a certain intersection immediately preceding the collision. Defendant testified that the collision did not occur at the intersection referred to by appellant, but it occurred near another intersection and that, immediately preceding the collision, appellant stopped her automobile suddenly without giving a signal. The questions of negligence and contributory negligence were questions of fact for the determination of the jury.

[8] The attempted appeal from the order denying appellant's motion for a new trial is dismissed. The judgment is affirmed.

SHINN, P. J., and PATROSSO, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.



161 Cal.App.2d Supp. 842

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

John Elmer MILLER, Defendant and
Appellant.

Cr. A. 3809.

Appellate Department, Superior Court,
Los Angeles County, California.

June 11, 1958.

Defendant was convicted of failing to yield right of way when making left turn at intersection. The Municipal Court of Alhambra Judicial District, David T. Sweet, J., rendered judgment, and defendant appealed. The Appellate Department of the Superior Court, Bishop, P. J., held that where two automobiles preceding de-

fendant driver were turned left at intersection in front of approaching automobile, and approaching automobile was stopped, when it was two thirds of its length into intersection, to avoid collision with defendant, who was also making left turn and following preceding automobiles, approaching automobile constituted a hazard under statute providing that driver of automobile intending to turn left at intersection shall yield right of way to any approaching vehicle which is so close as to constitute a hazard and it was defendant's duty to yield right of way.

Affirmed.

1. Automobiles Ⓒ355(1)

Evidence sustained conviction of failing to yield right of way when making left turn at intersection. West's Ann.Vehicle Code, § 551(a, b).

2. Automobiles Ⓒ335

Under statute providing that driver of vehicle intending to turn left at intersection shall yield right of way to any vehicle, which has approached or is approaching intersection from opposite direction and which is so close as to constitute a hazard at any time during turning movement, driver intending to turn left at intersection must yield right of way to automobiles that are not in motion, if they have arrived so close to intersection as to constitute a hazard to driver as he makes his left turn. West's Ann.Vehicle Code, § 551(a).

3. Automobiles Ⓒ154

Driver to whom right of way has been given is not thereby relieved of duties of remaining alert.

4. Automobiles Ⓒ335

A motorist desiring to make a left turn at intersection is under no duty to yield right of way to all those automobiles which were in line back of automobile or automobiles that constituted a hazard when he first sought to make turn, and he has right of way over those who were not a hazard until he yielded, and those in line behind driver or drivers who were making a left

turn, who yielded and who then were given right of way, do not have right of way, but must yield to those that constitute a hazard to them. West's Ann.Vehicle Code, § 551(a, b).

5. Automobiles ⇨335

Where two automobiles preceding defendant driver turned left at intersection in front of approaching automobile, and approaching automobile was stopped when it was two-thirds of its length into intersection to avoid collision with defendant who was also making left turn, approaching automobile constituted a "hazard" within statute providing that driver of automobile intending to turn left shall yield right of way to any approaching vehicle which is so close as to constitute a hazard and it was defendant's duty to yield right of way, whether or not preceding automobiles were properly yielded right of way. West's Ann. Vehicle Code, § 551(a, b).

See publication Words and Phrases, for other judicial constructions and definitions of "Hazard".

6. Criminal Law ⇨317

In prosecution for failure to yield right of way when making left turn at intersection, failure of people to call one police officer, who had been in position to witness events that made up case for people, did not require trial court to infer that, if called, he would have testified contrary to other officers. West's Ann.Vehicle Code, § 551(a, b).

7. Criminal Law ⇨643

Although trial court was authorized to order an official reporter to take down in shorthand all testimony in prosecution for failure to yield right of way when making left turn at an intersection, court was not required to order that it be done at public expense. West's Ann.Vehicle Code, § 551(a, b); West's Ann.Code Civ.Proc. § 274c; West's Ann.Gov.Code, § 69952.

BISHOP, Presiding Judge.

[1] The defendant, found guilty by the trial court, sitting without a jury, of failing to yield the right of way when making a left-hand turn at an intersection, was sentenced to pay a fine of five dollars. Measuring his grievance, not by the amount of the judgment, but by the principles he deems involved, the defendant has appealed. We are satisfied of two things: that the evidence supports the conviction; that the problems presented by left-hand turns at busy intersections justify us in commenting at some length, as we affirm the judgment.

The path of a motorist who purposes to drive straight across an intersection and that of one who intends to make a left turn will, of necessity, cross. If they approach the space, that is common to both paths, at the same time, unless one makes way for the other, they collide. In the absence of legislation, neither has a right superior to the other, although each has the equal duty of taking care to avoid a collision. The legislature has taken notice of the problems created by the conflicting rights and has enacted section 551 of the Vehicle Code, giving preferred rights to one or the other of the motorists, depending on the conditions recognized in the section.

That section, since its amendment in 1957, reads as follows: "(a) The driver of a vehicle intending to turn to the left at an intersection shall yield the right of way to any vehicle which has approached or is approaching the intersection from the opposite direction and which is so close as to constitute a hazard at any time during the turning movement.

"(b) Said driver turning left having so yielded and having given a signal when and as required by this code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn."

[2] The 1957 amendments made no change in subdivision (b). Before 1957, subdivision (a) read: "The driver of a vehicle *within an intersection* intending to

John Elmer Miller in pro. per.

Stanley Weinstein, City Pros., Alhambra, for respondent.

turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is *within the intersection* or so close thereto as to constitute an *immediate hazard*." (We have added emphasis to the words omitted in the 1957 version). It will be noted that by the addition of the words "which has approached or", the premise of the conclusion reached by us in *People v. Bull*, 1956, 144 Cal.App. 2d Supp. 860, 862, 301 P.2d 311, has been destroyed; the necessity of yielding the right of way is no longer limited to vehicles in motion, but applies as well to those not in motion, if they have arrived so close to the intersection as to constitute a hazard to the driver as he makes his left turn.

There are several simple, perhaps obvious, facts that should be kept in mind. The legislature, in section 87 of the Vehicle Code, has defined "right of way" as "the privilege of the immediate use of the highway." No problem of the right of way arises until two motorists desire to make use of the same portion of a highway at approximately the same time. The touchstone adopted by section 551 to determine who has the right of way, in the first instance is "hazard". This word connotes not a certainty, but a risk. We read in *Caminetti v. Guaranty Union L. Ins. Co.*, 1942, 52 Cal.App.2d 330, 333, 126 P.2d 159, 163: "Along with other meanings, the standard dictionary defines the noun 'hazard' as exposure to the chance of loss or injury, and the adjective 'hazardous' as involving risk of loss." In *Hough v. Contributory Retirement Appeal Board*, 1941, 309 Mass. 534, 36 N.E.2d 415, 418, the court said: "a hazard is a danger or risk lurking in a situation * * *". A similar conception appears in *The Philadelphia D.C.* 1912, 199 F. 299, 302: "'Risk of collision' means 'chance,' 'peril,' 'hazard,' or 'danger of collision' merely, and not immediate danger."

Two cars that seem about to try to occupy the same space at the same time, are, obviously, both "hazards"; each is a hazard to the other. If both cars are stopped by a red signal at an intersection, general-

ly speaking each becomes a hazard to the other at the moment the signal turns green, releasing them both. But since the adoption of section 551, Vehicle Code, the rights of the two drivers under the situation depicted, are not equal; one is given the right of way.

We find similar provisions of the code respecting rights of way applied in *Giles v. Happely*, 1954, 123 Cal.App.2d 894, 898, 267 P.2d 1051, 1053, where it is said: "The correct rule is accurately stated in *People v. McLachlan*, supra, by Mr. Presiding Judge Shaw, 36 Cal.App. Supp.2d [754], at page 757, 93 P.2d [280] at page 282, as follows: 'Questions of right of way arise between two users of the highways only when there is danger of a collision between them if both proceed on their respective ways without delay. *Mitrovich v. Graves*, 1938, 25 Cal.App.2d 649, 654, 655, 78 P.2d 227; *Cowan v. Market St. Ry. Co.*, 1935, 8 Cal. App.2d 642, 646, 647, 47 P.2d 752; *Switzer v. Baker*, 1916, 178 Iowa 1063, 160 N.W. 372, 375. The case of *Mitrovich v. Graves*, supra, involved the provision of section 562 of the Vehicle Code which requires a pedestrian crossing a roadway at a point not within a crosswalk to "yield the right of way to all vehicles upon the roadway," and the court said that it "merely means that when the course of an automobile along a highway meets with that of a person who seeks to walk across the street or roadway at a point other than along a marked crosswalk, under circumstances which render a collision likely, the pedestrian must stop and permit the vehicle to pass ahead of him. * * * The rule applies only under circumstances when the opposite courses of the vehicle and the pedestrian render it dangerous for both to proceed on their respective ways without delay. Under such circumstances the pedestrian must stop to permit the vehicle to precede him." In *Switzer v. Baker*, supra, the court had under consideration a city ordinance providing that "pedestrians are given the right of way over the crossings at street intersection," and said that such legislative regulations of the right of way mean "that,

when two or more persons moving in different directions approach a crossing at the same time or in such manner that if both or all continue their respective courses there is danger of collision, then the one having the preference is entitled to the first use of such crossing, and it is the duty of others to give him reasonable opportunity to do so.””

[3] It remains true that he to whom the right of way has been given is not thereby relieved of the duty of remaining alert. We quote from *Powell v. Bartmess*, 1956, 139 Cal.App.2d 394, 401, 294 P.2d 150, 155: “As was said in *Donat v. Dillon*, supra (192 Cal. 426 [429], 221 P. 193): ‘Assuming, therefore, that the defendant had the right of way, he was required to proceed across the intersection in a careful and prudent manner, ever watchful of the direction in which danger was most likely to be apprehended.’ In *Allin v. Snavelly*, supra (100 Cal.App.2d 411 [414], 224 P.2d [113] 115), this court remarked: ‘Under traffic conditions prevailing upon the highways of California ordinary care frequently requires the operator of an automobile who has the right of way to yield in order to avoid disastrous consequences although he may have entered an intersection first and therefore legally be entitled to the right of way.’” But it is also true that the one given the right of way may, until put on notice to the contrary, assume that the one whose duty it is to yield the right of way will do so. In *Baumert v. Govaker*, 1956, 143 Cal.App.2d 691, 695, 299 P.2d 964, 966, it is stated: “Under section 551 subdivision (a), of the Vehicle Code it was defendant’s duty to yield the right-of-way if plaintiff was so close to the intersection as to constitute an immediate hazard. Plaintiff, if free from negligence, would have had the right to expect defendant to obey the law in this particular, unless he knew or in the exercise of ordinary care would have known that defendant was not intending to yield the right-of-way.”

Turn about is fair play, and so it has been provided (subd. (b) of section 551) that, the driver turning left who has yielded

the right of way to those who constituted a hazard, if both he and they continued on their ways, is in turn entitled to the right of way over those drivers who had not been hazards but, due to the delay of his yielding, have become competitors of his for the immediate use of the portion of the highway both wished to occupy. Of necessity, those whose duty to yield is governed by subdivision (b) of section 551, are those who were not hazards, as the problem of the left turn either stopped his progress, or become hazards while he who was making the left turn was first faced, but who have slowed down, in order to yield the right of way. If subdivision (a) is interpreted as requiring one making a left turn to yield the right of way to all who *become* hazards, no situation is left for subdivision (b) to cover.

[4] These facts are clear. A motorist desiring to make a left turn is under no duty to yield the right of way to all those cars who were in line back of the car or cars that constituted a hazard; he has the right of way over those who were not a hazard until he yielded. Again, those in line behind the driver or drivers making a left turn who yielded, and then were given the right of way, do not inherit the right of way by the right of succession; they must yield to those that constitute a hazard to them.

“Who had the right of way?” will often be a close question of fact, but the difficulty of decision is inherent in the situation, it is not the fault of the rules prescribed. It was a close question in the case under review, but as we stated at the outset, the answer given by the trial court was supported by the evidence.

[5] The defendant, it disclosed, was driving the third car in line proceeding in a westerly direction, at the same time that a car, driven by a police officer with another officer as a passenger, was the third of three cars driving east. As the two cars ahead of the police car reached Garfield Avenue, they turned south (to the right) causing the two cars in front of defendant’s car, to proceed slowly as they turned left and

south into Garfield. The police car did not turn south, but kept on straight ahead on Mission, until it was brought to a sudden stop to avoid a collision with defendant's car which had made a left turn, as had the two cars that it was following. The police car was two-thirds its length in Garfield when it was brought to a stop some five to eight feet from the right rear of defendant's car. All cars in the picture thus sketched were being driven well within legal speed limits, those coming from the west at fifteen miles per hour, the defendant and his companions some five miles an hour during the period of their left turns.

It no doubt appeared to the trial judge that the police car, not because of its occupants, but because of its near approach, constituted a hazard as the defendant was about to make his left turn, and it was his duty to yield to it the right of way. Whether or not the two cars just ahead of the defendant took or were properly yielded the right of way is not determinative of the matter. If they had the right of way that fact did not serve to bestow it upon the defendant. Whether he had it, depended on the facts affecting him, not on those affecting those ahead of him. It is evident that the trial court was not persuaded by the defendant's testimony that a car, stopped one-half over the south curb line of Mission Road had caused defendant's car to come to a standstill south of the center line of Mission Road, before the police car entered Garfield, and that this, not defendant's failure to yield the right of way as he crossed the center line, was the reason he was in the path of the officers' car.

[6] The failure of the People to call a third officer, who had been in a position to witness the events that made up the case for the People (but who was not shown to have done so) did not require the trial court to infer that, if called, he would have testified contrary to the two officers. (Davis v. Franson, 1956, 141 Cal.App.2d 263, 270, 296 P.2d 600, 604-605; and see annotation, 135 A.L.R. 1375, 1376, citing California cases).

[7] While the trial court was authorized to order an official reporter to "take down in shorthand all the testimony" etc. (section 274c, C.C.P.), it was not required to order that it be done at public expense (section 69952, Government Code, even if it be that that section is still applicable since the reference to it was eliminated from section 274c in 1955).

We find no reason to reverse the judgment. It is affirmed.

DAVID, J., concurs.

SWAIN, Judge.

I concur in the judgment but I do not agree with that part of the opinion which states: "the driver turning left who has yielded the right of way to those who constituted a hazard, if both he and they continued on their ways, is in turn entitled to the right of way over those drivers who had not been hazards but, due to the delay of his yielding, have become competitors of his for the immediate use of the portion of the highway both wished to occupy." This interpretation is more merciful to left turners but it leaves the former difficulties in the section which I believe the legislature intended to eliminate.

Vehicle Code section 551 as amended in 1957 does not mean that only those through cars close enough to constitute a hazard at the time the left turner first yields, have the right of way but it also gives other through cars the right of way which, while he is yielding, approach so closely as to constitute a hazard at any time during his turning movement. If it were otherwise, the words "hazard at any time during the turning movement" would not carry out the obvious legislative intent. To be more specific, if there is a solid line of motorists who purpose to drive straight across the intersection, a driver intending to make a left turn may not cut through that line but must wait until those drivers have crossed the common space no matter how many cars are in that solid line. He, then, has the right of way over other through traffic,

approaching the intersection, which is far enough therefrom so that it does not constitute a hazard at any time during his turning movement as provided in subdivision (b) of said section.

The 1957 amendment deprives a motorist intending to make a left turn of rights which he theretofore had and may require him to wait much longer to use the common space than formerly. It may also congest traffic behind him but it establishes a clear cut rule which the legislature, doubtless, believed would reduce accidents.



161 Cal.App.2d Supp. 837

Howard M. KESSLER, Plaintiff and Respondent,

v.

Claude BRIDGE, Defendant and Appellant.
Civ. A. 9497.

Appellate Department, Superior Court,
Los Angeles County, California.

June 11, 1958.

Action for removal of vendor from premises and for an award of damages for withholding possession. From adverse judgment of the Municipal Court of the Citrus Judicial District, William M. Martin, J., the defendant appealed. The Superior Court, Appellate Department, David, J., held that equitable defenses that there was fraud in inducement for relinquishment of property, that delivery of deed to plaintiff was in violation of terms and conditions of escrow, that there was an unauthorized unilateral change in escrow instructions by plaintiff to effect delivery of deed, that there was a failure of consideration, that there was a cancellation of escrow and withdrawal of defendant's consent to the transfer, and that trans-

action was rescinded, were permissible and should have been considered.

Reversed and remanded.

1. Forcible Entry and Detainer §29(4)

Under statute providing that where a person holds over and continues in possession of real property after a three-day written notice to quit may be removed from property when property has been duly sold by him or a person under whom he claims and the title under sale has been duly perfected, a plaintiff, to prevail, must prove affirmatively that property was duly sold and that title under sale had been duly perfected. West's Ann.Code Civ.Proc. § 1161a, subd. 4.

2. Forcible Entry and Detainer §6(2)

Under statute authorizing removal of a person who holds over and continues in possession of real property after a three-day written notice to quit the same when the property has been duly sold by him and title under the sale has been duly perfected, title is an issue in a proceeding for removal. West's Ann.Code Civ.Proc. § 1161a, subd. 4.

3. Forcible Entry and Detainer §12(1)

In proceeding for removal of vendor from premises and for an award of damages for withholding possession, equitable defenses that there was fraud in inducement for relinquishment of property, that delivery of deed to plaintiff was in violation of terms and conditions of escrow, that there was an unauthorized unilateral change in escrow instructions by plaintiff to effect delivery of deed, that there was a failure of consideration, that there had been a cancellation of escrow and withdrawal of defendant's consent to the transfer, and that transaction was rescinded, were permissible and should have been considered. West's Ann.Code Civ.Proc. § 1161a, subd. 4.

4. Landlord and Tenant §61

A tenant is estopped to deny the title of his landlord.

5. Landlord and Tenant ⚖️288

Where landlord-tenant relationship exists between plaintiff and defendant, title will not be litigated in unlawful detainer proceedings. West's Ann.Code Civ.Proc. § 1161a, subd. 4.

6. Landlord and Tenant ⚖️290(1)

Where landlord-tenant relationship is shown to exist between plaintiff and defendant but the real issue is title and not possession, unlawful detainer will not lie.

7. Forcible Entry and Detainer ⚖️29(2)

It is competent to show in an unlawful detainer proceedings that relationship is not that of ordinary landlord and tenant, but instead is a sale of an interest in the property. West's Ann.Code Civ.Proc. § 1161a, subd. 4.

8. Execution ⚖️280(1)**Mortgages** ⚖️372(4), 544(1)

Statute providing for removal of person who continues in possession of real property following a sale where sale results from an execution against possessor or foreclosure of a mortgage executed by possessor or foreclosure under terms of a deed of trust is applicable to situations where strictly speaking there is no landlord-tenant relationship. West's Ann.Code Civ.Proc. § 1161a, subd. 4.

9. Forcible Entry and Detainer ⚖️8

Under statute providing for removal of person who continues in possession of real property where property has been sold by him or a person under whom he claims and title under sale has been duly perfected, title is duly perfected when all steps have been taken to make it perfect, and if there is want of performance or want of true consent the title cannot be said to be perfected. West's Ann.Code Civ.Proc. § 1161a, subd. 4.

10. Forcible Entry and Detainer ⚖️6(1)

An unlawful detainer proceeding is not a substitute for an equitable action for specific performance, even if it should be claimed the vendor has breached his contract.

Hanifin & Hanifin, El Monte, for appellant.

Guerin, Guerin & Graham, Los Angeles, for respondent.

DAVID, Judge.

[1, 2] Plaintiff secured judgment against defendant vendor of certain real property, for removal of the vendor from the premises and an award of damages for withholding possession. The proceeding was based on California Code of Civil Procedure sec. 1161a, subparagraph 4. To prevail, a plaintiff must prove affirmatively that the property was "duly sold" and that "the title under the sale has been duly perfected." Contrary to the rule applying to unlawful detainer where the landlord-tenant relationship is involved, title thus becomes an issue. *Kelliher v. Kelliher*, 1950, 101 Cal.App.2d 226, 232, 225 P.2d 554.

[3] Based upon decisions pertaining to landlord-tenant relationships, the trial court concluded that equitable defenses were not permitted, and refused to consider defendant's defenses. Under C.C.P. sec. 1161a, subparagraph 4, such defenses are proper, and the judgment must be reversed.

Summarized, defendant's defenses are, substantially, (1) fraud in the inducement for the relinquishment of the property; (2) delivery of the deed to plaintiff in violation of the terms and conditions of the escrow; (3) unauthorized unilateral change in escrow instructions by plaintiff to effect the delivery of the deed; (4) failure of consideration; (5) cancellation of the escrow and hence withdrawal of the defendant's consent to the transfer before made; (6) rescission of the transaction, effected before the institution of this suit.

In a case such as this it is essential that such issues be litigated, for otherwise a judgment in the unlawful detainer suit is res judicata as to them. *Bliss v. Security First National Bank*, 1947, 81 Cal.App.

2d 50, 58, 183 P.2d 312; *Freeze v. Salot*, 1954, 122 Cal.App.2d 561, 565, 266 P.2d 140, hearing denied, Supreme Court.

If grounds for rescission existed, and proper notice of rescission was given, then plaintiff at the time of institution of this suit had no title, and the "sale" after rescission is nonexistent, and may be declared so. Civil Code secs. 1688, 1689; cf. *Knight v. Black*, 1912, 19 Cal.App. 518, 126 P. 512, equitable defenses permitted; *Freeze v. Salot*, supra, 1954, 122 Cal.App.2d 561, 564, 266 P.2d 140, defenses against sale permitted.

[4-7] The division of the Code of Civil Procedure (Part 3, Title 3, Chapter 4) in which sec. 1161a(4) is found is denominated as "Summary Proceedings for Obtaining Possession of Real Property in Certain Cases", and prior to 1929, concerned forcible entries and detainers, and holding over by tenants beyond the terms of their tenancy. The doctrine in case of the landlord-tenant relationship is said to be that title will not be litigated in unlawful detainer proceedings. It has been often said that to do so would deprive the remedy of its summary character.

But underlying such doctrine is the basic principle that a tenant is estopped to deny the title of his landlord. *Reay v. Cotter*, 1865, 29 Cal. 168, 170; *Johnson v. Chely*, 1872, 43 Cal. 299, 305; *Francis v. West Virginia Oil Co.*, 1917, 174 Cal. 168, 170, 162 P. 394. Where the landlord-tenant relationship is shown to exist, title is not litigated; but if it is shown that the real issue is not possession, but title, then unlawful detainer is held not to lie. *Reay v. Cotter*, supra. It is erroneous to say that title is never in issue, for it is permissible to litigate it in connection with the existence of the landlord-tenant relationship (*Steinback v. Krone*, 1868, 36 Cal. 303; *Reay v. Cotter*, supra, 29 Cal. 168, 171). If the circumstances involve such fraud as the tenant could assert against the lease itself to invalidate it, this may be urged in an unlawful detainer

proceeding (*Johnson v. Chely*, supra, 43 Cal. 299, 305). It is competent to show that the relationship is not that of ordinary landlord and tenant, but instead is a sale of an interest in the property. *Manning v. Franklin*, 1889, 81 Cal. 205, 22 P. 550, or involves a partnership (*Pico v. Cuyas*, 1874, 48 Cal. 639; *Henderson v. Allen*, 1863, 23 Cal. 519, 521).

[8] In *Francis v. West Virginia Oil Co.*, supra, 1917, 174 Cal. 168, 162 P. 394, it was held that a defaulting vendee in possession of real property was not a tenant in any sense, so as to permit the employment of C.C.P. sec. 1161 applying to unlawful detainer; and that an action to eject such a person was not proper in unlawful detainer, in that he was entitled to show title undergirding his possession, and to present his equities and defenses. Specifically, it was held that default in the terms of an agreement of purchase of realty did not make the vendee a tenant of the vendor. 174 Cal. at page 171, 162 P. at page 395. (Accord: *Mertens v. Keene*, 1926, 77 Cal.App. 786, 247 P. 543.) Thereafter, in 1929, section 1161a was added to the Code of Civil Procedure to provide for removal of persons who continued in possession of real property following a sale if "the title under the sale has been duly perfected," in those instances (1) where a sale results from an execution against the possessor, or (2) the foreclosure of a mortgage executed by the possessor, or (3) foreclosure under the terms of a deed of trust. *American Nat. Bank v. Johnson*, 1932, 124 Cal.App.Supp. 783, 786, 11 P.2d 916, recognized that C.C.P. sec. 1161a applies to situations where "strictly speaking" there is no landlord-tenant relationship. Tenancy is not a necessary incident to a sale and a three-day notice to deliver up possession does not create a tenancy. C.C.P. sec. 1161a covers other instances where dispossession by legal procedures is preferred to self-help. No doctrine of estoppel is involved, comparable to that between the landlord and tenant. Thus, upon a purported foreclosure

sale under a trust deed, it is competent to assert in an action under C.C.P. sec. 1161a (3) that the trust deed was not in default, even though the finding to such effect depends in part upon equitable estoppel of the beneficiary (*Altman v. McCollum*, 1951, 107 Cal.App.2d Supp. 847, 236 P.2d 914); and the validity of the sale and of the trustee's deed was held to be so directly in issue in unlawful detainer that the judgment therein was *res judicata* (*Seidell v. Anglo-California Trust Co.*, 1942, 55 Cal.App.2d 913, 132 P.2d 12) and that case is authority that lack of consideration for a note in question was a legal issue to be determined in the unlawful detainer action (in 55 Cal.App.2d at page 922, 132 P.2d at page 16). Although there was a strong dissent, based in part upon *Cheney v. Trautzettel*, 1937, 9 Cal.2d 158, 69 P.2d 832, the Supreme Court denied a hearing in the *Seidell* case. The holding in *Altman v. McCollum*, *supra*, 107 Cal.App.2d Supp. 855-856, 236 P.2d 914, is to the effect that C.C.P. sec. 89, relating to jurisdiction of municipal courts has expressly conferred upon them power to consider equitable defenses in suits under C.C.P. sec. 1161a.

As between the parties here, there appears to be a bona fide dispute whether the property has been duly sold and the title duly perfected.

[9] Title is duly perfected when all steps have been taken to make it perfect, i.e., to convey to the purchaser that which he has purchased, valid and good beyond all reasonable doubt. *Hocking v. Title Ins. & Trust Co.*, 1951, 37 Cal.2d 644, 649, 234 P.2d 625, 40 A.L.R.2d 1238, which includes good record title (*Gwin v. Calegaris*, 1903, 139 Cal. 384, 73 P. 851), but is not limited to good record title, as between the parties to the transaction. The term "duly" implies that all of those elements necessary to a valid sale exist, else there would not be a sale at all. If there is want of performance or want of true consent the title cannot be said to be perfected. (C.C. secs. 1567-1589.) The court in an

unlawful detainer under C.C.P. sec. 1161a (4) has jurisdiction to determine the validity of such defenses.

If delivery of the deed violated the instructions, or if they were altered by plaintiff without defendant's authorization, there was no sale, and no rights can be derived therefrom by plaintiff. *Los Angeles City H. S. District v. Quinn*, 1925, 195 Cal. 377, 383, 234 P. 313; *Sousa v. First California Co.*, 1950, 101 Cal.App.2d 533, 538-539, 225 P.2d 955; note 48 A.L.R. 405. While one case states that forgery could not be set up in unlawful detainer proceedings under C.C.P. sec. 1161a (*Higgins v. Coyne*, 1946, 75 Cal.App.2d 69, 75, 170 P.2d 25), we cannot reconcile this with the other cases nor with the code, since proceedings based upon a forged deed certainly cannot "perfect the title". No bona fide purchaser is involved here. A forgery is a nullity (*Marlenee v. Brown*, 1943, 21 Cal.2d 668, 677, 134 P.2d 770); and so is delivery of a deed pursuant to instructions if they, as alleged, were altered by the plaintiff and his partner without any knowledge or authorization of the defendant.

[10] Quite independently of any ground of rescission, it is alleged that the defendant cancelled the escrow in which the deed was impounded on or about September 20, 1957. The deed was recorded September 26, 1957. Suit herein was filed November 22, 1957. If the escrow was validly cancelled before a valid delivery of the deed, then plaintiff cannot claim immediate possession. If the cancellation operated as a breach of contract, there still would not necessarily have been a sale. An unlawful detainer proceeding is not a substitute for an equitable action for specific performance even if it should be claimed the vendor has breached his contract.

It follows, therefore, that the judgment must be reversed, and the cause remanded for a new trial.

BISHOP, P. J., and SWAIN, J., concur.

161 Cal.App.2d Supp. 853

Robert A. JOHNSON, Plaintiff and Respondent,

v.

Murray SILVER et al., Defendants,

Murray Silver, Defendant and Appellant.

Dana E. HOUGH, Plaintiff and Respondent,

v.

Murray SILVER et al., Defendants,

Murray Silver, Defendant and Appellant.

C. A. 9491, 9492.

Appellate Department, Superior Court,
Los Angeles County, California.

June 17, 1958.

Plaintiffs, who hauled dirt excavated by defendant contractor, who was not licensed as a contractor, brought mechanic's lien actions against defendant contractor and defendant landowner. The Municipal Court of Los Angeles Judicial District, William R. Gallagher, J., entered judgments in favor of the plaintiffs, and the defendant landowner appealed. The Superior Court, Swain, J., held that evidence sustained finding that plaintiffs were employees, who could enforce mechanic's liens without proof that they were licensed contractors, and not contractors or subcontractors, who were required to prove that they were licensed, and that plaintiffs were not barred from recovery by fact that defendant contractor was not licensed, and that Municipal Court erred in finding that plaintiffs were employees of defendant landowner, and that plaintiffs, as employees of defendant contractor, were entitled to a mechanic's lien against the land.

Judgments modified and, as modified, affirmed.

David, J., dissented.

1. Licenses ⇨39.44

If plaintiffs were contractors or subcontractors, they were not entitled to prevail in mechanic's lien actions, in absence of pleading and proof that they were duly licensed contractors within meaning of the

Business and Professions Code, but if they were merely employees, then they could prevail in the actions without pleading and proving that they had contractors' licenses. West's Ann.Bus. & Prof.Code, §§ 7026, 7031, 7053; West's Ann.Code Civ.Proc. § 1181.

2. Licenses ⇨39.44

In mechanic's lien actions against defendant contractor, who was not licensed as a contractor, and defendant landowner, evidence sustained finding that plaintiffs, who were hired by defendant contractor to haul away dirt excavated by defendant contractor, were employees, who could enforce mechanic's liens without proof that they were licensed contractors, and not contractors or subcontractors, who were required to prove that they were licensed, though one of the plaintiffs hired drivers to help him in the work and took care of their unemployment, social security, and other payroll deductions. West's Ann.Bus. & Prof.Code, §§ 7026, 7031, 7053; West's Ann.Code Civ.Proc. § 1181.

3. Licenses ⇨39.43

Plaintiffs, who were hired by defendant contractor to haul away dirt excavated by defendant contractor, were not barred from recovery in mechanic's lien actions by fact that defendant contractor was not licensed. West's Ann.Bus. & Prof.Code, §§ 7026, 7031, 7053; West's Ann.Code Civ. Proc. § 1181.

4. Licenses ⇨39.44

In mechanic's lien actions against defendant contractor, who was not licensed as a contractor, and who hired plaintiffs to haul away dirt excavated by defendant contractor, and against defendant landowner, trial court erred in finding that plaintiffs were employees of defendant landowner as well as of defendant contractor. West's Ann.Bus. & Prof.Code, §§ 7026, 7031, 7053; West's Ann.Code Civ.Proc. § 1181.

5. Licenses ⇨39.43

Plaintiffs who, as employees of defendant contractor, who was not licensed as a contractor, hauled away dirt excavated by

defendant contractor, were entitled to a mechanic's lien against the land, though they were not employees of defendant landowner. West's Ann.Bus. & Prof.Code, §§ 7026, 7031, 7053; West's Ann.Code Civ. Proc. § 1181.

Robert E. Rosskopf, Hollywood, for appellant.

Robert S. Butts, Hollywood, for respondents.

SWAIN, Judge.

This is an appeal from judgments for plaintiffs in two mechanic's lien actions, consolidated for trial and on appeal. The owner of the real property in question is the defendant and appellant Silver. He hired and paid the defendant Shirey to excavate the site for an apartment building. It is not questioned on this appeal that Shirey was not a licensed contractor and that he hired the plaintiffs (respondents) to haul away the dirt after he, Shirey, excavated it. The plaintiff Johnson used three of his own trucks in this hauling, one of which he drove himself. His other two trucks were driven by men he hired for that purpose. In that work the plaintiff Hough drove one truck which he owned. The defendant Shirey did not appeal. Two principal questions are involved: (1) Were the plaintiffs contractors or were they employees of Shirey with wages as their sole compensation? (2) Are they barred from recovery by the fact that Shirey was not licensed as a contractor?

[1] If the plaintiffs were contractors (or subcontractors) the judgments must be reversed because they did not plead and prove that they were contractors as required by Business and Professions Code, section 7031. But if Business and Professions Code, section 7053 applies, they are not required to have contractors' licenses. The latter section provides: "This chapter does not apply to any person who engages in the activities herein regulated, as

an employee with wages as his sole compensation." Until 1949, this exception was part of section 7026.

[2] Plaintiffs claim they were employees of Shirey. They do not contend they were licensed as contractors. Their complaints allege that they orally agreed with Shirey to furnish labor and trucks for hauling away materials (dirt) from the real property in question. The court found these allegations were true. No issue was raised by the pleadings as to the precise character of the relationship whether employees or subcontractors—so no finding was made on that issue. The judgment is in harmony with the conclusion that plaintiffs were employees and the evidence supports that conclusion.

Appellant would have us hold that plaintiffs were subcontractors as a matter of law. This we cannot do. Johnson was to be paid by the hour for the use of each truck and driver. He paid the drivers and took care of unemployment, social security and other payroll deductions. There was nothing in the oral agreement which prevented Shirey from terminating it at will or prevented him from controlling the manner in which the work was done. The facts as to Hough were the same except that he had only one truck which he drove himself. Of course, he had no payroll deductions to make. In *Powell v. Berg*, 1950, 99 Cal.App.2d 353, 354, 221 P.2d 743, the court held that the plaintiff was an employee although he not only performed services but also advanced money and furnished a truck. In *Malvich v. Rockwell*, 1949, 91 Cal.App.2d 463, 205 P.2d 389, the plaintiff agreed to build a wharf for the defendant and for that purpose bought materials and hired laborers. He was held to be an employee. *Andrew v. Conner*, 1951, 101 Cal.App.2d 621, 225 P.2d 943, holds that Business and Professions Code, sections 7026 and 7031 do not preclude the foreclosure of a mechanic's lien by one whose sole participation in the project was the rental of his men and equipment to the

lience. See, also, *Denton v. Wiese*, 1956, 144 Cal.App.2d 175, 300 P.2d 746.

Nor is there any merit to appellant's claim that plaintiff Johnson's payment of social security, withholding taxes on laborers he hired, makes him a contractor as a matter of law. *Frugoli v. Conway*, 1950, 95 Cal.App.2d 518, 213 P.2d 76. At page 520 of 95 Cal.App.2d, at page 77 of 213 P.2d the court said: "The question whether one is an independent contractor or an employee is largely one of fact depending on all the circumstances of the relations of the parties. When those circumstances disclose a mixed relation of employment, the finding of the trial court based on substantial and competent evidence cannot be disturbed."

26 Cal.Jur.2d 401(note): "In an action against an employer, when plaintiff has introduced evidence that he acted as an employee or agent of the defendant, the burden is on the defendant seeking to avoid liability on such ground to prove that plaintiff acted as an independent contractor. *Malvich v. Rockwell*, 91 Cal.App.2d 463, 205 P.2d 389".

[3] As to the second question above, the plaintiffs are not barred from recovery by the fact that Shirey, the contractor, was not licensed. In *Fraenkel v. Bank of America*, 1953, 40 Cal.2d 845, 848, 256 P.2d 569, 571, the court said: "That law [B. & P. § 7026 and 7031] was enacted for the safety and protection of the public against imposition by persons inexperienced in contracting work, and for the prevention of fraudulent acts by contractors resulting in loss to subcontractors, materialmen, *employees* and owners of structures. *Loving & Evans v. Blick*, 33 Cal.2d 603, 609, 204 P.2d 23; *Franklin v. Nat. C. Goldstone Agency*, 33 Cal.2d 628, 632, 204 P.2d 37." [Italicizing of "employees" added.] After citing the above *Fraenkel* case the court said in *Matchett v. Gould*, 1955, 131 Cal. App.2d 821, 829, 281 P.2d 524, 530: "When a subcontractor is placed in the class of those for whose protection the law was

enacted, he is removed from the imputation of *pari delicto*, *Hedlund v. Sutter Med. Serv. Co.*, 51 Cal.App.2d 327, 333, 124 P.2d 878; *Robertson v. Hyde*, 58 Cal.App.2d 667, 672, 137 P.2d 703; 12 Cal.Jur.2d § 103, p. 302, and thus enabled to maintain an action for recovery of what is justly due him."

Nothing said about the *Matchett* case in *Lewis & Queen v. N. M. Ball Sons*, 1957, 48 Cal.2d 141, 154, 308 P.2d 713, affects the statement just quoted as far as the case at bar is concerned.

In *Grant v. Weatherholt*, 1954, 123 Cal. App.2d 34, 43, 266 P.2d 185, 192, re Business and Professions Code section 7031, the court said: "The courts will not impose penalties for noncompliance in addition to those that are provided expressly or by necessary implication." See, also, *Marshall v. Von Zumwalt*, 1953, 120 Cal.App.2d 807, 810, 262 P.2d 60. In this case the court held that section 7031 merely prevents an unlicensed contractor from bringing or maintaining any action and therefore does not bar him from using as a defense, by way of offset, to an action by the owner for an indebtedness on a note, money which he claims due him on the contract. That case puts the emphasis on the words "bring or maintain any action". By like reasoning we put emphasis on the words "no person engaged in the business or acting in the capacity of a contractor". That section thus does not bar employees of an unlicensed contractor from enforcing the mechanic's lien rights provided in Code of Civil Procedure, section 1181.

[4] Appellant also claims that the court erred in finding the plaintiffs were employees of appellant as well as of Shirey. In this they are correct.

[5] Each of the judgments is modified by striking therefrom the words "and Murray Silver" which appear on page 2, lines 2 and 3. The Findings are modified by striking the words "Murray Silver, by and through said defendant's agent" from page

2, lines 19-20. Under C.C.P. section 1181 the plaintiffs as employees of the contractor are entitled to a mechanic's lien against the real property in question.

The judgments as thus modified are affirmed, costs to respondents.

BISHOP, P. J., concurs.

DAVID, Judge.

I must dissent. Though desirous, where the law permits, to construe provisions for mechanic's liens with the greatest liberality, the facts herein and the well-established law relating to the effect of void contracts, impel the conclusion, as we view it, that the mechanic's liens claimed do not exist.

(1) Cal.Const. Art. XX, sec. 15 provides: "Mechanics, materialmen, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; * * *." As to creation of the lien this provision is self-executing (*Miltimore v. Nofziger Bros. Lumber Co.*, 1907, 150 Cal. 790, 90 P. 114). But the lien of "teamsters and draymen, and all persons * * * bestowing * * * necessary services * * or furnishing * * * teams * * *" is not created by the Constitutional section but by C.C.P. section 1181. *Mendenhall v. Gray*, 1914, 167 Cal. 233, 139 P. 67; C.C.P. section 1181. We must therefore look to the codes to determine whether the absence of any legal contract between Silver and either of the plaintiffs, is overcome by any contract implied by law, creating a valid lien against Silver's premises under the circumstances disclosed here.

(2) The findings that Robert A. Johnson and Dana E. Hough were employees of Murray Silver have no support in the evidence. The work performed by plaintiffs was not done at the instance of the owner, Silver, but of Shirey. Silver did not himself secure plaintiffs' services, as in *Andrew v. Conner*, supra, 1951, 101 Cal. App.2d 621, 225 P.2d 943, and since Shirey

could not have foreclosed a mechanic's lien (*Albaugh v. Moss Construction Co.*, 1954, 125 Cal.App.2d 126, 269 P.2d 936) neither may his subcontractors or employees, relying on his contract.

Shirey was not licensed as required by law and his contract with Silver is not enforceable in court. Business and Professions Code, sections 7026, 7028, 7031; *Gatti v. Highland Park Builders*, 1946, 27 Cal.2d 687, 689, 166 P.2d 265. Cf. *Berka v. Woodward*, 1899, 125 Cal. 119, 57 P. 777. Silver paid Shirey for the work including that performed by Johnson and Hough, and may not recover back such payment. *Comet Theatre Enterprises v. Cartwright*, 9 Cir., 1952, 195 F.2d 80, 30 A.L.R.2d 1229.

Code of Civil Procedure, section 1181 states that there shall be a mechanic's lien for furnishing necessary services "whether done or furnished at the instance of the owner or of any person acting by his authority or under him, as contractor or otherwise."

Code of Civil Procedure section 1182, sub. (c) provides that every contractor, etc. having charge of the work of improvement "shall be held to be the agent of the owner." The trial court undoubtedly found Shirey to be Silver's agent as a matter of law pursuant to these sections. Are they applicable?

(3) The contract being void for any purpose, no agency for the owner in securing plaintiff's services can be predicated upon it. *Hunt v. Douglas Lumber Co.*, 1933, 41 Ariz. 276, 17 P.2d 815, 820. Though reaching such proper conclusion, a materialman was allowed to recover. It was held not to have constructive notice of the contractor's unlicensed status; and the owner was held estopped to assert the invalidity, having received the benefit of the work.

The Arizona court refused to hold that the absence of the name of the contractor from the official register of contractors was constructive notice to anyone of the contractor's incapacity. *Hunt v. Douglas Lumber Co.*, supra, 17 P.2d at page 820.

(4) In California, the plaintiffs dealing with Shirey, required to be licensed, were on notice of his status. Civil Code sections 18, 19; Business and Professions Code, sections 7011, 7017, 7075, 7080, 7081; cf. *Meyer v. Seliggio*, 1947, 80 Cal.App.2d 161, 164, 181 P.2d 690; see *Santa Barbara Lumber Co. v. Ross*, 1920, 183 Cal. 657, 192 P. 436; *Wheaton v. Nolan*, 1934, 3 Cal.App. 2d 401, 39 P.2d 457.

(5) In California, no estoppel [or more properly stated, no quantum meruit] will lie, based upon benefits conferred, under a void contract. *Zottman v. City and County of San Francisco*, 1862, 20 Cal. 96, 106-108; *Brown v. Brown*, 1935, 8 Cal.App.2d 364, 47 P.2d 352; *Fewel & Dawes v. Pratt*, 1941, 17 Cal.2d 85, 109 P.2d 650; *Walker v. Harbor Realty & Development Co.*, 1931, 214 Cal. 46, 3 P.2d 557; *Dool v. First Nat. Bank*, 1930, 209 Cal. 717, 290 P. 15; *Duntley v. Kagarise*, 1935, 10 Cal.App. 2d 394, 52 P.2d 560; *Colby v. Title Ins. & Trust Co.*, 1911, 160 Cal. 632, 117 P. 913, 35 L.R.A.,N.S., 813; *Miller v. California Roofing Co.*, 1942, 55 Cal.App.2d 136, 143, 130 P.2d 740. The test is whether the plaintiffs must rely on the illegal transaction to state a case against defendant. Since here they must, they have no causes of action against Silver or his property. *Kyne v. Kyne*, 1940, 16 Cal.2d 436, 106 P.2d 620; *Holm v. Bramwell*, 1937, 20 Cal.App.2d 332, 67 P.2d 114.

The statutory provisions concerning licensing are for the protection of both the workman and the owner from frauds of the contractor, (*Fraenkel v. Bank of America*, supra, 1953, 40 Cal.2d 845, 848, 256 P.2d 569), and they both are equally entitled to protection under that law.

The purpose of the licensing provisions of the Business and Professions Code could be defeated if the employees of the purported contractor are allowed to recover against the owner sums which would not be due at all except for the existence of the forbidden contract, of which they had at least constructive notice.

(6) The enforcement of this public policy collides with that for securing payment for unpaid mechanics and materialmen. Where the invalidity declared only in relation to the legal enforceability of the contract between the parties (*Business and Professions Code*, section 7031; cf. *C. I. T. Corp. v. Breckenridge*, 1944, 63 Cal.App.2d 198, 146 P.2d 271), it might be urged that subcontractors would not be prevented from asserting that the unenforceable contract was voidable as to them, with enough legal vitality to make the contractor the owner's agent, in relation to the contractor's employees or subcontractors. *C.C.P.* 1182(c). But such contracts are void for any purpose (*C.C. secs.* 1550, 1667, 1598; *Holm v. Bramwell*, supra, 1937, 20 Cal.App. 2d 332, 67 P.2d 114; cf. *Spinney v. Griffith*, 1893, 98 Cal. 149, 32 P. 974; *San Francisco Pav. Co. v. Fairfield*, 1901, 134 Cal. 220, 224, 66 P. 255.

McClain v. Hutton, 1900, 131 Cal. 132, 61 P. 273, 63 P. 182, 622, involved an owner-contractor's contract, void because not recorded as then required by *C.C.P.* sec. 1184. The claim of lien in that case was not sustained. At that time *C.C.P.* sec. 1184 also provided that in such cases, labor and material furnished should "be deemed to have been done and furnished at the personal instance of the owner." There are no such statutory declarations now in reference to void contracts. In *C. I. T. Corp. v. Breckenridge*, supra, 1944, 63 Cal.App.2d 198, 146 P.2d 271, the *bona fide* holder of a note securing payment to an unlicensed contractor without notice of his disability was enforced. But there is no such doctrine as to subcontractors who are legally on constructive notice of the want of capacity of their employer, the contractor, to bind the owner. Neither plaintiff can recover without relying on the illegal contract.

Judgment for Hough and Johnson in the respective cases providing mechanic's liens and for foreclosure thereof should be reversed.

50 Cal.2d 512

Cite as 327 P.2d 513

COMMERCIAL COMMUNICATIONS, INC.
(a Corporation), et al., Petitioners,

v.

**PUBLIC UTILITIES COMMISSION of the
State of CALIFORNIA, Respondent;**
Pacific Telephone and Telegraph Company
(a Corporation), Real Party In Interest.

WATSON COMMUNICATIONS SYSTEMS,
Inc. (a Corporation), et al., Petitioners,

v.

**PUBLIC UTILITIES COMMISSION of the
State of CALIFORNIA, Respondent;**
Pacific Telephone and Telegraph Company
(a Corporation), Real Party In Interest.

**The CITY OF LOS ANGELES, A Municipal
Corporation, Petitioner,**

v.

**PUBLIC UTILITIES COMMISSION of the
State of CALIFORNIA, Respondent;**
Pacific Telephone and Telegraph Company
(a Corporation), Real Party In Interest.

S.F. 19722, 19723, 19725.

Supreme Court of California, in Bank.

June 27, 1958.

Rehearing Denied July 23, 1958.

Consolidated proceedings to review an order of the Public Utilities Commission excepting with modifications, a tariff filed by a public telephone company covering the installing, leasing and maintaining of private mobile communications systems. The Supreme Court, Shenk, J., held that the company was authorized to furnish the service on the ground that proposed tariff relating thereto was for the "transmission of telephone messages" or "in connection with and to facilitate communication by telephone"; that opposing petitioners were not denied due process or equal protection of the law; that there was no conflict of jurisdiction between the federal and state commissions and that consent decree entered in New Jersey did not preclude the furnishing of the service.

Order affirmed.

Schauer, Carter, and McComb, JJ., dissented.

327 P.2d—33

1. Telecommunications 461

In proceeding to review an order of the Utility Commission accepting schedule for installing and maintaining private mobile communications systems petitioner who did not petition for a rehearing before the Commission had no standing before the Supreme Court as a petitioner for review. West's Ann.Public Util.Code, § 1731.

2. Telecommunications 36

Where under its charter telephone company could also engage in activities of a nonutility nature, whether such activities unduly interfere with or hamper it in the performance of its public utility obligations were generally questions within the cognizance of the Utilities Commission. West's Ann.Public Util.Code, §§ 701, 702, 851.

3. Telecommunications 461

Under the constitution and statutes placing telephone companies under the jurisdiction of the Utilities Commission, ownership of any plant or equipment for the transmission of telephone messages would be sufficient to confer jurisdiction on the Commission, and operation and control are not prerequisites, and ownership may be of "any part" of such plant or equipment, and hence it was immaterial as respects the Commission's jurisdiction, that telephone company did not remain in control of private mobile communication equipment, or that it did not furnish a radio channel over which the equipment was operated, where such were matters of limitation imposed by the Federal Commission. West's Ann.Const. art. 12, § 23; West's Ann. Public Util.Code, § 216(a); Federal Communications Act, § 1 et seq. as amended 47 U.S.C.A. § 151 et seq.

4. Telecommunications 461

Fact that private mobile communications systems may be obtained from sources other than a public utility does not detract from the utility nature of such service which is offered to the public under a voluntarily filed tariff by the public utility. West's Ann.Const. art. 12, § 23; West's Ann.Public Util.Code, § 216(a).

5. Telecommunications ⇨461

Mobile communication service offered by proposed tariff filed by public telephone company was "for the transmission of telephone messages" or "in connection with and tending to facilitate the communication by telephone" and if dedicated to public use was subject to the jurisdiction of the Utilities Commission. West's Ann.Public Util.Code, §§ 207, 216(b), 233, 234.

6. Telecommunications ⇨461

Fact that only a restricted portion of the public was eligible to apply for private mobile communication service was not determinative of whether public telephone company offering the service had dedicated it to the public so as to be within the jurisdiction of the Utilities Commission where it was offered to all of the public who might be eligible to apply for it and since a dedication to a portion of the public would suffice. West's Ann.Public Util.Code, §§ 207, 216.

7. Constitutional Law ⇨296(1)

Until the Public Utilities Commission attempted regulation over competitors of a public telephone system with respect to furnishing private mobile communication service, they had no occasion to complain that they were denied due process of law by the Commission's acceptance of the public telephone company's tariff with respect to furnishing such service. West's Ann.Public Util.Code, §§ 207, 216.

8. Constitutional Law ⇨240(1)

Private operators of mobile communication services were not denied equal protection of law by the fact that a public regulated company competed with them in such service where there was no unfair competition and the rates prescribed by tariff for the service were found to be fair and reasonable. West's Ann.Public Util.Code, §§ 207, 216; U.S.C.A.Const. Amend. 14.

9. Constitutional Law ⇨296(1)

Regulation of private mobile communication service fulfilling a specialized need is not outside the permissible sphere of government regulation and does not contravene the Fourteenth Amendment

in view that there are several respects in which such systems are of public concern. West's Ann.Public Util.Code, §§ 207, 216; U.S.C.A.Const. Amend. 14.

10. Public Service Commissions ⇨6.3

Where the control is for the public good any industry may be regulated, provided there is "adequate reason" for it which must be to achieve a purpose within the police power of the state.

11. Telecommunications ⇨461

Where the Utilities Commission found that private mobile communication equipment was necessary in a public telephone company's performance of its duties to the public and that the leasing thereof was subject to its jurisdiction, it had the power to establish rates for such systems in lieu of contracts and to alter or permanently suspend proposed rates or establish other rates which it found to be just and reasonable. West's Ann.Public Util.Code, §§ 455, 728, 729, 851.

12. Public Service Commissions ⇨6

The powers of regulation conferred upon the Utilities Commission by the Legislature must be cognate and germane to the regulation of public utilities.

13. Telecommunications ⇨461

Utilities Commission had authority to regulate rates charged by public telephone company for the lease, maintenance, and service for private mobile communication equipment. West's Ann.Public Util.Code, §§ 210, 489, 701.

14. Commerce ⇨8(7)

Where proposed tariff for private mobile communication equipment applied only to service within the state and the Federal Communications Commission had not asserted jurisdiction over such tariffs or the rate, Public Utilities Commission had jurisdiction to regulate the tariffs or rates. Federal Communications Act, §§ 2(b), 3(e) as amended 47 U.S.C.A. §§ 152(b), 153(e); West's Ann.Public Util.Code, §§ 210, 489, 701.

15. Monopolies ⇨24(15)

Under federal antitrust laws where no trial is had and no testimony taken, a

consent decree is not evidence of or any admission of any of the charges contained in the complaint. Clayton Act, § 5, 15 U.S.C.A. § 16.

16. Monopolies §24(15)

A consent decree entered in a proceeding under the Sherman Act did not disclose an intent to prohibit service by public telephone company, a party to the decree regulated or unregulated, from continuing to furnish equipment and facilities for private mobile communications systems. Clayton Act, § 5, 15 U.S.C.A. § 16.

McClean, Salisbury, Petty & McClean, Robert S. McClean, John E. Scheifly, Los Angeles, Edward M. Berol, Bruce R. Geernaert, Berol & Silver, Robert N. Lowry, Brobeck, Phleger & Harrison, Gerald H. Trautman, Brent M. Abel, Thomas B. McGuire, McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, Jerome Preston, Jr., Lawrence A. Sullivan, Foley, Hoag & Eliot, Boston, Mass., Roger Arnebergh, City Atty., Alan G. Campbell, Asst. City Atty., Los Angeles, for petitioners.

Joseph E. Keller, Dow, Lohnes & Albertson, Washington, D. C., John E. Scheifly, McClean, Salisbury, Petty & McClean, Los Angeles, Brobeck, Phleger & Harrison, Robert N. Lowry, Francis L. Cross and Cross & Brandt, Oakland, as amici curiae on behalf of petitioners.

Everett C. McKeage, Roderick B. Cassidy, Hugh N. Orr, Boris H. Lakusta and H. J. McCarthy, San Francisco, for respondent.

Pillsbury, Madison & Sutro, Arthur T. George, Eugene M. Prince, Francis N.

Marshall, Dudley A. Zinke and G. H. Eckhardt, Jr., San Francisco, for real party in interest.

SHENK, Justice.

[1] This is a consolidated proceeding to review an order of the Public Utilities Commission accepting, with modifications and directions, tariff schedule no. 108-T filed by Pacific Telephone and Telegraph Company, hereinafter called Pacific. The schedule was voluntarily filed and covered the installing, leasing and maintaining of private mobile communications systems. The tariff was originally accepted to become effective April 30, 1956, but at the request of petitioners a rehearing was granted and the commission conducted an investigation into the proposed rates and conditions and an inquiry as to the scope of its own jurisdiction. The petitioners, with the exception of the City of Los Angeles, are private persons or firms engaged in furnishing similar service on a private contract basis, in competition with Pacific, which heretofore has offered this service only on a contract basis. The City of Los Angeles has appeared on behalf of customer interests of its own and its inhabitants, and pursuant to its public-spirited interest in utility regulation and growth. The petitioners¹ urge that the commission has incorrectly determined in favor of its own jurisdiction in this matter and contend that their rights under the Constitution of the United States and of this state are violated. They also urge that the tariff creates a conflict with federal law and with the provisions of a consent decree² to which Pacific, as a subsidiary of American Telephone and Telegraph Company, was a party.

court gave it permission to file a brief, without opposition from the commission until after the brief was filed. It is not necessary to rule on the commission's motion to strike this brief as it may be treated as an amicus curiae brief. Amici curiae briefs have also been filed by several interested parties.

1. Petitioner Thomas Poor, an individual doing business as Bakersfield Electronics, appears as one of the petitioners on the Watson Communication Systems, Inc. brief. He did not petition for a rehearing before the commission, and therefore has no standing before this court as a petitioner for review. Pub.Util.Code, § 1731.

Petitioner Gamewell Company did not petition for rehearing and likewise has no standing to petition for review. This

2. United States of America v. Western Elec. Co., Inc. and American T. & T. Co. et al., Civil Action No. 17-49, U.S.D.C., N.J., Jan. 29, 1956.

As a basis for its order the commission found and concluded: 1. That Pacific is a telephone corporation and a public utility in the performance of this service; 2. That the private mobile communications systems and service heretofore furnished under contract by Pacific and proposed in this tariff schedule constitute a telephone line and public utility telephone service, under the provisions of the Constitution and the Public Utilities Code, and that Pacific has dedicated the same to the public; 3. That the equipment so used is necessary or useful in Pacific's performance of its duties to the public and the leasing thereof is subject to commission jurisdiction as provided in section 851 of the Public Utilities Code³; 4. That the commission under sections 455, 728 and 729 has the power to establish rates for these systems in lieu of contracts; 5. That the commission under section 455 has the power to accept, alter or permanently suspend the proposed rates or to establish other rates which it finds to be just and reasonable; 6. That the proposed rates, with the revisions and supplementations ordered are just and reasonable.

[2] Pacific is a private corporation engaged in the public utility telephone business within this state. As such its services, property and charges are subject to the recognized supervision of the commission. However, under its charter Pacific may also engage in activities of a nonutility nature. Whether these activities unduly interfere with or hamper it in the performance of its public utility obligations or affect property owned by it which is necessary or useful in the performance of its obligations to the public, are of course, generally, questions within the cognizance of the commission (§§ 701, 702, 851). It is sometimes a question of mixed law and fact as to whether a particular activity is within the regulatory scope of the commission. Here we must look to the nature of the activity furnished under this tariff schedule as well as the question of dedication, to determine the jurisdictional issues presented.

Private mobile communication systems, as the name implies, afford direct oral communication with persons in moving vehicles. Tariff 108-T defines "private mobile communication systems" as "one or more land stations and one or more mobile stations, or two or more mobile stations, together with associated equipment, for radio-telephone communication between land and mobile stations or between mobile stations." It defines a land station as an "operational fixed radiotelephone station used with a private mobile communication system as a base station" or as a repeater, control or relay station. A mobile station is comprised of "a transmitter, a receiver (with loudspeaker), a push-to-talk handset or microphone, and an antenna." Because it involves the use of radio, there must be compliance with the requirements of the Federal Communications Commission and the provisions of the Federal Communications Act (Comm.Act of 1934, 48 Stat. 1064, 47 U.S.C.A. § 151 et seq. as amended). The person, firm or corporation desiring to have a private mobile communication system must apply to the federal commission for allocation of a radio wave length and for permission to operate the required equipment. The conditions for a license vary with the purpose for which the use is desired, and the system is licensed to be operated for that specific use only. The equipment may be manufactured, purchased or leased by the licensee but he must satisfy the commission that it meets its operating requirements. He may install, maintain and repair the equipment himself or he may delegate these duties but he must remain in control of the equipment. He is subject to punishment by the federal commission for violation of its regulations. The tariff of Pacific complies with the regulations of the federal commission.

Private mobile communication systems differ in some respects from public mobile communication systems. Pacific, as a common carrier telephone company, is licensed by the federal commission to operate public

3. Unless otherwise indicated all references hereafter are to the Public Utilities Code.

systems over the radio frequencies allocated for this public use. It may install radiotelephone equipment in the vehicle of a subscriber for this use, but all calls must be completed through the company's central office, with the intervention of a company operator to ask for the number and to make the connection. Calls in any number may be made on the company's exchange system throughout the world. This service obviously can only be furnished by a public utility telephone company. It is appropriate and effective for persons needing only occasional communication to or from their vehicles with their offices. It has been furnished by Pacific under tariffs filed with the state commission for the past decade.

Private mobile communication service fulfills a more specialized need. Where a continuously free channel is required, it is more efficacious. After the close of World War II and the Korean conflict government, industry and many organizations began to make extensive use of this type of service for quick, private communication with employees or agents in trucks and automobiles, and there is an ever increasing demand for the service. It is probably most widely known in connection with its use by law enforcement officers and taxicab companies. Pacific entered the field of furnishing private mobile systems in 1948 with two contract customers. In 1954 it was required by the state commission to file copies of its contracts. Subsequently (Order 51446, Re Southern Counties Gas Co., 54 Cal.P.U.C. 75) the commission held that this service would become a public utility service but that there was not then sufficient experience to warrant the filing of tariffs, that this was still an experimental venture and that it might be a disservice to Pacific's telephone rate-payers to require it at that time to file tariffs and to offer this service to all comers. This decision was not challenged. When Pacific filed tariff schedule 108-T in 1956 it had 214 contract customers, covering 1702 private mobile units, and had 225 inquiries on hand for private systems. The

214 contracts represented only 4.5% of the total private mobile base stations then licensed in this state.

The petitioners urge that in furnishing these private systems on a lease-maintenance basis Pacific is merely engaging in an equipment service, not a "telephone service" and they stress the importance of the following differences between public and private systems: that the private systems have no tie-in or interconnection with the general toll and switching facilities of Pacific; that Pacific cannot furnish the radio channel or the license to operate the equipment but these must be secured by the user; that the user must remain in control of the equipment; that he remains responsible to the federal commission; that the equipment and maintenance may be obtained from many private sources, whereas public mobile communication may be obtained only from a public utility telephone company; that the power for energizing the sending apparatus may be obtained from other sources than a telephone company; that for the operation of the private systems there is no dependence upon rights of monopoly, eminent domain or franchise; that Pacific is merely leasing inert radio equipment; that this service is not available to all of the public, and does not come within the common understanding of a telephone system offering.

Article XII, section 23, of our Constitution provides: "Every private corporation * * * owning, operating, managing, or controlling any * * * plant, or equipment, or any part of such * * * plant or equipment within this State * * * for the transmission of telephone * * * messages * * * either directly or indirectly, to or for the public * * * is hereby declared to be a public utility * * * and every class of private corporations * * * hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The * * Commission shall have * * * such power and jurisdiction to supervise and regulate public utilities * * * and to fix the rates to be charged for commodities fur-

nished, or services rendered by public utilities as shall be conferred upon it by the Legislature. * * * (Emphasis added.) In the Public Utilities Code the Legislature has further defined "public utility" as including "every * * * telephone corporation * * * where the service is performed for or the commodity delivered to the public or any portion thereof" [§ 216, subd.(a)] and has provided that "Whenever any * * * telephone corporation * * * performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such * * * telephone corporation * * * is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part." § 216, subd.(b). "Telephone corporation" is defined as including "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this State" (§ 234); and "telephone line" is defined as including "all * * * property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires." § 233. (Emphasis added.)

[3] It is readily apparent that by the use of the disjunctive it was intended that *ownership* of any plant or equipment would be sufficient and that operation and control were not made prerequisites to commission jurisdiction; furthermore that such ownership may be of "any part" of such plant or equipment. It is therefore immaterial that Pacific does not remain in control of the equipment or that it does not furnish the radio channel over which the equipment is operated. These are matters of limitation imposed by the federal commission. The

requirement that there be no interconnection with the general toll and switching facilities of Pacific is also imposed by the federal commission and acquiesced in by Pacific, although such connection is physically possible and, in stated cases of public emergency, is permissible.

[4] The fact that private mobile communication systems may be obtained from sources other than a public utility, does not detract from the utility nature of this service which is offered to the public under a voluntarily filed tariff. Regulated and nonregulated services compete in many fields⁴ and there is no requirement in our Constitution or laws that telephone service may be offered only by a monopoly. In some of its phases a telephone company, dedicated to the public service, does tend to become a monopoly (*California Fire Proof Storage Co. v. Brundige*, 199 Cal. 185, 189, 248 P. 669, 47 A.L.R. 811). Were this not so, severe annoyance and economic waste might be caused if telephone users were obliged to subscribe to many competing companies with duplicate instruments on their desks, and with transmission wires invading the skies or radio telephony cluttering the frequency channels, in order to obtain complete telephone service.

[5] The real issue presented is whether the service offered by the proposed tariff is "for the transmission of telephone messages" or "in connection with and to facilitate communication by telephone."

The word "telephone" is not defined in the code. In its narrow sense "telephone" refers to the instrument by which telephony is achieved. It is defined in Webster's New International Dictionary, 2d edition as "An instrument for reproducing sounds, especially articulate speech, at a distance." In defining "telephony" the Encyclopaedia

4. *Story v. Richardson*, 186 Cal. 162, 193 P. 1057, 18 A.L.R. 750 (sale of excess electrical energy by a private person); *Southern California Edison Co. v. Railroad Commission*, 194 Cal. 757, 230 P. 661 (sale of surplus water by a private person); *Market Street R. Co. v. Railroad Commission*, 24 Cal.2d 378, 150 P.

2d 196, affirmed 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171 (competing transit service by a municipal utility and a commission-regulated utility); *Samuelson v. Public Utilities Commission*, 36 Cal.2d 722, 227 P.2d 256 (competing highway contract carriers and highway common carriers).

Britannica (1954 ed.) states "In a broad sense the term telephone or telephony includes the entire art of speech transmission with the many accessories and operating methods which research, development and invention have supplied to facilitate and extend conversation at a distance by electrical means." As this court pointed out in *Television Transmission, Inc., v. Public Utilities Commission*, 47 Cal.2d 82, 88, 301 P.2d 862, 865, in telephony "one may carry on a two-way communication by speaking as well as by listening" and it is distinguishable from radio broadcasting in that the latter "is more akin to that of music halls, theaters, and newspapers." While mobile communication involves an application of the art of radio to telephone communication, it is more akin to telephony than to radio broadcasting.

In determining whether Pacific is here offering a telephone service, it appears to be basic that what a telephone company actually provides and maintains is the facilities for the transmission of telephone messages, or for communication by telephone. In its earliest beginnings this transmission was over a single iron wire connecting two telephone instruments with ground return circuits. It was over such a wire that Alexander Graham Bell called to his startled assistant, "Mr. Watson, come here, I want you." That was in March 1876. Many technological improvements in the art of telephony have since been made, including radiotelephony and the instruments used for carrying on conversations at distances greater than the human voice naturally carries. The exact form or shape of the transmitter and the receiver or the medium over which the communication can be effected is not prescribed by law. In common understanding the communication effected by private mobile systems would appear to be a telephone communication. Section 233 above quoted expressly recognizes that communication may be made without the use of

transmission wires. Among the other uses of radio is the transmission of telephone messages without the use of wires. We are informed that today ordinary toll telephone service is furnished as much by radio as by land lines and that Pacific now operates about 350,000 toll circuit miles of microwave radio relay in California. It also uses radio for such diverse services as rural subscriber lines, coastal harbor service and highway service. All of these are treated as public telephone service under filed tariffs. Because of the physical nature of the medium here used (radio), the private nature of the communication contemplated and the restrictions established by the federal commission, private radiotelephone differs in some respects from public radiotelephone service and also from land line telephone service. Nevertheless it is a telephone service and if dedicated to public use it is subject to the jurisdiction of the respondent commission.

[6] The commission found that Pacific has dedicated this service to the public. The fact that only a restricted portion thereof is eligible to apply for it is not determinative. It is offered to all of the public who may be eligible to apply for it. Dedication to a portion of the public will suffice. §§ 216, 207⁵; *Camp Rincon Resort Co. v. Eshleman*, 172 Cal. 561, 158 P. 186. This service is within a class recognized by the Constitution and the Legislature as a public utility. The cases cited by petitioners in which dedication constituted the main problem do not present any difficulty.

[7] No jurisdiction over the petitioners or other competitors of Pacific in this field has been asserted by the commission, and in its order it expressly disclaims any intention to assert such jurisdiction until there should be evidence that they had dedicated or were willing to dedicate their service to the public. Until the commission attempts regulation of these petitioners,

5. Section 207: "'Public or any portion thereof' means the public generally, or any limited portion of the public, includ-

ing a person, private corporation * * for which the service is performed or to which the commodity is delivered."

they have no occasion to complain that they are denied due process of law by the commission's acceptance of Pacific's tariff. *Stephenson v. Binford*, 287 U.S. 251, 277, 53 S.Ct. 181, 77 L.Ed. 288; *Continental Baking Co. v. Woodring*, 286 U.S. 352, 367-369, 52 S.Ct. 595, 76 L.Ed. 1155; *Hicklin v. Coney*, 290 U.S. 169, 172-173, 54 S.Ct. 142, 78 L.Ed. 247.

[8] Nor are the petitioners denied equal protection of the law by the fact that a regulated company competes with them in this service. The commission found as a fact that there was no unfair competition by Pacific in this field, and ruled that it would not allow Pacific to give its private mobile customers services which it would not make available to the customers of its competitors and that it would require Pacific to maintain charges which would be fully compensatory. The rates prescribed by the tariff were found, with the modifications ordered, to be fair and reasonable, and as to this the conclusion of the commission on the record presented is binding upon this court.

[9, 10] There is no sound basis for the contention that the regulation of this service is outside the permissible sphere of government regulation and that it contravenes the 14th Amendment. There are several respects in which the private mobile communication systems are of public concern. The evidence shows that these systems are for a considerable part used by public transportation companies, trucking companies, law enforcement agencies, fire departments, and utility companies such as irrigation and water companies. Their purpose is the maintaining of communication with vehicles moving on the public streets and highways. The medium used is radio and is generally of public concern. " * * * [W]here the control is for the public good

any industry may be regulated, provided there is 'adequate reason' for it. That 'adequate reason' can only be to achieve a purpose within the police power of the state." *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal.2d 436, 443, 254 P.2d 29, 33. The jurisdiction exerted by the commission over this tariff offering goes merely to the regulation of the telephone service offered by a public utility, a matter concededly within the police power of the state and the powers given to the commission by the Constitution and the Legislature.

[11] Also in support of its jurisdiction the commission found that the private mobile communication equipment is necessary or useful in Pacific's performance of its duties to the public and the leasing thereof is subject to its jurisdiction, as provided in section 851⁶; that under sections 455, 728 and 729⁷ it has the power to establish rates for these systems in lieu of contracts; and that under section 455 it has the power to accept, alter or permanently suspend the proposed rates or to establish other rates which it finds to be just and reasonable. These findings may not be disregarded.

[12, 13] It is well established that the powers of regulation conferred upon the commission by the Legislature must be cognate and germane to the regulation of public utilities. *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 137 P. 1119, 50 L.R.A., N.S., 652; *Morel v. Railroad Commission*, 11 Cal.2d 488, 492, 81 P.2d 144. When these powers relate to telephone companies they must be cognate and germane to the regulation of public utility telephone companies. In this instance the exercise of jurisdiction over this service would seem to be reasonably within the powers so granted to the com-

6. Section 851. "No public utility shall sell, lease * * * any part of its * * * plant * * * or other property necessary or useful in the performance of its duties to the public * * * without first having secured from the commission an order authorizing it so to do.
* * *

7. Sections 455, 728 and 729 set forth the procedure whereby the commission may investigate the propriety and reasonableness of rates contained in tariffs lawfully filed, and establish new rates.

mission. Its authority to regulate the rates charged by Pacific for this lease-maintenance service sufficiently appears in sections 210⁸, 489⁹ and 701¹⁰.

This leaves for consideration the question of any probable conflict between the jurisdiction of the federal and state commissions and of an alleged limitation on the state commission by reason of the provisions of the New Jersey consent decree hereinbefore referred to.

[14] The respondent commission held that the provisions of section 2, subdivision (b)¹¹ and section 3, subdivision (e)¹² of the Communications Act of 1934 as amended (47 U.S.C.A. §§ 152, 153) make it clear that the federal commission has no jurisdiction, except under the radio licensing provisions of the act, over intrastate communication service by radio, and that "interstate communication by radio" does not include communication between points in the same state if such communication is regulated by a state commission. The proposed tariff applies only to service within this state. The commission's ruling would appear to be correct. It is noted that the Federal Communications Commission has not asserted jurisdiction over such tariffs or rates.

[15] In January 1956 the Department of Justice brought a proceeding under the

Sherman Act in the United States District Court in New Jersey against Western Electric Company, Inc. and American Telephone and Telegraph Company. By consent of the parties and without trial of the issues a consent decree was entered. Under the federal antitrust laws where no trial is had and no testimony taken, a consent decree is not evidence of or an admission of any of the charges contained in the complaint. 15 U.S.C.A. § 16; *Barnsdall Refining Corp. v. Birnamwood Oil Co.*, D.C.E.D.Wis.1940, 32 F. Supp. 308, 310-311. The New Jersey court specifically retained continuing jurisdiction to issue orders and directions with reference to the construction or enforcement of this final judgment. From the briefs submitted in the proceeding before this court it appears that the original parties to the New Jersey proceeding take opposing views as to the meaning and effect of subdivision (d) of section V of that decree which provides as follows:

[16] "The defendant AT&T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries * * * in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply * * * (d) for a period of five (5) years from the date of this Final Judgment, leas-

8. Section 210: "Rates' includes rates, fares, tolls, rentals, and charges, unless the context indicates otherwise."

9. Section 489: "Under such rules as the commission prescribes, every public utility other than a common carrier shall file * * * schedules showing all rates, tolls, rentals, charges * * * together with all * * * contracts * * * which in any manner affect or relate to rates, tolls, rentals, classifications, or service * * *."

10. Section 701: "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

11. Section 2, subdivision (b) [47 U.S.C.A. § 152, subdivision (b)], which provides

in part as follows: "Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. * * *"

12. Section 3, subdivision (e) [47 U.S.C.A. § 153, subdivision (e)], which provides: "Interstate communication' * * * means communication * * * (1) from any State * * * to any other State * * * but shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between points in the same State * * * if such communication is regulated by a State commission." (Note: Subchapter II is entitled "Common Carriers.")

ing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment * * *."

The Department of Justice takes the view that under subdivision (d) the defendants in that action were prohibited from engaging in the business of leasing and maintaining facilities for private mobile communications systems, but were allowed a cut-off period of five years for serving those who were lessees within 45 days after the date of the judgment. Its view is that the phrase in subdivision (d) reading "the charges for which are not subject to public regulation" is descriptive of the fact stated, namely, that such charges *are not subject to public regulation*. The other parties to the consent decree are of the view that this phrase merely provides that if the charges are regulated by a state commission the telephone companies are not prohibited by the decree from continuing to furnish equipment and facilities for private mobile communications systems. Pacific, as hereinabove stated, was a party to that decree and would be bound by its terms.

Insofar as we are advised no ruling has been obtained from the New Jersey federal court as to the meaning and effect of subdivision (d) of section V, and no adjudication of this issue has been made by the Federal Communications Commission. However, it has been brought to our attention that in a Memorandum Opinion and Order released November 21, 1957, in the proceedings entitled "In the Matter of American Telephone and Telegraph Company, et al., Lease and maintenance of equipment and facilities for private communication systems, Docket No. 11972," in which this issue was sought to be raised, the federal commission stated it had been unable to find any basis in the specific language of the consent decree to support the contention of the Department of Justice that it was the intent of that decree

to prohibit the service, regulated or unregulated. That commission made no actual determination on this question.

In the proceedings before the state commission some of the petitioners argued that Pacific's motive in filing the proposed tariff 108-T was to avoid the consent decree. The commission held that there was no proof to that effect; that it would not take judicial notice of good or bad intentions; that if the federal court wished to bar such activities by Pacific even though subject to regulation, it would have made such a provision, and that there was nothing in the decree to prompt it to change its ruling that this service was utility service subject to its jurisdiction. No good reason appears why the decision of the commission in this respect should be disturbed.

The order is affirmed.

GIBSON, C. J. and TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

If we follow established law, or even the fundamental principles of our governmental plan, we should hold that the Public Utilities Commission is without jurisdiction in this matter because it clearly appears that the private mobile radiotelephone operations of the Pacific Telephone Company are not public utility operations. Pacific, by its purported dedication of its private mobile radiotelephone equipment and maintenance service and its filing of a tariff schedule, cannot impart the character of a true public utility into that which is essentially a highly competitive private enterprise. The action of the commission, in the premises, gives official approval to the unwarranted invasion of a free market by the entering wedge of what appears to be a design for eventual monopolistic sequestration of the field. This public utility company should not be allowed to convert the furnishing of equipment and maintenance service for private communications into an operation under control of the Public Utilities Commission.

The conditions of the furnishing of equipment and facilities by Pacific are described as follows in Schedule 108-T, filed by Pacific with the Public Utilities Commission. The lessee-licensee is "responsible for securing from the Federal Communications Commission the necessary authorizations for the communications system and the operating personnel as may be required in accordance with the Rules and Regulations of the Federal Communications Commission."

"The station licensee shall have exclusive control of the communication facilities furnished to such licensee and full responsibility for their use and operation in accordance with the station authorization and the Rules and Regulations of the Federal Communications Commission.

"The station licensee shall have unlimited right of ingress to and egress from any premises of the Telephone Company on which is located land radio station equipment furnished to each licensee under this schedule, and the licensee shall have unrestricted access to such equipment."

The lessee must provide and maintain an adequate power supply for each mobile station and, unless the land station is located on premises of Pacific, must provide and maintain an adequate power supply for the land station.

Pacific undertakes only to furnish, install, and maintain the facilities for communication.

The foregoing description by Pacific of the private mobile communication operation shows that the operation is essentially

a private business, not a public utility service. The lessee, not Pacific, must secure the requisite authorization for radio operation from the Federal Communications Commission. The lessee has full responsibility for the operation and exclusive control over the communication facilities. The lessee provides the power for operation of the station (except in the few and entirely distinct situations of land stations on telephone company property). Thus it is the lessee who operates and controls the communication service; Pacific merely invades the field of private enterprise to furnish and maintain equipment necessary or convenient to the carrying on of the private communications.

There is nothing in the nature of the private mobile communications business which contemplates that the supplier of the communications equipment retain an interest in it, as Pacific does; most private manufacturers of such equipment sell the equipment to those who operate it. The many thousands of such privately owned items of equipment installed and maintained in aircraft are subject to regulations of both the Federal Communications Commission and the Civil Aeronautics Administration. To what extent the Public Utilities Commission of California expects to overlap the jurisdiction of the federal regulatory bodies is not precisely defined.

According to the majority's construction of the applicable provisions of the state Constitution¹ and the Public Utilities Code,² the Constitution has authorized

1. Cal.Const. art. XII, § 23: "Every corporation * * * owning * * * equipment * * * for the transmission of telephone * * * messages * * *, either directly or indirectly, to or for the public * * * is hereby declared to be a public utility subject to such control and regulation by the * * * Commission as may be provided by the Legislature * * * The * * * Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or

services rendered by public utilities as shall be conferred upon it by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. * * *

2. Pub.Util.Code, § 216: "(a) 'Public utility' includes every * * * telephone corporation * * * where the service is performed for or the commodity delivered to the public or any portion thereof.

the Legislature to provide, and the Legislature has provided, that any service in connection with any telephonic communication, public or private, is a public utility service subject to the jurisdiction of the Public Utilities Commission if it is offered to the public or any portion thereof. But the Constitution should not lightly be understood as authorizing the Legislature to convert private business into a public utility and the legislation enacted pursuant to the Constitution should not be understood as intended so to do.

Private mobile radiotelephone communication systems are analogous to private inter-office or intra-building communication systems. Concerning the latter type of communication system the following language and holding of *Chesapeake & Potomac Tel. Co. v. Manning* (1902), 186 U.S. 238, 246-247, 22 S.Ct. 881, 46 L.Ed. 1144, are pertinent: "it cannot be presumed that a legislature intends any interference with purely private business. It cannot ordinarily prescribe what an individual or corporation, engaged in a purely private business, shall charge for services, and, therefore, although the language of a statute may be broad enough to include such private business, it will generally be excepted therefrom in order to remove all doubts of the validity of the legislation. It appears that some portion of the defendant's business is of a purely private nature, the receipts whereof are spoken of in its reports as private rentals, and as to such business Congress could not, if it would, prescribe what shall be charged therefor.

"(b) Whenever any * * * telephone corporation * * * performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such * * * telephone corporation * * * is a public utility subject to the jurisdiction, control and regulation of the commission. * * "

Pub.Util.Code, § 207: "'Public or any portion thereof' means the public generally or any limited portion of the public, including a person, [or] private corporation * * * for which the service is performed or to which the commodity is delivered."

In many buildings, both those belonging to the government or the District [of Columbia], and those belonging to private individuals, is what may be called a local telephone plant; that is, an arrangement of telephones by which parties in different rooms can communicate with each other; a system which is not connected with the general telephone exchange, and is no more public in its nature than the speaking tubes or call bells in a building. It is only for the personal use of parties in the building. By it those in the building cannot communicate with the general public, nor can such public reach parties in the building. It is simply a local convenience for the use solely of those who are in the building. Such combinations of telephone instruments in a single building, with no outside connections, are furnished by the defendant, and the rentals therefrom, as well as the expenses thereof, are entered in its books of account, and constitute a part of its business." The described system, it is held, was not subject to rate regulation by Congress. (See also *City of St. Paul v. Tri-State Telephone & Telegraph Co.* (1935), 193 Minn. 484 [258 N.W. 822] [telephone systems, separate from the general public telephone system, for city's fire and police departments are "a private use"].)

Contrary to the majority opinion (p. 16 of ditto) it has been held that the fact that a private telephone system may be used by a governmental unit for governmental purposes does not make the system a public utility subject to regulation

Pub.Util.Code, § 233: "'Telephone line' includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."

Pub.Util.Code, § 234: "'Telephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this State."

as such. (*Chesapeake & Potomac Tel. Co. v. Manning* (1902), *supra*, 186 U.S. 238, 247, 22 S.Ct. 881, 46 L.Ed. 1144, *City of St. Paul v. Tri-State Telephone & Telegraph Co.* (1935), *supra*, 193 Minn. 484, 486 [258 N.W. 822, 824].)

The fact that equipment for private mobile communications systems is furnished and maintained by a public utility corporation which also furnishes public utility facilities and service, does not mean that the corporation, as to the private service, can be compelled to file a tariff with the Public Utilities Commission or is entitled to have a tariff accepted by the commission. "The mere fact that such telephones are furnished by the company, which also does a public business, does not make them a part of such public business, or subject them to the regulation by Congress of its charges. A railroad company may, if authorized by its charter, carry on not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacture of cars and locomotives to the supervision of the legislature, although such body would have the right to regulate the charges for railroad transportation." (*Chesapeake & Potomac Tel. Co. v. Manning* (1902), *supra*, 186 U.S. 238, 247, 22 S.Ct. 881; see *Allen v. Railroad Commission* (1918), 179 Cal. 68, 82, 175 P. 466, 8 A.L.R. 249.)

The fact that Pacific has offered, by filing Schedule 108-T, to submit to the jurisdiction of the commission and to furnish communication equipment on a lease and maintenance basis without discrimination to persons authorized by the Federal Communications Commission to operate private mobile communications systems, cannot convert an essentially private business operation into a public utility offering. (See *Allen v. Railroad Commission* (1918), *supra*, 179 Cal. 68, 82, 175 P. 466, 8 A.L.R. 249.)

The opinion of the commission states, "We are not convinced that Pacific's presence in the field will constitute any threat

to the continued vigor of its competitors. It should not, does not propose to, and will not be allowed to favor its own private mobile customers by way of connections with its 'land lines' not allowed to the customers of its competitors. It will be required to maintain charges which are fully compensatory. It will be under the disadvantage of being unable to enter into price competition with its competitors to secure the business of particularly desirable customers; and it will be required to serve customers its competitors may not elect to serve. * * *

"The Commission finds that competition of regulated companies with the nonregulated, if it is unfair at all, is more likely to be unfair to the regulated rather than to the nonregulated competitors. * * * [I]n the Commission's opinion, the public has less to fear from the activities of a 'monopoly' when such 'monopoly' is fully regulated by public authorities and we fail to find that Pacific will be in a position to compete unfairly with its smaller rivals."

These determinations of the commission ignore the realities of the situation. Pacific, a public utility corporation, obviously is looking toward expanding the area of its operations into a field now serviced by private enterprise. Surely the commission is not presuming that Pacific is altruistic in filing schedules for its activities in this field. And certainly Pacific has the right to seek expansion, diversification, and increased profits—but not by the process of bringing disparate segments of private enterprise into its monopolistic domain. Of course it is true that Pacific currently, under free enterprise conditions, is far from having a monopoly in this field. But manifestly it is working toward elimination of the competition of private persons and firms in the newly invaded field of private mobile communication service. The result of the majority decision upholding the order of the commission will be a tendency to promote monopoly in a field of business operation which is and should remain in the realm of free enterprise. The decision of the majority places the stamp

of approval upon bureaucratic recognition, as well as control, of Pacific in a type of business which has not been shown to require regulation as a monopoly. The private mobile communication business has heretofore operated satisfactorily under the freely competitive conditions which have characterized it. Understandably the petitioners engaged in this business in the open market of free enterprise object to commission action which amounts to bureaucratic sponsorship of a public utility corporation operating as a public utility in this field.

The following discussion in *General Alarm, Inc. v. Underdown* (1953), 76 Ariz. 235 [262 P.2d 671, 672-673 [1-3]], concerning a telephonic and telegraphic burglary, fire, and emergency alarm system is apropos: "To be a public service corporation, its business and activities must be such as to make its rates, charges, and methods of operation a matter of public concern. It must be, as the courts express it, clothed with a public interest to the extent clearly contemplated by the law which subjects it to governmental control. Free enterprise and competition is the general rule. Governmental control and leagled monopolies are the exception and are authorized under our constitution only for that class of business that might be characterized as a public service enterprise. The theory is that the right to public regulation and protection outweighs the customary right of competition. If the public contact with a business is such that its necessities and convenience can be better served through governmental supervision and controlled monopoly, thereby eliminating customary competition, the state may exercise its police power to that end. Such invasion of private right cannot be allowed by implication or strained con-

struction. It was never contemplated that the definition of public service corporations as defined by our constitution be so elastic as to fan out and include businesses in which the public might be incidentally interested or businesses that might incidentally transmit messages in furtherance of the main object of the enterprise that otherwise could not be so characterized. The public has some interest in all business establishments but that interest must be of such a nature that competition might lead to abuses detrimental to the public interest. The public interest contemplated depends on the nature of the business, the means by which it touches the public, and the abuses which may reasonably be anticipated if not controlled. *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103, 27 A.L.R. 1280. Our constitution must and easily can be interpreted in harmony with these principles. So construed, it is only in the interest of the convenience and necessity of the public, of the nature and to the degree herein stated, that a business may be supervised and controlled, rates fixed or monopolies granted."

With reference to the provision of the 1956 consent decree of the United States District Court for the District of New Jersey in *United States v. Western Electric Co.*, quoted in the majority opinion, 327 P.2d at page 521,³ I would comment as follows: This provision is not a clear declaration that the charges for leasing and maintaining private communications systems are not subject to public regulation; neither is it a clear declaration that American Telephone and Telegraph Company and its subsidiaries are not enjoined from engaging in the business of leasing and maintaining facilities for private com-

3. "The defendant AT&T is enjoined and restrained from engaging, either directly, or indirectly through its subsidiaries * * * in any business other than the furnishing of common carrier communications services; provided, however, that this Section V shall not apply * * * (d) for a period of five (5) years from

the date of this Final Judgment, leasing and maintaining facilities for private communications systems, the charges for which are not subject to public regulation, to persons who are lessees from defendants or their subsidiaries of such systems forty-five (45) days after the date of this Final Judgment. * * *

munications systems where the charges for those private communications services are subject to public regulation. In the circumstances it does not appear that the provision of the consent decree should influence the decision herein.

For the reasons above stated I would annul the order of the Public Utilities Commission.

CARTER and McCOMB, JJ., concur.

Rehearing denied: CARTER, SCHAUER and McCOMB, JJ., dissenting.



50 Cal.2d 535

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James A. WEISS, Fred Lee Johnson, Gerald Lee Hubbard and Vivian Hubbard,
Defendants and Appellants.

Cr. 6208.

Supreme Court of California,
In Bank.

June 27, 1958.

Prosecution for abortion and for conspiracy to commit abortion. The Superior Court, Los Angeles County, Joseph M. Maltby, J., rendered judgment, and defendants appealed. The Supreme Court, Schauer, J., held that evidence was sufficient to connect each individual defendant with the conspiracy at or prior to the time of the commission of the earliest substantive offense of which he was convicted.

Judgment affirmed.

Opinion, 318 P.2d 517, vacated.

1. Searches and Seizures ☞3(1)

Officers' information, obtained in course of lengthy investigation, including information obtained from observation of occupants' activities and from telephone call

in which an officer purported to arrange for an abortion, warranted search of premises occupied by alleged abortionist and his accomplices.

2. Criminal Law ☞627½

In abortion prosecution, that trial court, over defendants' objection, permitted prosecution to remove exemplars of defendants' handwriting from courtroom for expert examination was not error, where it did not appear that the examination caused the expert to change his opinion as to the authorship of certain exhibits, or that defendants' attorney requested or would have been denied an opportunity to have his own expert examine the exhibits.

3. Criminal Law ☞386

In abortion prosecution, testimony by prosecution witness concerning the telephone call from an unidentified person was hearsay and trial court's refusal to strike it was error.

4. Criminal Law ☞338(4), 351(10)

A defendant's efforts to suppress testimony against himself indicates a consciousness of guilt, and evidence of such action is admissible against him, but evidence of an attempt by third person to suppress testimony is inadmissible against a defendant where the effort did not occur in defendant's presence, unless the defendant authorized the effort.

5. Criminal Law ☞1171(1)

The prosecution's willful offering of evidence of an attempt by a third person to suppress evidence against a defendant, outside the defendant's presence and without his authorization, may be prejudicial error.

6. Criminal Law ☞1186(4)

In view of whole record in abortion prosecution, improper admission of hearsay evidence concerning alleged attempt by unidentified person to suppress evidence against the defendant did not require reversal. West's Ann.Const. art. 6, § 4½.

7. Criminal Law ☞1170(4)

In abortion prosecution, wherein the subject of an abortion and her husband testified against defendant, trial court's re-

fusal to permit cross-examination of husband concerning his objection to the abortion and his co-operation with police officers was not prejudicial where these matters were brought out when defendant called husband as a defense witness.

8. Criminal Law Ⓒ1037(1, 2)

Where there is misconduct, it is ordinarily the duty of counsel promptly to call the attention of the court to the matter and to request that the jury be instructed as a foundation for complaint on appeal, except where the error could not be cured and harmful result obviated by timely instruction.

9. Criminal Law Ⓒ1037(1)

In abortion prosecution, prosecuting attorney's description of defendants' operation as an "abortion mill", and his references to the dangers of the operation were not, under the evidence, so flagrant or incurable as to permit review where no timely objection was made.

10. Criminal Law Ⓒ730(13)

Under circumstances shown by record in abortion prosecution, wherein defense counsel first raised, before successful objection by prosecution, matter of other offenses charged but not prosecuted, prosecuting attorney's action in raising the matter in closing argument was not prejudicial misconduct, in view of instruction.

11. Criminal Law Ⓒ576(5)

A defendant who consents to be tried more than 60 days after the filing of the information waives his right to trial within the statutory time. West's Ann.Pen.Code, § 1382, subd. 2.

12. Criminal Law Ⓒ1166(7)

Where defendants in abortion prosecution waived their right to trial within statutory time, and prosecuting attorney obtained continuance from Monday to Wednesday on ground that he was trying another case, and on Wednesday trial was continued, with defendants' consent, to the succeeding Monday, continuance served orderly administration of justice and was not prejudicial to defendants, in absence of a

showing that a judge was not available for trial in that branch of the court on the first Monday. West's Ann.Pen.Code, § 1382, subd. 2.

13. Criminal Law Ⓒ576(5)

The right to a speedy trial may be waived.

14. Criminal Law Ⓒ576(5)

Consent to delay beyond the statutory time for trial is not a waiver of the right to speedy trial, but a defendant's consent to delay until a certain date does not entitle him to a trial as of right on that day if good cause appears for further delay, as when the condition of the court's business will not permit the trial to proceed. West's Ann. Pen.Code, § 1382, subd. 2.

15. Witnesses Ⓒ254

In abortion prosecution, wherein a defendant set up alibi that he was working on particular day, and defendant's supervisor appeared with his journal but testified that it did not refresh his memory as to whether defendant was working that day, restricting defendant's examination of witness by excluding questions whether journal would refresh his recollection as to other matters was not improper.

16. Witnesses Ⓒ277(1)

If a defendant takes the stand and makes a general denial of the crime with which he is charged, the permissible scope of cross-examination is very wide.

17. Witnesses Ⓒ277(4)

When a defendant testifies to a state of things contrary to and inconsistent with the prosecution's evidence, thus indirectly denying the testimony against him, but does not testify expressly with relation to the same facts, cross-examination is not limited to the precise facts concerning which he testifies, and can be extended to facts or denials which are necessarily implied from his testimony in chief.

18. Witnesses Ⓒ277(6)

In abortion prosecution, wherein the prosecution introduced evidence to effect that at a particular time a defendant made an appointment by telephone and made a

notation of this appointment, and defendant in testifying denied having made the telephone appointment, he, by testifying to a state of facts inconsistent with his having made the notation, became subject to cross-examination concerning the notation. West's Ann.Pen.Code, § 1323.

19. Abortion ⚖️11

Conspiracy ⚖️47

Evidence was sufficient to sustain a defendant's conviction of abortion and conspiracy to commit abortion.

20. Conspiracy ⚖️45

In prosecution for conspiracy to commit abortion, evidence concerning the defendant's earlier subscription to a telephone which allegedly was used in the abortion operation was competent, in light of other evidence connecting defendant with the remaining defendants and with abortions.

21. Conspiracy ⚖️41

After a conspiracy to commit an unlawful act is established, every act of each member of the conspiracy, pursuant to or growing out of conspiracy, is the act of all of them.

22. Conspiracy ⚖️41

A person who joins a conspiracy is not criminally liable for acts of others committed before he joined the conspiracy.

23. Criminal Law ⚖️422(1)

A person who joins the conspiracy after its formation and actively participates in it adopts the prior acts and declarations of his fellow conspirators only to the extent that these acts or declarations are admissible against him, and they are so admissible only to show such matters as the nature and objectives of conspiracy in which he joined, and the incidents thereof, but not to prove his guilt of substantive crimes theretofore committed.

24. Conspiracy ⚖️48

Instruction, which suggests that a defendant could be criminally liable for a crime committed by a conspirator prior to the time the defendant joined the conspiracy, should never be given.

25. Conspiracy ⚖️48

Criminal Law ⚖️1172(6)

In prosecution for conspiracy to commit abortion, giving of instruction, suggesting that a defendant could be liable for a crime committed pursuant to conspiracy prior to the time he joined it, was error but not prejudicial where no defendant was convicted of a substantive offense of abortion committed prior to the time that the evidence connected him with the conspiracy. West's Ann.Pen.Code, § 31.

26. Criminal Law ⚖️566

In a criminal prosecution, a witness' answer to question whether person in photograph was a certain person, "I believe so", was not insufficient as evidence of identity.

27. Abortion ⚖️11

Conspiracy ⚖️47

A defendant cannot be convicted of abortion or of conspiracy to commit abortion unless the testimony of the abortee is corroborated by other evidence. West's Ann.Pen.Code, § 1108.

28. Abortion ⚖️11

Conspiracy ⚖️47

In prosecution for abortion and conspiracy to commit abortion, testimony of abortee as to a defendant's guilt of substantive offense and connection with the conspiracy was sufficiently corroborated. West's Ann.Pen.Code, § 1108.

29. Abortion ⚖️11

Conspiracy ⚖️47

In a prosecution for abortion and conspiracy to commit abortion, testimony of the woman aborted can be corroborated by the testimony of another woman that the same person performed an abortion upon her in a similar manner. West's Ann.Pen.Code, § 1108.

30. Conspiracy ⚖️47

In prosecution for conspiracy to commit abortion and for abortion, evidence was sufficient to connect each individual defendant with the conspiracy at or prior to the time of the commission of the earliest substantive offense of which he was convicted.

Harold J. Ackerman, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond Momboisse and John S. McInerny, Deputy Attys. Gen., for respondent.

SCHAUER, Justice.

Defendants James A. Weiss, Fred Lee Johnson, Addie Estelle Simmons, Gerald Lee Hubbard, and Vivian Hubbard were charged with (Count I) conspiracy to commit abortion committed continuously from March 29, 1955, through February 3, 1956, and (Counts II through VII) a series of six criminal abortions committed during that period. Defendants were tried before a jury, which found them guilty of all counts except as follows: Defendant Weiss was found not guilty as to Counts II and III; both the Hubbards and Simmons were found not guilty as to Count II. Each defendant moved for a new trial. The motions were denied, except as to defendant Simmons, who withdrew her motion for new trial and subsequently abandoned her appeal. Before us are the appeals of the remaining defendants from the ensuing judgments of conviction and from the order denying a new trial.

Defendants (collectively or individually, as appropriate in the context) argue that (1) the trial court erroneously admitted evidence obtained by illegal search and seizure; (2) the trial court erred in permitting the removal from the court room, before the taking of evidence began, of exemplars of the handwriting of defendants Hubbard for the purpose of permitting examination of them by a prosecution expert; (3) the trial court erroneously admitted hearsay testimony of a telephone conversation between one of the abortees and an unidentified person who represented himself to be an attorney of defendants; (4) the trial court erroneously restricted the cross-examination of an accomplice witness; (5) the prosecuting attorney erred to defendant's prejudice in his argument to the jury; (6) defendants were denied their right to a speedy trial (U.S.Const. amend-

ment VI; Cal.Const. art. I, § 13; Pen. Code, § 686, par. 1); (7) the trial court erroneously restricted defense counsel's examination of a defense witness offered to prove an alibi of one of defendants; (8) the trial court erroneously permitted the making, at the direction of the prosecuting attorney, and the introduction, on cross-examination of a defendant, of an exemplar of that defendant's handwriting; (9) the evidence is insufficient as a matter of law to sustain the conviction of defendant Gerald Lee Hubbard; (10) the trial court erroneously instructed the jury that one who becomes a conspirator after the formation of the conspiracy is liable for crimes committed by his co-conspirators before he entered the conspiracy. For the reasons hereinafter stated, we have concluded that insofar as the matters complained of were error, the error was not prejudicial (Cal.Const. art. VI, § 4½).

Evidence which Defendants Claim was Illegally Obtained. Defendants Johnson, Simmons, and Weiss were arrested at the premises where the abortions were performed, 5460 The Toledo, Long Beach, at about 7:55 p. m. on February 3, 1956. Defendant Gerald Lee Hubbard was arrested at the Hubbard home, 6701 Sunnybrae Avenue, Canoga Park, at approximately 11:10 p. m. on the same night. On The Toledo premises were found an operating table and appurtenant equipment (displayed to the jury but not formally received in evidence); photographs of the premises were taken and received in evidence; a sterilizer, rubber gloves, forceps and other surgical equipment, surgical gowns and masks, and various papers were taken from The Toledo premises and received in evidence. Papers taken from the Sunnybrae premises were received in evidence. Defendants object to the introduction of this evidence on the ground that it was obtained by illegal search and seizure. The People introduced much evidence, outside the presence of the jury, which shows that the arresting officers had reasonable grounds to enter and search the premises and arrest defendants without a warrant. Such evidence is as follows:

In the latter part of 1953 or the first part of 1954 Lieutenant Zander, police officer, investigated the activities of Vivian Hubbard, her brother, defendant Weiss, and her son, defendant Johnson. He observed Vivian taking women to 13605 Gault Street (not the premises involved in the present prosecution) and on two occasions observed defendant Gerald Lee Hubbard accompanying Vivian when she was taking women from those premises. From women who had been aborted on the premises Zander learned "that a woman who believed herself to be pregnant and desired to terminate her pregnancy would receive from any of several sources the telephone number Albany 2309 and the name Vivian, and instructions if she were to call that number and ask for Vivian that she could make arrangements to have an abortion performed; * * * that the woman who identified herself as Vivian would make arrangements satisfactory with the pregnant woman for her to go to a parking lot at Hody's Drive-in * * * at a designated time and that they would be instructed to have with them an amount of cash that would be set forth in this conversation; and that they would be instructed that they would be met there by a woman in a black Lincoln Capri and that they would be taken then to a doctor who would perform the abortion and would be subsequently returned to the parking lot"; that pursuant to these arrangements the women were taken to the Gault Street address, where they paid Vivian, disrobed, put on a white gown, and were assisted by Vivian onto an operating table and "instructed by her in the use of an anesthetic device that they described as a cannister with a face mask, * * * and that they would then notice a man dressed in a white mask with a cap * * * and wearing a white gown enter the room, and that on occasion they would see or hear the metallic clink of instruments, feel some instruments being inserted in their private parts, feel certain sensations of pain or pulling or cramping * * *; that after some minutes on this table they would awaken from a semi-consciousness * * * and following this procedure they would be

returned by Vivian in this car to the parking lot where they had been initially picked up; and that in each instance following this procedure they would resume their normal menstrual periods."

Lieutenant Zander further learned that during the latter part of 1953 some aborted women were taken to the home of defendant Johnson and there cared for by Johnson and his wife. In May, 1954, Lieutenant Zander had arrested defendants Vivian, Weiss, and Johnson, and Johnson's wife, and another person. Prosecution of these persons on the charges then laid resulted in disagreement of the jury; apparently prosecution on those charges of those who are defendants in this action was not carried further.

In January, 1955, Lieutenant Zander investigated an address in Seal Beach where the telephone was listed under a pseudonym of defendant Weiss. The officer had received information that women were being taken to that address for the purpose of having abortions performed, but he did not "actually see any of the operation at that address."

In July, 1955, Lieutenant Zander talked with Mr. Meade of the State Medical Board. Mr. Meade stated that he had received a report that Evelyn Rogers (sometimes referred to in the transcript as "Rodgers") had been hospitalized and that the doctor who treated her "reported it as a criminally induced abortion." Mrs. Rogers told Mr. Meade and a police officer that she "believed herself pregnant, wanted to terminate the pregnancy, had received from a source that she declined to name a Diamond telephone number and the name Vivian—no—that she had received a call from a woman that identified herself as Vivian, and that during the conversation she was given a Diamond telephone number to make subsequent calls to, and that she had had a conversation with this person in which she discussed the term of her pregnancy, her desire to terminate it, and the matter of what the price would be for the abortion, and that she was instructed to go to the Clock Cafe

* * * on a certain day"; Mrs. Rogers went to the appointed place at the designated time and was taken to a house "where she had had certain instrumentation performed upon her after a payment of a sum of money"; the man who performed the operation wore a white cap, a mask, and a long white gown; "an anesthetic was used * * * a breathing device had been strapped to her wrist."

Lieutenant Zander learned from Officer Bates, to whom a Mr. Jaderquist had reported, that Mrs. Jaderquist was pregnant and planned to have an abortion; that after having talked to a Vivian on the telephone Mrs. Jaderquist arranged to go to the Long Beach Municipal Airport "where she would be met by a woman who would take her to the doctor." Thereafter, by listening to a telephone conversation between Jaderquist and Officer Bates, Lieutenant Zander learned that Mrs. Jaderquist had kept her appointment, was driven by a described route from the airport to a house with the number "5460" on it, had been taken to an upstairs bedroom and given an anesthetic and "lost partial consciousness." Investigation by the police officers disclosed only one house in the described neighborhood with the number "5460" on it, that is, 5460 The Toledo.

Thereafter in front of 5460 The Toledo Lieutenant Zander saw a parked automobile with a license number which, investigation disclosed, was registered in the name of Harry M. Umann, who, the officers knew, was the attorney of Vivian, Weiss, and Johnson. Beginning January 16, 1956, Lieutenant Zander placed 5460 The Toledo under the observation of himself and other officers stationed in a disguised panel truck parked near the house. Officers observed Addie Simmons in the car registered to Umann take a number of young women to and from the premises. They observed Weiss at the premises in a pickup truck registered under his pseudonym, James Alexander. They observed Johnson leave in an automobile

registered to Gerald Hubbard at 6701 Sunnybrae, Canoga Park.

At the Long Beach Municipal Airport officers observed Addie Simmons in the Umann car picking up and letting out women passengers.

On February 1, 1956, Lieutenant Zander telephoned Diamond 7-0583, a number which he ascertained was that of Gerald Hubbard by inquiry at the number Albany 2309 which he had learned in his prior investigations. The officer spoke to a person whose voice he recognized as that of Gerald Hubbard, said that he was "Frank La Peer" and made an appointment for an abortion for a fictitious "girl friend." It was arranged that the "girl friend," wearing described clothes, was to meet a woman named Addie in a Long Beach cafe. The following day the officer again called the Diamond number, spoke to a man whose voice he recognized as Hubbard's, told Hubbard that he was "Frank La Peer," and cancelled the appointment for the abortion.

[1] On the basis of the foregoing information officers entered and searched the premises at 5460 The Toledo and 6701 Sunnybrae. The trial court ruled that the search of the premises was reasonable and that the evidence obtained by such search was admissible. The ruling is tenable in view of the evidence of the information obtained by the officers in the course of their lengthy investigations.

Some of the evidence offered on the issue of search and seizure was obtained prior to the decision in *People v. Cahan* (April 27, 1955), 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513. Defendant argues that evidence illegally obtained prior to the Cahan decision cannot justify a search and seizure subsequent to that decision. Assuming, without deciding, that this argument would have merit if it applied to the facts at hand, it can have no application here. There is no showing that the investigations into the Gault Street address in the latter part of 1953 or early 1954 were illegally conducted, and no evi-

dence illegally obtained in the course of these investigations was introduced at the present hearing on the justification of the search and seizure.

The Evidence as to Count I. Count I averred the conspiracy (proved by the evidence as a whole) and the following overt acts in furtherance of the conspiracy and to effect its objects:

1. That in June, 1955, defendant Johnson rented 159 Syracuse Walk, Naples. It was proved that Johnson rented the premises in June 1955, and that in July, 1955, an abortion was performed on Edith Rogers at that address.

2. That about July 9, 1955, defendant Vivian Hubbard rented 5460 The Toledo, Long Beach. It was proved that this defendant rented those premises on the averred date and that abortions were subsequently performed there on the abortees named in Counts III through VII of the information.

3. That about July 14, 1955, defendant Gerald Lee Hubbard contracted for telephone service at 5460 The Toledo. It was proved that on that date an application for telephone service signed "Gerald L. Hubbard" was made to the telephone company, but the prosecution's handwriting expert testified that the signature was not in Hubbard's handwriting.

4. That on January 23, 1956, defendant Simmons transported Mary Yoho and Marion Powell from Long Beach Municipal Airport to 5460 The Toledo. This was proved by the testimony of Mrs. Yoho, the abortee named in Count VI, and Mrs. Powell, the abortee named in Count VII.

5. That about February 1, 1956, defendant Gerald Lee Hubbard had a conversation with H. Zander. Lieutenant Zander testified to the jury concerning the telephone conversation in which on that date he arranged an appointment for an abortion for a fictitious girl friend.

6. That on January 18, 1956, defendant Johnson received \$350 from Nancy Cliff. Mrs. Cliff, the abortee named in Count IV,

testified that she paid Johnson this sum on the alleged date for an abortion.

7. That on January 19, 1956, Vivian Hubbard had a conversation with Marion Powell. Mrs. Powell testified that about that date she called Diamond 7-0583 and had a telephone conversation with a woman who identified herself as Vivian, with whom Mrs. Powell arranged for an abortion. This telephone number was listed to defendant Gerald Lee Hubbard, Vivian's husband.

8. That on January 18, 1956, defendant Weiss visited 5460 The Toledo to perform abortions. This was proved by the testimony of Nancy Cliff that on that date an abortion was performed on her at that address by a man dressed in a white robe, cap, and mask, whom she believed was the person depicted in a photograph of Weiss so garbed.

9. That on February 3, 1956, defendant Weiss visited 5460 The Toledo to perform abortions.

10. That on February 3, 1956, Weiss was dressed in a surgical mask, cap, and gown at The Toledo premises. Lieutenant Zander testified that on February 3 he saw Weiss enter the premises at 5460 The Toledo and that thereafter Zander entered the premises and observed Weiss in surgical garb with a mask. That Weiss' purpose was to commit abortions on February 3 can be inferred from the other evidence, hereinafter summarized, of his commission of abortions on other dates at that address.

Evidence as to Count II. Evelyn Rogers, who had received a promise of immunity from prosecution, testified as follows: In June, 1955, she was examined by a physician and informed that she was pregnant. After discussions with an unidentified person concerning termination of the pregnancy she received a telephone call from a woman who said that her name was Vivian. "She said that she heard I was in trouble and I said I believed I was. * * * She said that probably she could get someone to help me. I asked if it was a regular doctor and she said 'Yes.' I asked her how it could be done, and she said, 'A

curettement.' I asked how much it was and she said \$350. * * * She asked me what kind of a car I would have and I told her. * * * [S]he told me to go down to the Clock Drive-In on Pacific Coast Highway and be there at 1:00 o'clock [on an appointed day] and I would be met by a fellow in a green car. * * * She gave me a telephone number in case anything went wrong. * * * It was a Diamond number. * * * On Saturday I went down to the Clock Drive-In [with Patricia Carroll]. * * * We sat and waited for a while and pretty soon the green car did pull up alongside us and this boy [not identified as anyone in the court room] got out and I believe he did ask me if I was Evelyn. * * * I said, 'Yes,' and he said, 'Come with me.' Which I did." Miss Carroll waited for Mrs. Rogers at the drive-in. The young man drove Mrs. Rogers to 159 Syracuse Walk.

Mrs. Rogers was directed to a bedroom of the house where she met the defendant Johnson and a man in a mask and gown. She was told to undress and put on a white robe. She was placed on a table "lying down with my knees in the stirrups." Johnson explained to her how to use an anesthetic device; to "Put the clamp * * on my wrist and bulb in my hand and the mask over my face, and if I felt myself waking I was to press the bulb and it would keep me relaxed and asleep. * * * The fellow in the mask and gown was down at the bottom of the table, and the other fellow [Johnson] was standing alongside of me." She felt an instrument inserted in her vaginal orifice, and "some sort of a pain tugging, pulling or pressure."

When the procedure was completed the masked and gowned man gave her an envelope containing pills on which was written the Diamond number and she was told that "if anything were to happen that I was to call that number." Mrs. Rogers then dressed and the young man who had brought her to the house drove her back to the drive-in, where she met her friend Patricia Carroll.

Within a few days Mrs. Rogers started hemorrhaging and became quite ill. She called the Diamond number and a woman who identified herself as Vivian told her to lie down and apply ice packs to her abdomen. Mrs. Rogers' illness continued. She called her own doctor and he immediately hospitalized her. She was interviewed by the police and by Mr. Meade of the State Medical Board. She related to them the incidents which she recounted in her testimony and directed them to the house where the abortion had been performed.

Thereafter Mrs. Rogers received a telephone call from an unknown person who assertedly identified himself as "Vivian's attorney." Her testimony in this regard will be hereinafter set forth in connection with defendants' meritorious contention that it should not have been received.

Patricia Carroll testified that Mrs. Rogers told her that she (Mrs. Rogers) was pregnant and was going to have an abortion, and that the witness accompanied Mrs. Rogers to the Clock Drive-In, where Mrs. Rogers was picked up by a man in a green car.

Evidence as to Counts III through VII. The women who underwent the abortions involved in each of these counts testified substantially as follows: Each found that she was pregnant and determined to have an abortion. Each obtained the name Vivian and a Diamond telephone number (Diamond 7-0583, the number of the Hubbard residence) and was told that Vivian could make arrangements for termination of the pregnancy. Each called the Diamond number and talked with a woman who said she was Vivian (except Mrs. Yoho, who talked with a man at that number). Each was informed that the price would be \$350, and made an appointment to meet a woman called Addie at the Long Beach Municipal Airport (except Mrs. Robinson, whose appointment was at a cafe). Each was met at the appointed time and place by defendant Addie Simmons and driven by her to 5460 The Toledo. There each saw the defendant Johnson and paid him \$350. Upstairs each saw a man in a surgical robe, cap, and

mask; Mrs. Cliff, Mrs. Robinson, Mrs. Yoho, and Mrs. Powell were able to identify a photograph of defendant Weiss in robe, cap and mask as the man who was present at The Toledo; and Mrs. Yoho was able to identify him in the courtroom.

Each of the women, as instructed by defendant Johnson, undressed and put on a surgical gown, and lay upon a table with stirrups. An anesthetic mask was placed on the face, with a device strapped to the wrist so that the patient could administer the anesthetic to herself. Johnson stood beside the woman and the man in the mask and robe stood at the foot of the table. The woman felt something inserted in her vaginal orifice, then, breathing the anesthetic, almost or altogether lost consciousness. After the operation was completed, each woman was given an envelope with the name Vivian and the Diamond telephone number and instructed to call if she had any trouble. Each of the women was instructed to put on a sanitary belt and pad and, after dressing, was returned by Addie to the place where she had been picked up.

The removal of the Handwriting Exemplars from the Court Room for Further Examination by the Expert. After the jury had been impaneled and before the taking of testimony began the prosecuting attorney moved to withdraw from the clerk's possession exemplars of the Hubbards' handwriting which had been exhibits (numbered 14, writing of Vivian, and 15, writing of Gerald) at the preliminary hearing, in order that an expert might examine them. Defense counsel objected that "The defendants have a right to be present at any examination and it should be conducted in open court." The court overruled the objection and granted the People's motion. Thereafter a handwriting expert testified upon direct examination that from a comparison of Exhibit 26 (Exhibit 15 at the preliminary hearing, an exemplar of the writing of Gerald) with other exhibits, notations of appointments for abortions, including particularly Exhibit 58, notation of the fictitious appointment made by Lieutenant Zander, he concluded that they were

written by the same person. Still other notations of appointments for abortions were, in the opinion of the expert, written by the person who wrote Exhibit 27 (Exhibit 14 at the preliminary hearing, an exemplar of the handwriting of Vivian Hubbard).

On cross-examination of the expert, defense counsel asked whether he had testified at the preliminary hearing that "It is my opinion that the writings found here in 13 [Exhibit 58 at the trial] * * * were written by the person responsible for the * * * [s]pecified writing in 14 [the exemplar of Vivian Hubbard's writing]." The witness replied "I don't recall how I answered the question. I know what I should have answered and I know what I should have said. Whether I made an error or a reporter made an error, I don't know." The expert further explained that before the preliminary hearing he had marked then Exhibit 13 (Exhibit 58 at the trial) "H" to indicate that in his opinion it was written by Gerald Lee Hubbard rather than "V," the mark he used to indicate that writing in his opinion was that of Vivian. The expert further testified, "Now counsel says I compared 13 against 14 and found them to be the same. That is not what I should have testified to * * * [I]f I said 15 with 14 or 13 like it should have been, then the reporter is responsible for the mistake made in the record."

Defendants assert that they do not impugn the integrity of the handwriting expert, but that they wish to make the point that "errors did show up after the handwriting expert was given a second look at the evidence," and that Exhibit 58 was of crucial importance to the prosecution's case because defendant Gerald Lee Hubbard denied Lieutenant Zander's testimony as to the telephone conversation concerning the fictitious abortion. There is no suggestion, however, that the expert's examination of the handwriting exemplars immediately before the taking of testimony at the trial caused him to change his opinion as to the authorship of Exhibit 58. Rather, as he frankly testified, there was a mistake

either in his testimony at the preliminary hearing or in the reporting of that testimony. It was for the jury to appraise the effect of this frankly admitted mistake.

Defendants rely on the unusual case of *People v. Ramirez* (1952), 113 Cal.App.2d 842, 849-851, 249 P.2d 307. There defendant was on trial for illegal sale of heroin. In evidence were certain capsules which contained a residue of white powder. After the taking of evidence had been concluded, and in the absence and without the knowledge of defendant and defense counsel, the prosecution was permitted to turn the capsules over to a chemist for analysis. The prosecution was then permitted to reopen the case and introduce testimony of the chemist that the capsules had contained heroin. It was held that the court's action was prejudicial error because (at page 851 [2] of 113 Cal.App.2d, at page 312 of 249 P.2d) "All proceedings in connection therewith were secret. Defendant was not notified and thus given an opportunity to object to such action or to participate therein. Defendant was also denied the right to have another chemist present when the test was made."

[2] The circumstances of the present case are materially different from the circumstances which were held to constitute prejudicial error in *Ramirez*. The proceedings here were not secret. Although it does not appear that the court acceded to defense counsel's statement that "if anything is to be done to the exhibits, we have a right to be there," there is no indication that defendants' attorney requested or that he would have been denied an opportunity to have his own expert examine the exhibits. And the removal of the exhibits for examination occurred before they were introduced in evidence and before the taking of testimony began, not, as in the cited case, to the surprise of an unnotified defendant, after it had been announced that the taking of testimony was concluded. In the circumstances we find no error in permitting the examination of the exemplars by the handwriting expert.

Evidence of Telephone Conversation Between the Abortee Evelyn Rogers and a Person who Represented that he was Defendant Vivian's Attorney. As previously stated, there is evidence that Mrs. Rogers directed Mr. Meade of the State Medical Board and police officers to the Syracuse Walk premises where the abortion was performed on her. Following such foundation her testimony continues:

"Q. By Mr. Cochran [prosecuting attorney]: The following day * * * did you receive a telephone call? A. Yes, I did.

"Q. Was it from a man or from a woman? A. I think it was from a man.

"Q. Did that person purport to know what you had done the day before? A. Yes. He said he had heard that I was in the hospital, that I had been ill.

"Q. And speaking about your activities the day before you got the telephone call about going to this place with those persons, do you remember that being the subject of the conversation on the telephone? A. Yes, I believe so.

"Q. Do you remember what was said? A. I believe I was asked if we had gone down. I said 'No.'

"Q. Did the person tell you who it was? A. I don't remember. That has been over a year ago.

"Q. Just relate it as nearly as you can, Mrs. Rodgers.

"Mr. Umann [defense counsel]: He would be calling for hearsay at this time, your Honor.

"The Court: I am inclined to agree. There has been no identification of the person to whom she talked. The objection is sustained.

"Q. By Mr. Cochran: Do you remember the person who talked to you, stating what his position was in respect to the defendants in this case?

"Mr. Umann: * * * I object to that and move to strike it on the grounds that there is no evidence that he had stated what his position was, and he is asking the identity of the person that said that. There is no evidence that it was said even. * * * [I]t is also a leading question. If she knows she can say; if she doesn't know, that is all he is entitled to find out.

"The Court: The objection is sustained on the ground that it is leading. If she remembers any of the conversation, I have no objection to her stating.

"Q. By Mr. Cochran: Tell us the best you remember as to who the person said he was, if he did say, Mrs. Rodgers.

"The Court: * * * Did he identify himself, if it was a man, over the phone to you?

"The Witness: I don't recall too well. I believe he may have said that he was Vivian's attorney * * *. That is my best memory. * * *

"Q. By Mr. Cochran: Go ahead and state the conversation.

"Mr. Umann: We will object to this as calling for hearsay.

"The Court: The objection is overruled. * * *

"A. He said that he heard that I had been in the hospital and had I been contacted by anyone? I don't recall if I said yes or no. That I don't recall. They asked me if I knew a Mr. Meade. * * * I said not that I could recall. I don't think I said I did. I don't think I remembered his name at the time myself, and if I had gone down to Long Beach to point out the house, and I said no. That is about all I can remember of the conversation.

"Q. That, of course, was not true? A. No, it wasn't true."

On cross-examination, the following occurred:

"Q. Did this man give his name?

A. No. Not that I can recall. * * *

"Q. Do you recognize the voice?

A. You mean now?

"Q. Yes. A. No, I don't."

Thereafter defense counsel moved to strike Mrs. Rogers' testimony as to the telephone conversation on the ground that it was hearsay and "because of the innuendo that the jury may derive from this hearsay that is damaging the attorney in this case. It was never shown to be the attorney in this particular case, yet, this is the implication that was produced by this voice that she didn't identify as anybody * * *."

[3] The trial judge refused to strike the hearsay testimony; this was error. However, the prosecuting attorney stated to the jury, "I don't want the jury to get the impression that it [the anonymous telephone call to Mrs. Rogers] was Mr. Umann, or anyone acting on his behalf, or even acting with his knowledge." And the trial judge stated, "The Court has the same impression that Mr. Umann had no part of that. We don't even know it was an attorney actually. Certainly it was not this defense counsel."

[4, 5] The testimony as to the telephone call was not admissible. The record is barren of any showing that the call was connected with or authorized by any defendant. The People assert that the evidence was admissible to show that the witness Rogers had been "impliedly intimidated" (see *People v. Cunha* (1951), 107 Cal.App. 2d 382, 386 [2], 237 P.2d 12) and that the context of the conversation makes it apparent that the call was from an agent of defendants since only such an agent would have been familiar with the matters to which the caller referred. But, obviously, certain prosecution agents were at least as aware of the suggested facts as were the defendants and, insofar as competent evidence is concerned, the trial court had no more basis for assuming that the call came from an agent of defendants than from an agent of the prosecution. The rules here pertinent are stated as follows in *People v. Kendall* (1952), 111 Cal.App.2d 204, 213, 244 P.2d 418: "[18] Efforts to

suppress testimony against himself indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him. [Citation.] [19] Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. [Citation.] However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant." (See *People v. Gilliland* (1940), 39 Cal.App.2d 250, 255-257 [1], 103 P.2d 179; *People v. Burke* (1912), 18 Cal.App. 72, 91-92, 122 P. 435.) If the attempt is made by a third person, not in the presence of a defendant or shown to have been authorized by him, it should at once be suspect as a mere purporting attempt to suppress evidence and in truth an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender. The wilful offering of such evidence might well form the basis for declaring a mistrial instant, or for granting a new trial, or for reversal on appeal if the case is not so strong and the record otherwise so clear as to bring the judgment within the saving grace of California Constitution, article VI, section 4½.

[6] It is only by reliance on the above mentioned constitutional provision that this case can be saved. Viewing the record as a whole and in accord with the rules we have established (*People v. Watson* (1956), 46 Cal.2d 818, 836, 299 P.2d 243), it does not appear that the improper admission of the hearsay evidence prejudiced defendant Johnson, the only defendant who was convicted of the abortion of Mrs. Rogers, or the other defendants so far as their convictions of conspiracy are concerned. In the light of the wealth of competent evidence against the defendants, it appears unreasonable to believe that the jury attached controlling significance to the small bit of evidence concerning the telephone call.

Restriction of Cross-Examination of the Accomplice Witness Jaderquist. Mrs.

Jaderquist testified in detail concerning the abortion alleged in Count III. Mr. Jaderquist testified that he was her husband; that she told him she was pregnant and desired an abortion; that he drove her to the Long Beach Municipal Airport where they were met by defendant Simmons; that Mrs. Simmons drove away with Mrs. Jaderquist after instructing Mr. Jaderquist to pick her up at an appointed time and place; that he did pick her up at such time and place.

Defendants complain of the sustaining of objections, on their cross-examination of Mr. Jaderquist, to questions whether he approved of or objected to the abortion; they also complain that they were not allowed to go into the fact that prior to and immediately after his wife's abortion he had been in touch with the police in connection with it. These matters, defendants urge, would have shown bias and prejudice on the part of the witness toward the defendants.

Thereafter the defense called Mr. Jaderquist as a witness. Defense counsel brought out the fact that the witness had been in touch with the police about two weeks before his wife made final arrangements for the abortion, later reported to the police the facts concerning his meeting with defendant Simmons and matters which his wife had told him concerning the abortion, and "was very unhappy with the idea of my wife having this particular abortion at that particular time."

[7] Although it might have tended to show bias against the defendants on the part of Mr. Jaderquist had defense counsel been allowed to show by cross-examination that he did not want his wife to have an abortion and that he co-operated with the officers at the time of the abortion in their efforts to build a case against defendants, it does not appear that defendants were prejudiced by the restriction of cross-examination in these respects since all the matters which they desired to bring out were elicited from Mr. Jaderquist when he testified for the defense. While there may have been some loss of effec-

tiveness in the presentation of the defendants' case due to the facts that they were not allowed to bring out these facts immediately after the witness testified for the prosecution, the matter, at least in and of itself, does not appear to be a serious one.

Argument of the Prosecuting Attorney. There was no objection at the time of argument to the following matters which defendants now assert constituted prejudicial misconduct:

The prosecuting attorney referred to defendants' operations as an "abortion mill."

"I say * * * everyone of them is lucky she is alive and survived this ordeal."

"Here is a woman who might be going right into peritonitis or a situation that would cause her death, but they already had her money. This is sort of a heartless approach, 'Put on some ice packs. You will be all right.'"

"[D]oes it occur to you what a chance these women were taking going to a place where this man had no medical training, conveniences for reviving a woman who might go into shock. * * * Can you not imagine with some possible horror what could happen to a woman if some emergency of that sort arose. Of course, that is not an element of the offense, but it is just a thought * * * that I wanted to leave with you * * *."

[8] The People rely upon the general rule that where there is misconduct it is ordinarily the duty of counsel to promptly call the attention of the court to the matter and request that the jury be instructed as a foundation for complaint on appeal. (People v. Kirkes (1952), 39 Cal.2d 719, 726, 249 P.2d 1.) The defendants rely upon the well recognized exception to this rule where the comment is such that the error could not be cured and the harmful result obviated by timely instruction to the jury. (*Ibid.*)

[9] It does not appear that the above instances of asserted misconduct were flagrant or incurable. The description of

defendants' operation as a "mill" appears warranted by the evidence that many women were aborted, and the references to the dangers of the operation appear not unwarranted in view of the circumstances that they were carried on in private houses and, it could be inferred, not under normal hospital conditions, and that they were performed by persons who, so far as the evidence disclosed, were without medical or surgical training

Two other women, Mrs. Gerry and Mrs. Sun, testified for the prosecution in substance similarly to, but in less detail than, the women named in the abortion counts. In his argument to the jury, defense counsel said, "We have covered the six women involved in this case. In addition to that, you heard the story of two women * *, Mrs. Gerry and Mrs. Sun, who have told you substantially each and every detail that these women have told you. * * * Why are they not a basis for a criminal count in this case? There is an answer to it, because there has been a complete adjudication. There has been a hearing in this case to determine whether or not there was sufficient evidence."

The prosecuting attorney objected, "I am going to ask that counsel be immediately stopped on that line of argument. There is nothing in this record. An attempt was made before to inject it and it was stopped."

The Court ruled, "There is nothing before the Court along the line that counsel is talking about. You are instructed to disregard it. You are not to proceed with that line of argument."

In his closing argument the prosecuting attorney said, "He [defense counsel] says, 'Why didn't they make a count out of that? Why didn't they make counts of other women?' What advantage or what reason would it be, we have six substantive counts of abortion; we have one count of conspiracy; what additional strength would it have lent to the case for us to have brought in five, ten, fifteen or twenty other women?"

Defense counsel said, "I think it is totally unfair to permit this to go unchallenged. Knowing these women did serve as a basis of a charge and there has been an adjudication at the preliminary hearing, and there was not sufficient evidence. Now he is telling the jury we have enough anyway. When he knows there has been a hearing on it."

The prosecuting attorney said, "Counsel already has been admonished by the Court and he is violating the Court's instructions."

The court ruled, "You had both better stay away from that subject. There is no such evidence before the Court at all. The citation of misconduct each way is denied."

[10] Defendants now cite the above quoted argument of the prosecuting attorney as prejudicial misconduct. As appears from the argument of defense counsel, it was he who first injected into this case the matter of asserted adjudication adversely to the prosecution of charges laid by the witnesses Gerry and Sun. While it would certainly have been better practice on the part of the prosecuting attorney—since his objection had barred the subject—not to have mentioned the matter further, and while the trial court could well have held that the re-introduction of the subject by the prosecutor had opened the door, it may fairly be said that inasmuch as the point of the argument was originated by defense counsel and since defense counsel in his objection to the prosecuting attorney's argument again placed the inadmissible matter before the jury, there is no present ground for holding that the defendants were prejudiced by the ruling, "The citation of misconduct each way is denied." In this sparring, defense counsel appears to have been fully the match of the prosecutor, and the trial judge to have been impartial in seeking to have a verdict reached on evidence rather than innuendo.

[11] *The Right to a Speedy Trial.* The information was filed on March 29, 1956.

On May 15, 1956, with the consent of defendants trial was set for July 30. On Monday, July 30, 1956, the cause was called and defense counsel answered, "ready for trial." Mr. Cochran, the prosecuting attorney, stated that he was trying a case in another department; that "This is a very long and complicated case and there is no one else prepared on it but myself. It will have to trail. I understand we might get on by Wednesday." The trial judge said, "We were supposed to have a judge here on Wednesday. Now we are not sure whether he will be here Monday or Wednesday. If he does not come we can only trail it again to Monday." He ordered the cause continued until Wednesday, August 1. Defense counsel said, "We are ready for trial today * * *. We are not waiving our statutory time." (As appears from the foregoing statement of facts, defendants had already initially waived their "statutory time" in that they had consented to be tried more than 60 days after the filing of the information. Pen.Code, § 1382, par. 2.)

On Wednesday, August 1, defense counsel stated, "defendants will waive time and request that the matter go over to Tuesday," and each defendant personally answered affirmatively the question whether he "waive[d] time for trial and consent[ed] that your trial be held August 7."

On August 7 when the case was called for trial defense counsel moved for a dismissal on the ground that "I objected on Monday, July 30th, at that time counsel for the People stated that there was no court open and he was engaged in trial * * *. [W]e move to dismiss, because there were in fact fourteen departments of the Superior Court open in Los Angeles County." The court denied the motion. Trial proceeded.

[12] It should be noted that pursuant to rules of court trial was held in the Long Beach branch of the Los Angeles superior court, and there is no showing that a judge was available for trial in that branch on July 30, when defendants contend they should have been allowed to go to trial. As in *People v. Osslo* (1958), 50 Cal.2d 75,

323 P.2d 397 (see page 106 of 50 Cal.2d, page 414 of 323 P.2d, for more complete discussion of the law), it appears that in the circumstances here the orderly administration of justice was served by the granting of a continuance and that defendants were not thereby prejudiced.

[13, 14] The right to a speedy trial is one which defendants can waive. (People v. Hocking (1956), 140 Cal.App.2d 778, 780[2], 296 P.2d 59; People v. Workman (1953), 121 Cal.App.2d 533, 536 [5], 263 P.2d 458.) Although consent to delay beyond the 60 day period from the filing of the information does not amount to a waiver of the right to a speedy trial, it has been held that where a defendant did so consent he "was not entitled to go to trial as of right on the day to which he last consented if good cause appeared for further delay. But the further delay must not be unreasonable and good cause is shown where the condition of the court's business would not permit the trial to proceed. [Citations.]" (In re Lopez (1952), 39 Cal.2d 118, 120 [3], 245 P.2d 1.) The record here meets the test.

Restriction of Defense Counsel's Examination of a Defense Witness Offered to Prove an Alibi of Defendant Gerald Hubbard for the Time of Lieutenant Zander's Cancellation of the Fictitious "La Peer" Appointment. Gerald Hubbard was the only defendant who took the stand. As previously stated, Lieutenant Zander testified that in a disguised voice he talked with Gerald Hubbard and made (on February 1), then cancelled (on February 2) a fictitious appointment for an abortion. Hubbard testified that he did not talk with Zander on these occasions and that he was at work at the fire department for 24 hours commencing at 8:00 a. m. on February 2.

The defense called as a witness Acting Captain Coultrup of the fire department. He testified that he kept the journal records of the department and brought the journal to court. He further testified that he had no independent recollection of what men were on duty on February 2. Asked whether the journal refreshed his

recollection as to who was present at the department on that date, he answered, "No."

To the question, "Were there any changes of personnel that day?" the prosecuting attorney objected "in view of the witness' answer that his recollection is not refreshed, and that it must be reflected by the book, and we state that it is not the best evidence." The objection was sustained. A similar objection was sustained to the question, "Did you mark any absentees for that day?"

The journal, introduced in evidence, contained an entry that Hubbard was detailed to the rescue unit.

On redirect examination Coultrup was asked, "would it refresh your recollection as to your activities on other days * * * if you looked at the entries?" An objection that this was "irrelevant to anything in this inquiry" was sustained. To the question, "As to events and not individuals, would it refresh your recollection to look at the book and see what the entries were?" an objection that the question "calls for speculation * * * and is not proper redirect examination" was sustained.

[15] Defendant Gerald Hubbard argues that his examination of the witness Coultrup was improperly restricted. It is apparent from the record that the witness had no independent recollection of the personnel on duty on February 2 or on other days. In the circumstances the only evidence of Hubbard's presence at the fire department which could be produced by the witness was the journal which was put in evidence. Defendant Gerald Hubbard further argues that the above quoted questions on redirect examination should have been allowed "to sustain * * * [Coultrup's] veracity and integrity." However, defense counsel does not explain how any answers of the witness Coultrup to those questions could have such effect; indeed, it does not appear that the "veracity and integrity" of such witness had been impugned. In the circumstances the restriction of the testimony of the witness was not improper.

Asserted Error in Permitting the Making and Introduction in Evidence of an Exemplar of the Handwriting of Defendant Gerald Hubbard on Cross-Examination. Defendant Gerald Hubbard testified as follows: He did not receive a telephone call from Lieutenant Zander or "Frank La Peer" on February 1. He was visiting his wife at the hospital throughout that day. He did not receive such a call on February 2. He was working at the fire department throughout that day. He denied testimony that after his arrest he told Zander that he (Hubbard) recognized Zander's voice over the telephone.

On cross-examination Mr. Hubbard, at the request of the prosecuting attorney, without objection, wrote various words which appeared on the notations of two appointments for abortions which the handwriting expert had testified were in Mr. Hubbard's handwriting; one of these was the fictitious appointment with the "girl friend" of "Frank La Peer." The prosecuting attorney then offered the witness' handwriting in evidence. Defense counsel objected that on his direct examination "I did not say a word about writing." The prosecuting attorney said, "Here is my reasoning, your Honor. If he were not there on the 1st of February, then that note would not have been made by him. Now, in respect to whether or not it was in fact written by him, I had a right to question him about other writing and to ask him to write and then let the jury determine whether or not. They also have the function of determining handwriting." The court agreed and overruled the objection.

[16, 17] Section 1323 of the Penal Code provides that if a defendant "offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." Defendant Gerald Hubbard argues that the introduction in evidence of the handwriting exemplar made on cross-examination went beyond the permissible limits of cross-examination as stated in this section and explained in *People v. Zerrillo* (1950), 36 Cal.2d 222, 227-228, 223 P.2d 223: "[6] If

a defendant takes the stand and makes a general denial of the crime with which he is charged the permissible scope of cross-examination is very wide. [Citations.] [7] Moreover, as stated in *People v. Tes-hara*, 141 Cal. 633, 638 [75 P. 338], 'A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. He can be cross-examined with respect to facts or denials which are necessarily implied from the testimony in chief, as well as with respect to facts which he expressly states.'" (See, also, *People v. Tarantino* (1955), 45 Cal.2d 590, 599 [12], 290 P.2d 505.)

[18] As defendant Gerald Hubbard points out, he made no categorical denial of the crimes. But the above quoted reasoning of the prosecuting attorney as to the receipt in evidence of the exemplar made on cross-examination is sound. By testifying to a state of facts inconsistent with his having written the "La Peer" notation, Mr. Hubbard became subject to cross-examination (including the making of the exemplar) concerning his writing of that notation.

[19] *Sufficiency of the Evidence to Support the Conviction of Gerald Hubbard.* The following summary of the evidence against Gerald Hubbard suffices to refute his contention that the evidence against him was insufficient to sustain his conviction:

According to the testimony of Mrs. Rogers, the abortee named in Count II, a few days before July 2, 1955, the date of her abortion, a woman who said her name was "Vivian" (the name of Mr. Hubbard's wife, a convicted defendant herein), over the telephone, gave Mrs. Rogers a Diamond telephone number to call in connection with Mrs. Rogers' arrangements for the abortion. The home telephone number of Gerald Hubbard was Diamond 7-0583. This was the number at which other abor-

tees were told to call "Vivian" and the number which Lieutenant Zander called when he arranged with Gerald Hubbard the fictitious appointment for an abortion and when Zander subsequently cancelled that appointment.

As already stated, on July 14, 1955, an application for telephone service at 5460 The Toledo was made in the name of Gerald Hubbard. Credit information given in connection with this application included the notations, "Employed by Los Angeles Fire Department 9th and Santee. Fireman. Personal address 6701 Sunnybrae, Canoga Park." This information as to Mr. Hubbard was accurate. But, as previously stated, the application for telephone service, in the opinion of the People's handwriting expert, was not written or signed by Mr. Hubbard. Mr. Hubbard testified that he did not register for the telephone at The Toledo or instruct anyone to register for it on his behalf. However, the question whether he was connected with the registration, in the light of the other evidence, was for the appraisal of the trier of fact.

In the Hubbards' home were found notations of apparent appointments for abortions in Mr. Hubbard's handwriting. In addition to notations concerning women not otherwise identified in the testimony, there was a notation reflecting the fictitious "La Peer" appointment which Zander testified he made with Mr. Hubbard. Other notations in Mr. Hubbard's handwriting included one for an appointment for Mrs. Mary Yoho, who testified that she was aborted on January 23, 1956, and one for an appointment for Mrs. Dorothy Gerry, who testified that she was aborted on February 3, 1956.

On an unspecified date, at The Toledo premises, Lieutenant Zander observed a Mercury automobile registered to Gerald Hubbard; it was driven by defendant Johnson. On January 20, 1956, at The Toledo premises, Zander observed the Mercury; it was driven by defendant Simmons and with her was a girl whom Zander "had seen her [Simmons] pick up at the Long Beach Municipal Airport." Mr. Hubbard

testified that he had given this automobile to defendant Johnson as a Christmas present. The effect of this testimony as connecting Mr. Hubbard with the activities at The Toledo premises was for the appraisal of the trier of fact.

Officer Galindo went to the Hubbard residence on February 3, 1956, and was invited in by Mr. Hubbard. The officer said, "You are under arrest on suspicion of abortion." Mr. Hubbard said, "Well, what is this all about?" Officer Galindo replied, "Well, we knocked over the place down at 5460 The Toledo and you are in on it." Mr. Hubbard asked, "*How deep am I in on it?*" (Italics added.) Galindo replied, "Well, if you want to sit down and talk about it * * * I will discuss it with you." However, Mr. Hubbard refused to discuss the matter further. He did thereafter say, "I knew that was Sergeant Zander on the phone I talked to the other day," but said further that he (Hubbard) did not talk with Zander; "He [Zander] just said hello."

On the night of February 3 at the Los Angeles police station Zander saw Mr. Hubbard. Zander said, "Hello, Jerry," and Hubbard replied, "Hi, I thought I recognized your voice the other day. It is nice to talk to you again."

[20, 21] In the light of the other evidence connecting Gerald Hubbard with the remaining defendants and with abortions, it can fairly be said that the evidence concerning the telephones is competent and shows his association with the charged criminal activities as early as July, 1955. He could be found to have been a member of the conspiracy to commit abortions from that time on until his arrest in 1956 and, therefore, liable as a co-conspirator for the series of abortions of which he was convicted, commencing with the abortion of Mrs. Jaderquist on November 23, 1955 (Count III) and extending through the abortion of Marion Powell on January 23, 1956 (Count VII), under the rule that "after a conspiracy to commit an unlawful act is established, every act of each member of the conspiracy [pursuant to or growing out of the conspiracy] is in contem-

plation of law the act of all of them." (People v. Harper (1945), 25 Cal.2d 862, 870 [2], 156 P.2d 249; People v. Waller (1939), 14 Cal.2d 693, 703 [8], 96 P.2d 344; People v. Kauffman (1907), 152 Cal. 331, 334, 92 P. 861.)

The Erroneous Instruction as to Conspiracy. At the request of the People the jury were instructed as follows:

"Where a criminal conspiracy has been formed, each of the persons forming the same, while he is a member thereof, is liable for every act, and is bound by the acts and declarations of each and all the conspirators, done or made in pursuance and furtherance of the said conspiracy, and *every person who joins and becomes a party to a conspiracy after the formation thereof, and who adopts the said conspiracy and its purposes and objects, becomes liable for every act*, and is bound by each and all the declarations of each and all the other conspirators done in pursuance and furtherance of the said conspiracy, and continues to be so liable and bound for so long as he remains a member thereof." (Italics added.) This instruction is CALJIC Instruction 932 (Calif. Jury Instructions, Criminal, 1946 ed.). Defendants, not without reason, urge that the italicized portion of the instruction erroneously informed the jury that a conspirator could be held liable for crimes committed by his co-conspirators before he joined the conspiracy.

That this error may have made an impression on the jury, defendants argue, is shown by the fact that after the jury had retired they returned into court and their foreman said, "We would appreciate if you could read the instructions concerning conspiracy to us again. There seems to be quite a bit of confusion on it." The court reread the instructions on the subject, including the instruction to which defendants object.

Defendants rely on the following statement in 11 Cal.Jur.2d, Conspiracy, § 9, p. 229: "It would appear * * * that where the act is itself criminal there is, upon the part of one joining the conspiracy subsequent to the act, no liability as a principal,

as that term is defined in the Penal Code, and a defendant in a criminal action is convicted as a principal or accessory or not at all. No case has been found in which a conspirator has been prosecuted for a crime committed by a co-conspirator during the course of the conspiracy and pursuant to its ends, where the crime was incidental to the conspiracy and not the substantive offense contemplated by it, and where it was committed prior to defendant's entry into the conspiracy." Section 31 of the Penal Code defines a principal as one "concerned" in the commission of a crime. Manifestly, a conspirator is not "concerned" in the commission of a crime which was committed before he joined the conspiracy.

[22, 23] As we read CALJIC Instruction 932 (Calif. Jury Instructions, Criminal, 1946 ed.), it is susceptible, as defendants urge, of the interpretation that one who "becomes a party to a conspiracy after the formation thereof, and who adopts the said conspiracy and its purposes and objects, becomes *liable* for every act * * * of each and all the other conspirators done in pursuance and furtherance of the conspiracy" (italics added), including criminal acts done before the person joining the conspiracy became a party thereto. This is not the law and we are not disposed to adopt such a rule as the substantive law of the state. At oral argument the People commendably disavowed any purpose of contending for such a rule of substantive law and urged only the rule that where a person joins a conspiracy after its formation and actively participates in it, he adopts the prior acts and declarations of his fellow conspirators pursuant to the conspiracy *to the extent that evidence of those acts and declarations is admissible against him*. People v. Sherman (1954), 127 Cal.App.2d 230, 237 [4], 273 P.2d 611; People v. Griffin (1950), 98 Cal.App.2d 1, 44 [20], 219 P.2d 519; People v. Jones (1938), 25 Cal.App. 2d 517, 520, 77 P.2d 897; People v. Fitzgerald (1936), 14 Cal.App.2d 180, 203, 58 P.2d 718, certiorari denied 299 U.S. 593, 57 S.Ct. 115, 81 L.Ed. 437; People v.

MacPhee (1914), 26 Cal.App. 218, 224, 146 P. 522; People v. Schmidt (1917), 33 Cal. App. 426, 443, 446, 165 P. 555.) And, as is hereinafter developed in more detail, it is admissible against him only to show such matters as the nature and objectives of the conspiracy in which he joins, and the incidents thereof, but not to prove his guilt of substantive crimes theretofore committed.

We recognize that it is said in 1 Wharton's Criminal Law and Procedure (1957), § 90, p. 198, and 11 Am.Jur., Conspiracy, § 8, p. 549, that "The rule of responsibility for the acts of co-conspirators includes acts done before the defendant joined the conspiracy, as well as the acts subsequent to his participation," and in 15 C.J.S. Conspiracy § 75, p. 1108, that persons who come into a conspiracy after its formation and assist in the furtherance of its execution with knowledge of its purpose "are deemed in law parties to all acts done by any of the other parties, either before or after, in furtherance of the common design."¹ But the cases cited in those works for the quoted propositions are not cases where a defendant was convicted of a substantive offense committed by his co-conspirators before he became a member of the conspiracy.

Nor do the California cases which contain language in seeming accord with those propositions uphold conviction of a substantive offense committed by conspirators before the defendant joined the conspiracy. Implications in the language of the following cases that a defendant could be held retroactively liable for such a substantive offense are disapproved: People v. Brumbach (1957), 152 Cal.App.2d 386,

391-392, 314 P.2d 98; People v. Sherman (1954), supra, 127 Cal.App.2d 230, 240 [13], 273 P.2d 611; People v. Griffin (1950), supra, 98 Cal.App.2d 1, 44 [20], 219 P.2d 519; Anderson v. Superior Court (1947), 78 Cal. App.2d 22, 24, 177 P.2d 315; People v. Fitzgerald (1936), supra, 14 Cal.App.2d 180, 203, 58 P.2d 718; People v. MacPhee (1914), supra, 26 Cal.App. 218, 224, 146 P. 522.

It is often said, as stated in the People's brief, that "one who joins a conspiracy after its formation and actively participates in it, thereby adopts the previous acts and declarations of his fellow conspirators." But, as hereinabove indicated, this is not to say that such a one becomes substantively liable for previous criminal acts of his fellow conspirators to which he was not a party. Rather, he "adopts" the acts in the sense that evidence thereof is "original evidence against [him]" (People v. MacPhee (1914), supra, 26 Cal.App. 218, 224, 146 P. 522) in a prosecution for the conspiracy or for a crime committed as an object of or in furtherance of or as a natural outgrowth of the conspiracy *after he joined it*. To the same general effect see, also, People v. Anderson (1949), 90 Cal.App.2d 326, 335, 202 P.2d 1044, holding competent to establish "jurisdiction and venue," evidence of the terms and objectives of a conspiracy originally formed *before*, and of an act pursuant to the conspiracy done *after*, defendant had joined it.

[24, 25] Although the instruction under consideration (ante, 327 P.2d 544) is er-

1. In the latter work it is added that "some authorities have held that a person joining in a conspiracy after its formation is not responsible for acts done by other members of a combination before he became a member," citing State v. Duncan (1876), 64 Mo. 262, 266, where it is said, "The second instruction given for the State is erroneous in telling the jury that if there was a party of persons combined for the purpose of stealing horses, etc., and sharing the proceeds, and defendant at any time, at or after the formation of said company became a member, he was criminally liable for all

the acts done by any other person belonging to the combination, before and afterwards, in furtherance of the common design. In other words, if the defendant joined a company of horse thieves, he was liable for all the thefts they or any of them may have committed before he became a member, whether he received any part of the property so stolen, or its proceeds or not; his joining the company had relation back, and implicated him in every theft they had committed, even years before. The statement of the proposition is its own refutation."

roneous in suggesting that a defendant could be "liable" for a crime committed pursuant to the conspiracy prior to the time he joined it, and, hence, should never be given, the instruction was not prejudicial here because no defendant was convicted of a substantive offense of abortion committed prior to the time that evidence connected him with the conspiracy.

[26] Defendant Weiss was convicted of the abortion charged in Count IV and subsequent abortions. He was connected with the abortion charged in Count IV, committed on January 18, 1956, and with the conspiracy to commit abortions on and after that date, by the testimony of the abortee named in Count IV. This woman was shown a photograph of Weiss in a surgical gown and mask and asked, "do you recognize the person that is in this photograph as the person you talked to in that bedroom [where she testified that the abortion was committed]?" She answered, "I believe so." This is not insufficient as evidence of identity. *People v. Harris* (1948), 87 Cal.App.2d 818, 824 [4], 198 P.2d 60; *People v. Tullous* (1953), 119 Cal.App.2d 637, 640, 259 P.2d 955.)

[27, 28] We recognize that a defendant cannot be convicted of abortion upon the testimony of the abortee unless she is corroborated by other evidence (Pen.Code, § 1108) and that section 1108 applies also to the offense of conspiracy to commit abortion (*People v. MacEwing* (1955), 45 Cal. 2d 218, 223 [1], 288 P.2d 257; *People v. Buffum* (1953), 40 Cal.2d 709, 723-724 [19, 20], 256 P.2d 317). As the following resume of testimony will show, there is sufficient corroboration of the testimony of Mrs. Cliff, the abortee named in Count IV, which tends to show that Weiss was guilty of the substantive offense there charged and thus connected with the conspiracy as of that date:

Mrs. Cliff testified as follows: On January 18, 1956, at about 6:30 p. m. she and her husband arrived at the Long Beach Municipal Airport. Defendant Simmons picked her up in a black Cadillac, told Mr. Cliff to return at 9:00 o'clock, and drove

Mrs. Cliff and another woman to 5460 The Toledo. Mrs. Cliff described the abortion procedure at The Toledo premises and testified that at its conclusion she was given pills in an envelope with the notation "Vivian, DI. 7-0583" and was told to call that number "if I needed any advice." Defendant Simmons then drove Mrs. Cliff to the airport, where Mrs. Cliff was met by her husband.

Corroborating the testimony of Mrs. Cliff that the date of the abortion charged in Count IV was January 18 is the testimony of Officer Mitchell that at 6:30 p. m. on that date he saw defendant Simmons, driving a black Cadillac, pick up Mrs. Cliff and another woman at the Long Beach Municipal Airport, and that at about 9:00 p. m. he saw defendant Simmons return to the airport with Mrs. Cliff and saw Mrs. Cliff alight from the Cadillac and join her husband. As has already been shown, defendant Simmons is connected with the conspiracy, and The Toledo premises are shown to be the place where abortions pursuant to the conspiracy were committed, by other evidence. Tending to connect defendant Weiss with the crimes is the testimony of the police that they found him on The Toledo premises, dressed in surgical cap and gown and mask, when they arrested him.

[29] A majority of this court accepts the view that in a prosecution for abortion or for conspiracy to commit abortion the testimony of the woman aborted can be corroborated by the testimony of another woman that the same person performed an abortion upon her in a similar manner. (*People v. Davis* (1954), 43 Cal.2d 661, 675 [22, 23], 276 P.2d 801; *People v. Gallardo* (1953), 41 Cal.2d 57, 63-64 [10, 11], 257 P. 2d 29.) The testimony of Mrs. Cliff as to the abortion is therefore corroborated by the testimony of other abortees summarized ante, 327 P.2d 534.

Defendant Fred Johnson was convicted of all the counts of abortion, commencing with the abortion charged in Count II, committed on July 2, 1955. The evidence connects him with the conspiracy as early as about June 6, 1955, when he rented the

premises at 159 Syracuse Walk where the abortion charged in Count II was subsequently committed. The abortee named in Count II was asked, "Do you see either of those persons [who were present at the abortion] in the courtroom?" She answered, "I see one, I believe," and pointed out defendant Johnson.

Mrs. Rogers, the abortee named in Count II, testified that she was aborted on the Saturday after a Wednesday in "the first part of July or the last part of June of 1955." Her testimony as to the date is corroborated by the testimony of her friend Mrs. Carroll that she accompanied Mrs. Rogers to the Clock Drive-In on July 2, 1955, after Mrs. Rogers had expressed her intention to undergo an abortion. At the drive-in, both Mrs. Rogers and Mrs. Carroll testified, Mrs. Rogers was picked up by a man in a green car. (See summary of their testimony, ante, 327 P.2d 533.) Mrs. Rogers' testimony as to the abortion and defendant Johnson's role therein is corroborated by the testimony of the other abortees that abortions were performed upon them in a similar manner and that Johnson took a similar part in the proceeding (ante, 327 P.2d 534).

Defendant Gerald Hubbard was convicted of all the abortions charged commencing with the abortion alleged in Count III, which was committed on November 23, 1955. (The abortion of which Mr. Hubbard was acquitted was that charged in Count II, committed July 2, 1955.) His connection with the conspiracy from July, 1955, as shown by the Diamond telephone number at his home and the application in his name for telephone service at 5460 The Toledo, is explained ante, 327 P.2d 542.

Defendant Vivian Hubbard was also convicted of abortions commencing with the abortion charged in Count III, committed on November 23, 1955. She was connected with the conspiracy as early as July 9, 1955, by testimony (together with the other evidence) that on that date she rented the premises at 5460 The Toledo.

[30] Therefore, as hereinabove stated, the evidence connects each defendant with

the conspiracy at or prior to the time of the commission of the earliest substantive offense of which he was convicted.

For the reasons above stated the judgments appealed from and the order denying a new trial are affirmed as to each defendant.

GIBSON, C. J., and CARTER, TRAYNOR, SPENCE, and McCOMB, JJ., concur.

SHENK, J., concurs in the result.



162 Cal.App.2d 70

**PACIFIC ALLIED, a corporation, Plaintiff
and Respondent,**

v.

**CENTURY STEEL PRODUCTS, INC., a
corporation, Defendant and
Appellant.
Civ. 22931.**

District Court of Appeal, Second District,
Division 1, California.

July 10, 1958.

Action under an agreement by which the defendant agreed to reimburse plaintiff for labor costs over a specified minimum if the plaintiff would use certain steel forms for storm drain construction constructed by the defendant. From a judgment of the Superior Court of Los Angeles County, and from an order denying a motion for new trial, Roger Alton Pfaff, J., the defendant appealed. The District Court of Appeal, Lillie, J., held that the evidence sustained findings for the plaintiff, that the failure of plaintiff to furnish a "continuous report" of operations to the defendant did not preclude recovery and that the submission of an "itemized cost breakdown" was not a condition precedent to the plaintiff's recovery.

Judgment affirmed. Appeal from an order denying motion for new trial dismissed.

1. Appeal and Error ⚭931(1)

In determining sufficiency of evidence to sustain questioned findings, an appellate court must accept as true all evidence tending to establish the correctness of the findings made, taking into account all inferences which might reasonably have been thought by the trial court to lead to the same conclusion and every substantial conflict in the testimony is to be resolved in their favor.

2. Contracts ⚭322(4)

In action to recover excess costs under a contract by which defendant agreed to build for plaintiff certain steel forms for storm drain construction under provision that if plaintiff would try the forms, defendant would guarantee that as a result thereof, plaintiff's labor cost per square foot would not exceed four cents, evidence sustained finding that no instructions as to placing, stripping and moving the form were given plaintiff by the defendant and that such as given were followed and that strict compliance with any provision in reference thereto was waived by the defendant.

3. Contracts ⚭322(4)

In action to recover excess costs under a contract by which defendant agreed to build for plaintiff certain steel forms for storm drain construction under provision that if plaintiff would try the forms defendant would guarantee that as a result of their use, plaintiff's labor cost per square foot would not exceed four cents, evidence sustained finding that defendant by its actions waived any further report of actual labor costs.

4. Contracts ⚭278(2)

The old rule of strict compliance with conditions of a contract before recovery may be had thereon has been modified and relaxed in California.

5. Contracts ⚭294

Where defendant, to persuade plaintiff to use its forms, guaranteed that it would reimburse plaintiff for all labor costs in excess of 4¢ per square foot and that labor could be performed for such sum and during the operations there was almost daily and continuous communication between the parties, failure to furnish the daily written report referred to in the contract did not preclude the recovery by plaintiff of the excess costs incurred in view that the rule of substantial performance applied.

6. Contracts ⚭305(1)

Where defendant, to persuade plaintiff to use its forms, guaranteed it would reimburse plaintiff for all labor costs in excess of 4¢ per square foot, and after the job was completed plaintiff submitted to defendant a statement of costs and defendant did not request any further itemization, compliance with the requirement in the guarantee that an "itemized cost breakdown" be furnished was waived, especially where no prejudice to the defendant resulted.

7. Contracts ⚭221(2)

Conditions precedent are not favored in the law and provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction, particularly when a strict construction would work a forfeiture.

8. Contracts ⚭218

Whether a provision constitutes a condition or a covenant is determined from the whole document, its purpose and intention of the parties.

9. Contracts ⚭221(2)

Where defendant, to persuade plaintiff to use its forms, guaranteed that it would reimburse plaintiff for all labor costs in excess of 4¢ per square foot, agreement was not construable as requiring the submission of an "itemized cost breakdown" as a condition precedent to recovery of the excess costs, where the furnishing thereof was incidental to the main purpose of the agreement.

10. Contracts ⇨350(2)

In action to recover extra costs under an agreement by which defendant was to reimburse plaintiff for labor costs over a specified minimum if plaintiff would use the forms of the defendant, evidence sustained findings that the work of scraping and oiling was necessarily included in the contract terms of "placing, stripping and moving" the forms.

11. Contracts ⇨322(3)

In action to recover extra costs under an agreement by which defendant was to reimburse plaintiff for labor costs over a specified minimum if plaintiff would use the forms of the defendant, finding that plaintiff was not guilty of any lack of due care in placing, stripping and moving the forms was not error under the evidence.

12. Contracts ⇨328(1)

In action to recover extra costs under an agreement by which defendant was to reimburse plaintiff for labor costs over a specified minimum if plaintiff would use the forms of the defendant, mere fact that others could use the defendant's forms at less labor cost than plaintiff did not of itself constitute negligence.

W. E. Kalbfleisch, Torrance, for appellant.

John W. Shenk, III, John F. O'Hara, Los Angeles, for respondent.

LILLIE, Justice.

On April 17, 1954, the parties entered into a "Purchase Agreement," whereby defendant agreed to build for plaintiff certain steel forms for storm drain construction. A controversy arose over the guarantee therein, whereby defendant agreed to reimburse plaintiff for labor costs over a specified minimum. Plaintiff sued to recover excess labor costs of \$3,304.31. The case was heard by the court without a jury and, after deducting certain amounts, the court rendered its judgment for \$2,982.96. Defendant appeals therefrom and from the order denying its motion for new trial.

Viewing the evidence in the light most favorable to respondent, the following is a

brief summary of the pertinent facts. At the insistence of defendant corporation, manufacturer of steel forms, plaintiff corporation, engaged in storm drain construction, agreed to try its forms if defendant would guarantee that as a result of their use plaintiff's labor costs per square foot would not exceed four cents. The following guarantee was included in the purchase agreement:

"Item. 6 This entire purchase agreement is based upon the sellers guarantee that these forms and carrier when used by the buyer to complete that part of the reinforced concrete box conduit section of the Alameda-Toluca Park Storm Drain, Projects 166 and 167 for which they are designed and intended, will not exceed four cents per square foot (labor only) to place, strip and move the form of the exposed inside concrete surface. It being further mutually understood and agreed that the final cost of these forms and carrier to the buyer will be based upon actual labor costs per foot, a continuous report of which will be furnished the seller. It being understood that the moving of these forms will be done in accordance with the directions and guidance of the seller as initially set up, thereby satisfying the seller with the field methods employed so as to assure the most favorable results from a cost standpoint.

* * * * *

"Item. 9 While it is provided under Item 5 that the total price to be paid at time of delivery is \$10,900.00, it is further and definitely understood and agreed that as is provided under Item 6 should the labor cost as defined therein, total more than four cents per square ft, (sic) the seller will immediately upon completion of the job and upon an itemized cost breakdown being submitted by the buyer, return to the buyer sufficient money to result in a total cost to the buyer on the direct labor involved for moving and setting forms of four cents per square foot."

Prior to the execution of the contract McDonald, president of plaintiff, advised Fritz, president, and Schaper, vice president, of defendant, that a complete breakdown of cost would be kept on the work and explained its method of keeping costs, daily record, and posting to the weekly record against the item and the quantity of work done. He showed Schaper the books and the method of keeping time cards and the distribution of items on the total job, of which Schaper approved; and advised him the records would be available to defendant at any time.

Plaintiff commenced work with defendant's forms May 6, 1954. McDonald and Clark of plaintiff corporation were on the job daily. There was a constant communication between plaintiff and defendant during this time and they were in touch with each other almost every day. From the beginning, plaintiff kept a daily account of costs of that part of the job involving labor to "place, strip and move" the forms, being designated on its books and records as "8-4." Daily time cards (exhibit No. 5) showing dates, hours worked and names and number of men working on "8-4" were also kept. A compilation (exhibit No. 4) taken from the books and records of plaintiff shows the time and money involved on "8-4," dates of entries, locations of sections worked, square footage worked each day, total square footage and labor costs to each date and unit costs.

The work was finished August 13, 1954. On September 7th plaintiff wrote a letter to defendant demanding \$3,304.31 excess labor costs, to which was attached the following "Statement of Cost":

"Statement covering use of steel forms as provided for under purchase agreement between Century Steel Products, Inc., and Pacific Allied dated April 17, 1945:

63,677	sq. ft. contact surface area
\$.04	per sq. ft. as specified in agreement.
\$ 2547.08	total cost @ 4¢ per sq. ft.
\$ 5851.39	total actual labor cost to place, strip, & move steel forms.
2547.08	total cost @ 4¢ per sq. ft.
\$ 3304.31	excess cost as covered by letter of transmittal."

Defendant refused to pay the amount and this action resulted.

The trial court made detailed findings of fact and concluded that plaintiff substantially performed all obligations to be performed by it under the agreement and that strict compliance with the provisions relating to following directions and submission of an itemized cost breakdown were waived by the actions of the defendant.

Although objecting to specific findings as contrary to the evidence and law, appellant's basic contention is that the provisions in the agreement referring to a "continuous report" and "itemized cost breakdown" must be strictly construed and constitute conditions precedent to recovery.

[1] In determining the sufficiency of evidence to sustain questioned findings, an appellate court must accept as true all evidence tending to establish the correctness of the findings made, taking into account all inferences which might reasonably have been thought by the trial court to lead to the same conclusion and every substantial conflict in the testimony is to be resolved in their favor. *Burke v. Chrostowski*, 46 Cal.2d 444, 296 P.2d 545; *McCarthy v. Tally*, 46 Cal.2d 577, 297 P.2d 981; *McCreary v. Mercury Lumber Distributors*, 124 Cal.App.2d 477, 268 P.2d 762.

[2] Appellant contends that the trial court's finding that no certain instructions as to placing, stripping and moving the forms were given plaintiff by defendant and that such as were given were followed, and its conclusion that strict compliance with any provision in reference thereto was waived by the action of defendant, were contrary to the evidence.

We find no error in the trial court's finding or conclusion. There is nothing in the agreement requiring plaintiff to follow instructions in *placing* and *stripping* the forms. Item 6 refers only to moving: "It being understood that the moving of these forms will be done in accordance with the directions and guidance of the seller as initially set up * * *" The evidence discloses that no particular directions for

moving were initially given by defendant. Clark had several conversations with Fritz and Schaper throughout the entire operation regarding the use of the forms, including moving, but the exact detail and manner in which the forms were to be moved was never discussed because "it was obvious how they were to be moved; only one way to do it." On May 28, 1954, defendant wrote to plaintiff making a number of suggestions to expedite the placing, stripping and moving, with which plaintiff complied. Thereafter because of increasing costs plaintiff wrote to defendant suggesting it take certain steps, but no reply was received.

[3] As a further ground for reversal, appellant urges that since a "continuous report" of actual labor costs was to be furnished, the trial court's finding thereon is contrary to the evidence and that strict compliance with the requirement is a condition precedent to plaintiff's recovery. The court found that plaintiff orally informed defendant at least once a week of the high cost of labor in placing, moving and stripping the forms; that on June 7, 1954, plaintiff wrote defendant that the costs were substantially more than 4¢ per square foot; that defendant was aware of said increased cost throughout the length of the job; that the reports and records of said job were continually available to defendant, but at no time did defendant avail itself of them; and that continuous oral reports were furnished defendant; and defendant, by its actions, waived any further report.

Item 6 in part provides: "It being further mutually understood and agreed that the final cost of these forms and carrier to the buyer will be based upon actual labor costs per foot, a continuous report of which will be furnished the seller." The record contains substantial evidence to support the trial court's finding. It discloses that during the time the work was being done, there was constant communication between the parties; that Clark called Fritz on the telephone almost every day with regard to the increased costs; that plaintiff kept daily accounts of cost and "right from the be-

ginning continuously" communicated with defendant almost daily about them; that plaintiff repeatedly advised defendant of the excess cost and on occasion "advised them to see us as often as possible"; and on June 7, 1954, wrote to defendant that costs were running in excess of 4¢ per square foot. Defendant originally approved plaintiff's method of keeping books and time cards, knew of the complete daily record of costs and was aware of their availability to defendant at all times. Defendant did not ask to see them nor did it ever request a written report of costs during this time.

[4] Appellant argues that before plaintiff can recover it must strictly comply with the provision that a "continuous report" be furnished. The old rule of strict compliance with the terms of a contract urged by appellant has been modified and relaxed in California. *Atowich v. Zimmer*, 218 Cal. 763, 25 P.2d 6. The court, in *Thomas Haverty Co. v. Jones*, 185 Cal. 285, 197 P. 105, discussing the doctrine of substantial performance as against the rule of strict compliance, pointed out that if there has been substantial performance in good faith, if the failure to make full performance can be compensated in damages and if the omissions and deviations were not wilful or fraudulent and do not substantially affect the usefulness of the work for the purposes for which it was intended, the performing party may in an action upon the contract recover the amount unpaid in the contract price less the amount allowed as damages for the failure of strict performance. In recognizing the hardship often involved in the rule requiring strict performance, the court, citing *Connell v. Higgins*, 170 Cal. 541, 150 P. 769, held that the question of what constitutes substantial performance is to be determined in each case with reference to the particular facts and circumstances, together with the intention of the parties and the purpose of the contract.

[5] Taking the contract in the instant case according to its general intent and purpose, defendant, in order to persuade plaintiff to use its forms, guaranteed in

writing it would reimburse plaintiff for all labor costs in excess of 4¢ per square foot and warranted that the labor could be performed for such sum. Obviously during operations defendant wanted to be kept informed whether costs were above or below the four cents. This was the real purpose of the "continuous report." Nothing in the writing states how, when, or in what form it was to be made. Without doubt, particularly in view of the "almost daily" and continuous communication between the parties, defendant at all times throughout the entire job was aware of the excess costs. How could a daily written, or any other kind of a report better serve the purpose for which the continuous report was to be furnished? No request for a continuous daily written, or any, report was ever made by defendant until after the controversy arose, from which it may be reasonably inferred that defendant was satisfied with the kind of report and cost information it had received. Of interest here is the court's statement in *Thomas Haverty Co. v. Jones*, supra, 185 Cal. 285, at page 297, 197 P. 105, at page 110: "The contract provided that the contractor should keep careful and complete records of his installation of the systems provided for, and show by drawings 'every important detail of the system,' and that his record should be delivered to the owner before final acceptance. It is claimed that this condition was not complied with. Drawings were furnished to the defendant in attempted compliance with this provision; but they were, in certain unimportant particulars, inaccurate. The court found that no damage was sustained by reason thereof. The evidence shows that the defendant never expressed any dissatisfaction therewith or demanded any different or additional report or statement. We think strict performance of this provision was waived."

The instant case is one in which the rule of substantial performance well applies and it would seem unreasonable in the light of the purposes for which the report was to be made and the conduct of the defendant in connection therewith, to uphold ap-

pellant's contention; nor can we find that the defendant was in any way prejudiced by the lack of any other kind of report. The question of the application of the relaxed interpretation of the rule of strict compliance seems definitely concluded by the finding of the trial court that there was a substantial performance of the contract in this regard which this court will not disturb.

[6] Appellant's next point involves the requirement in the guarantee that an "itemized cost breakdown" be furnished. The trial court found that after the job was completed, plaintiff submitted to defendant a "Statement of Cost"; that defendant did not request of plaintiff any further itemization or cost breakdown but denied any liability whatever under its guarantee; that such itemization was continuously available to defendant and that it was submitted to defendant during the trial. It concluded that strict compliance was waived by the action of the defendant.

Item 9 provides in part: "* * * the seller will immediately upon completion of the job and upon an itemized cost breakdown being submitted by the buyer, return to the buyer sufficient money to result in a total cost to the buyer on the direct labor involved for moving and setting forms of four cents per square foot." The "Statement of Cost" presented to defendant after the job was completed, although showing the number of square feet of contact surface area, actual labor costs per foot, the cost at four cents per square foot and the excess cost to plaintiff, at its best is not an "itemized cost breakdown." However, there is substantial evidence to the effect that defendant at no time before the controversy arose made objection that an itemized cost breakdown was not submitted or disputed the figures. At first the delay in defendant's payment was because plaintiff's demand "hit him (Fritz) hard" and he didn't want to discuss it then. Later, Fritz told the plaintiff, in connection with payment, that if it would order some more forms defendant might be able to absorb the loss and pay the amount. At another

point defendant wanted time in which to pay. After some time, it finally denied liability altogether. At all times, plaintiff's books and records contained an itemized cost breakdown and were available to defendant, as it well knew. After September 7, 1954, on at least three separate occasions, Clark told Fritz that he would be glad to furnish in detail complete information on any phase of the operation in connection with the "Statement of Cost," but no request was ever made, nor was any request ever made for an itemized cost breakdown. On one occasion, Clark suggested that someone from defendant come out and go through the complete record, but no one did. During the trial, an itemized cost breakdown, time cards and a complete compilation from plaintiff's books and records were furnished to defendant. It is clear from the record that defendant waived any further itemization and that the evidence clearly supports the trial court's findings and conclusion.

There is no need to further discuss the rule of substantial compliance except to point out that from a reading of the agreement the purpose in submitting the "itemized cost breakdown" was to apprise the defendant that the labor cost totaled more than four cents so that it could pay the excess or challenge the amount if it disagreed. At no time was defendant foreclosed from obtaining the final and itemized figures, had it desired them, and at all times the books and records of plaintiff were open to it. However, it is clear from the evidence defendant did not refuse to pay because the bill was not itemized or because the amount was incorrect, nor did it complain because no breakdown was furnished; it refused to pay because it felt that the charge was not warranted at all. It cannot now defeat plaintiff's claim by representing that it did not pay because an itemized bill was not presented. Under the circumstances, it would be unreasonable and unfair to now deprive the plaintiff of the guarantee because of a failure to submit an itemization of cost, particularly since we can find in the record

no prejudice to defendant as a result of its failure to receive an itemized cost breakdown.

[7-9] Appellant's contention that submission of the "itemized cost breakdown" is a condition precedent to plaintiff's recovery is without merit. There is nothing in the agreement requiring such construction. Conditions precedent are not favored in the law and the provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. *Larson v. Thorlesen*, 116 Cal.App.2d 790, 254 P.2d 656; *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 P. 325; *Front St. M. & O. R. Co. v. Butler*, 50 Cal. 574. This is particularly true when a strict construction works a forfeiture. *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 309, 73 P. 966. Whether a provision constitutes a condition or a covenant is determined from the whole document, its purpose and the intention of the parties. *Ernst v. Cummings*, 55 Cal. 179. Certainly, in the agreement at bar neither the express terms, nor necessary implication thereof, require the provisions in question to be construed as conditions precedent. From a reading of the entire agreement, in the light of the evidence, it is clear that the furnishing of a "continuous report" and an "itemized cost breakdown" was incidental, although important, to the main purpose of the agreement. In Item 6 the parties mutually agreed that the final cost of the forms to plaintiff would be based upon actual labor cost per foot, "a continuous report of which will be furnished the seller." The quoted phrase provided the manner in which the defendant was to be informed of the cost. In Item 9 the defendant agreed that upon completion of the job and upon receiving an "itemized cost breakdown" it would return certain excess labor costs to plaintiff. The purpose of both of these requirements was to inform the seller whether the costs were in excess of the four cents per square foot and the amount thereof. Neither the language of the contract nor the testimony of the parties support appellant's conten-

tions that either provision was to be considered a condition precedent to the recovery of the amount and we believe that the substantial performance found by the trial court is all that was required of plaintiff.

Appellant's further argument that plaintiff did not keep bookkeeping records of labor costs only to place, strip and move the forms is specious. The record is replete with evidence that plaintiff not only kept detailed records, daily and otherwise, of the labor and the costs of the job in question, designated "8-4," but actual time cards and a complete compilation based on the books and records of plaintiff which disclose in detail the actual square footage of contact surface area in which the forms were used, the actual daily labor costs, etc. Plaintiff included in the "moving, stripping and placing" the oiling and scraping, which the lower court found to be proper and which this court affirms. Other portions of the job were not included in "8-4." Although some overtime and labor costs of erecting bulkheads were included, the trial court deducted the same from the actual labor cost.

[10] Appellant also urges error in the trial court's findings that the work of scraping and oiling was necessarily included in "placing, stripping and moving" the forms. Item 6 provides: "This entire purchase agreement is based upon the sellers guarantee that these forms and carrier when used by the buyer * * * will not exceed four cents per square foot (labor only) to place, strip and move the form of the exposed inside concrete surface." The agreement did not define these terms and the trial court, no objection being made by appellant, permitted extrinsic evidence as to the meaning of "stripping" and whether scraping and oiling were a necessary part of the operation. The court had its choice of accepting the testimony of McDonald who was constantly on the job and who had 17 years experience as a contractor, seven of which were exclusively in the construction of storm drains; or the testimony of Fritz whose business is steel fabrication;

and Miller, who although having worked with defendant's steel forms, was a former carpenter with one month's experience as a general contractor and whose qualifications in this matter were questioned. The trial court accepted the testimony of McDonald. He testified that at no time prior to the time the controversy arose did the defendant advise him that placing, stripping and moving did not include oiling and scraping; that scraping the forms is a part of the operation of placing, moving and stripping and cannot be separated from it; that the ease in stripping is dependent upon the oiling and there is no way by which the two operations can be separated. He told the trial judge: "If you don't oil, you don't strip," and it becomes a part of the concrete so there is no way to separate it; that he does not know any contractor who separates the work and that any surface exposed to freshly poured concrete has to have oil and the steel forms must be oiled. He testified, in effect, that oiling and stripping were a necessary part of placing and moving and were included therein. This is clearly a matter of a conflict in the evidence and we find substantial evidence in the record to sustain the trial court's findings.

[11, 12] Appellant finally objects to the trial court's finding that plaintiff was not guilty of any lack of exercise of due care and diligence in placing, stripping and moving the forms. Negligence on the plaintiff's part was set up as an affirmative defense. It is clear from the record that no evidence was offered in this connection except the testimony of two witnesses that their labor cost in placing, stripping and moving defendant's forms was around four cents per square foot. The mere fact that others could use defendant's forms at less labor cost than plaintiff does not itself constitute negligence. Excess cost arising in the exercise of due care must have been contemplated by the parties, otherwise they would not have entered into the guarantee. The only other evidence offered related to Mr. Fritz' testimony that there was lack of supervision, but again no specific in-

stances were related and no other showing was made. On the other hand, the record shows that Clark and McDonald of plaintiff corporation were on the job almost daily, were long experienced in storm drain construction and supervised the work, keeping a constant eye on labor costs. This contention seems to merit no further comment.

Judgment affirmed. Appeal from order denying motion for new trial dismissed.

WHITE, P. J., and FOURT, J., concur.



162 Cal.App.2d 90

Troy GOUGH, Plaintiff and Appellant,

v.

SECURITY TRUST & SAVINGS BANK OF SAN DIEGO, a California Corporation, as Executor of the Estate of Louise Smith Deane, who was also known as Louise S. Deane and Mrs. Charles Deane, Deceased, Defendant and Respondent.

Civ. 5837.

District Court of Appeal, Fourth District, California.

July 11, 1958.

Action to recover from the estate of decedent upon quantum meruit for services rendered and based on an oral agreement leave to plaintiff property by will to compensate him for his services. From an adverse judgment in the Superior Court of San Diego County, William A. Glen, J., the plaintiff appealed. The District Court of Appeal, McCabe, J. pro tem., held that records kept by the plaintiff as to his services were not admissible as business records or books of account and that the evidence justified the grant of a nonsuit.

Judgment affirmed.

1. Evidence $\S$ 376(1)

Foundation which must be laid for admission of business records is that the records are books of account, kept in the regular course of business, business is of a character in which it is proper and customary to keep such books, entries are either original entries or first permanent entries of the transaction, are made at time or within a reasonable proximity as to the time of the transactions, and that persons making them had personal knowledge of the transactions or obtained it from a report regularly made to him by some person employed in the business whose duty it was to make the same in the regular course of business. West's Ann.Code Civ.Proc. $\S\S$ 1953e, 1953f.

2. Evidence $\S$ 351, 354(1)

Where plaintiff had regular gainful employment as an employee of a ferry boat company, and was not engaged in any private business of his own, any records kept by him respecting the services rendered to decedent would not be admissible as business records or account books. West's Ann.Code Civ.Proc. $\S\S$ 1953e, 1953f.

3. Pleading $\S$ 313

A "bill of particulars" merely amplifies the allegations of the complaint, and is deemed to constitute a part of that pleading, and is in the nature of a more specific allegation of the facts recited in the complaint.

See publication Words and Phrases, for other judicial constructions and definitions of "Bill of Particulars".

4. Trial $\S$ 139(1)

A nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all of the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff.

5. Executors and Administrators $\S$ 451(2)

In action to recover from the estate of decedent upon quantum meruit for services

rendered and on an oral agreement whereby plaintiff agreed to render services for the decedent and she agreed to leave a will giving property to plaintiff to compensate him for his services, evidence justified the granting of defendant's motion for nonsuit.

Earl J. Cantos, San Diego, for appellant.

Ralph Waverly Wallace, William McChesney Wallace, and Lawrence A. Patton, San Diego, for respondent.

McCABE, Justice pro tem.

Plaintiff appeals from the judgment of dismissal entered after the granting of a motion for nonsuit.

By the first cause of action plaintiff seeks to recover from the estate of decedent upon quantum meruit for services rendered. The second cause of action alleges an oral agreement whereby plaintiff agreed to render services for decedent and she agreed to leave a will giving property to plaintiff to compensate him for the services.

Decedent, a widow, was approximately eighty-five years of age at the time of her death on October 1, 1956. Plaintiff, a nephew by marriage, had known decedent for about 19 years prior to her death. During the period from May, 1947, to October 1, 1956, plaintiff had been continually and gainfully employed by a ferry boat company. Decedent lived in her own home. Plaintiff lived at his own home. Plaintiff and decedent were friends and frequently visited in each other's home. From 1947 to October 1, 1956, plaintiff trimmed the hedges, cut the lawn, did some plumbing, carried out the trash and did household jobs at decedent's home.

Defendant as executor of the estate at the trial invoked the prohibition set forth in Section 1880, subdivision 3, Code of Civil Procedure, which provides as follows:

"The following persons cannot be witnesses:

* * * * *

"3. Parties or assignors of parties to an action or proceeding, or persons

in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

Most of the testimony adduced at the trial came from witnesses not precluded from testifying by the provisions of this section. The attorney who in December, 1955, prepared a will for decedent, testified to a copy of the will and such copy was admitted into evidence. By the terms of that will decedent bequeathed some shares of stock to plaintiff, provided that he was to be the residuary beneficiary, and appointed him executor. As late as September, 1956, decedent told plaintiff and others that she had not changed her will "and that he would get well paid for what he has done, for him not to worry about it". Similar statements were made by decedent during the years immediately prior to her death. Obviously, the December, 1955 will was revoked and another will under which defendant bank was appointed executor was admitted to probate. The date and provisions of the will admitted to probate and under which defendant was appointed executor do not appear in the record but we may assume that the provisions of the will are not favorable to plaintiff.

Plaintiff sought to introduce into evidence certain records dating from April, 1947, which records were kept by him. It is contended these records reflected the work done and number of hours of work done by plaintiff for decedent and the entries were made from "month to month". Plaintiff offered them into evidence as business records and account books kept by plaintiff in the course of his doing of the work for decedent. The exact form of the records is not clear from the record except they were on sheets of paper clipped together by a staple and they reflected writings of plaintiff. Defendant objected to the admissibility of these records on the grounds: (1) they are not account books or business records kept in the course of business; and

(2) to admit them would violate the provisions of section 1880, subdivision 3, *supra*.

[1] It has been the rule of evidence in this state for many years that the foundation which must be laid for the admission into evidence of business records is: (1) the books or records are books of account; (2) kept in the regular course of business; (3) the business is of a character in which it is proper and customary to keep such books; (4) the entries are either original entries or the first permanent entries of the transaction; (5) made at the time or within a reasonable proximity to the time of the transactions; and (6) the persons making them had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some person employed in the business whose duty it was to make the same in the regular course of business. *Chan Kiu Sing v. Gordon*, 171 Cal. 28, 31, 151 P. 657; *Kains v. First National Bank*, 30 Cal.App.2d 447, 449, 86 P.2d 935.

Section 1953e of the Code of Civil Procedure provides:

"The term 'business' as used in this article shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not."

Section 1953f of the Code of Civil Procedure provides:

"A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

[2] Under these rules of evidence plaintiff did not lay the proper foundation for the admissibility of the papers. Under the testimony in the record plaintiff could not

do so. By his ruling in sustaining the objection to their admissibility the trial judge determined that the records were not books of account, kept in the regular course of business, and the business was not of such a character in which it is proper and customary to keep books. Plaintiff had regular gainful employment as an employee of a ferry boat company, he was not engaged in any private business of his own. Such being the fact, any records kept by him would not be admissible on his case in chief as business records or account books. The ruling of the court was correct.

Because the papers were not admissible as business records or books of account it becomes unnecessary to rule upon the contention of defendant that they are inadmissible under the prohibitions of Section 1880, subdivision 3 of the Code of Civil Procedure.

[3] Plaintiff contends the trial court erred in refusing to allow him to introduce into evidence a bill of particulars which was a part of the official file of this case. The trial court's ruling was correct. In *Silva v. Linneman*, 73 Cal.App.2d 971, 975, 167 P.2d 794, 797, the court said:

"A bill of particulars merely amplifies the allegations of the complaint, and it is deemed to constitute a part of that pleading. It is in the nature of a more specific allegation of the facts recited in the complaint, and requires proof of each item contained therein, just as a complaint does. It has the effect merely of limiting plaintiff's evidence to the specific items therein. It does not take the place of necessary evidence in proof of the alleged cause of action." (Cases cited.)

[4] On a motion for nonsuit the trial court is governed by certain rules. In the case of *In re Estate of Lances*, 216 Cal. 397, 400, 14 P.2d 768, these are defined as follows:

"It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant

a nonsuit. A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' (Cases cited). Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." (Citation.)

[5] Clearly, the motions for nonsuit were properly granted as to both causes of action. There is no evidence in the record and no legitimate inference which may be drawn to support any other reasonable conclusion than that reached by the trial judge. In each cause of action it is required that the reasonable value of the services rendered be proved. There is no evidence in the record from which the trier of fact could find the reasonable value of the services. Plaintiff seeks to avoid this deficiency by contending that had the record kept by plaintiff been allowed into the evidence of the case he could have proved the element of reasonable value. From the reporter's transcript it appears that such a record contained monthly entries and the hourly time spent on the particular work. This would not have been evidence of the reasonable value. Since there is a lack of proof of this vital essential, the trial court had no alternative but to grant the motions for nonsuit and enter the judgment of dismissal.

Since this lack of proof is so apparent and decisive, we are not deciding whether

there is evidence of the other essentials of plaintiff's causes of action.

Judgment affirmed.

MUSSELL, Acting P. J., and GRIFFIN, J., concur.



162 Cal.App.2d 123

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

William A. BASERTO, Defendant and
Appellant.

Cr. 6172.

District Court of Appeal, Second District,
Division 2, California.

July 14, 1958.

Defendant was convicted of the unlawful sale of heroin and from a judgment of the Superior Court of Los Angeles County, Herbert V. Walker, J., the defendant appeals. The District Court of Appeal, Ashburn, J., held that the evidence sustained conviction as against defense of alibi and that the identification of defendant was not established.

Judgment affirmed.

1. Criminal Law Ⓒ566

In prosecution for the unlawful sale of heroin, evidence was sufficient to establish the identification of the defendant as the person who sold the heroin to officer. West's Ann. Health & Safety Code, § 11500.

2. Criminal Law Ⓒ553

Argument of inherent incredibility of witness will not lie in an appellate court unless there exists either a physical impossibility that the witness' statements are true or their falsity is apparent without resorting to inferences or deductions.

3. Criminal Law Ⓒ1159(4)

In prosecution for the unlawful sale of heroin, credibility of officer testifying to the sale was for the jury. West's Ann. Health & Safety Code, § 11500.

4. Criminal Law Ⓒ572

Court was not required to accept the alibi testimony of defendant though not directly contradicted by another witness.

5. Criminal Law Ⓒ572

In prosecution for the unlawful sale of heroin, evidence sustained conviction as against defense of alibi. West's Ann. Health & Safety Code, § 11500.

Jefferson & Jefferson, Martha Malone Jefferson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Albert Bianchi, John A. Vanderlans, Deputy Attys. Gen., for respondent.

ASHBURN, Justice.

There is no merit in this appeal. Upon the sole ground of insufficiency of the evidence it attacks a judgment convicting defendant of two charges of sale of heroin in violation of § 11500, Health and Safety Code.

On April 19, 1957, Officer Ronald Nelson, of the Narcotics Division of the Los Angeles Police force, posing as a shoplifter with "hot" shirts for sale, offered them to defendant who rejected same and then agreed to sell and did sell and deliver to Nelson a bindle containing eight grams of heroin for \$20 cash, which was then paid to him. On the next evening, April 20th, without resorting to the routine of attempted sale of "hot" goods, Nelson made a like purchase from defendant of eight grams of heroin for \$20 cash in hand.

Defendant, after a non-jury trial, was found guilty on both counts, sentenced for the term prescribed by law with sentences to run concurrently. He appeals from the judgment.

[1] The first claim of counsel is that the evidence is insufficient to establish iden-

tification of defendant, he himself having testified that he had no such transaction with Nelson. The case was submitted upon a transcript of the grand jury hearing and additional evidence offered at the trial. Before the grand jury Officer Nelson testified from a photograph which he said he recognized as a person named William A. Baserto, and that that was the person from whom he bought the narcotic. It is argued that there never was any proof that the person shown in the photograph was this defendant. But Nelson testified at the trial:

"Q. Now, do you see the defendant seated down at the end of the counsel table in the white jacket? A. Yes, sir.

"Q. Is that the William A. Baserto that you made reference to in your testimony before the Grand Jury? A. Yes, sir.

"Q. And did that involve certain transactions on or about the 19th of April of 1957, 19th and 20th of April, 1957? A. Yes, sir."

Manifestly, this contention of appellant is groundless.

[2, 3] Next it is argued that there were discrepancies in Nelson's testimony which make it inherently incredible and hence it could afford no basis for overcoming alibi testimony offered by defendant and a corroborating witness. The argument of inherent incredibility will not lie in an appellate court unless there exists "either a physical impossibility that they [the witness' statements] are true, or their falsity [is] apparent without resorting to inferences or deductions." *People v. Huston*, 21 Cal. 2d 690, 693, 134 P.2d 758, 759. See, also, *People v. Huston*, 156 Cal.App.2d 670, 320 P.2d 175. The asserted discrepancies in Officer Nelson's testimony are insubstantial in character and do not approach the measure prescribed by the cases just cited; at best they afford ground for divergent inferences. The cited case of *People v. Headlee*, 18 Cal.2d 266, 115 P.2d 427, is not contrary to those authorities; it rests upon a state of facts which bears no similarity to those at bar.

[4, 5] The second point urged by counsel is that the defendant and his witness made out a good alibi, and their testimony must be accepted because Nelson's testimony is incredible and there is no other contradiction. Aside from the question of rejecting Nelson's testimony, it is also true that the court was not required to accept the alibi testimony though not directly contradicted by another witness. In other words, the judge had the prerogative of disbelieving defendant and his witness. *Odenthal v. Lee*, 113 Cal.App.2d 666, 669, 248 P.2d 937; *Huth v. Katz*, 30 Cal.2d 605, 608-609, 184 P.2d 521.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.



162 Cal.App.2d 209

C. W. SEYBERT and Jean Seybert,
Plaintiffs and Appellants,

v.

COUNTY OF IMPERIAL, James Gibson,
Clifford Gibson, Rowland Gibson, Alma
Gibson and Ed Rutherford, Defendants.

County of Imperial, Respondent.

Civ. 5839.

District Court of Appeal, Fourth District,
California.

July 17, 1958.

Rehearing Denied Aug. 1, 1958.

Hearing Denied Sept. 10, 1958.

Action for personal injuries sustained by water skier on a lake when she was struck by a motor boat operated by the individual defendants brought against County on the theory that it failed to promulgate rules and regulations governing safety on the lake. From an adverse judgment in the Superior Court of Imperial County, Elmer W. Heald, J., the plaintiffs appealed. The District Court of Appeal,

Mussell, Acting P. J., held that no cause of action was stated against the county.

Judgment affirmed.

1. Counties ⇨142

Statutes in effect waiving governmental immunity as to local agencies created a liability unknown to the common law and are to be strictly construed against claims of plaintiffs. West's Ann.Gov.Code, §§ 53050, 53051.

2. Statutes ⇨176

Question as to the extent of duties which are imposed by statute is one of law, to be determined by the court and not one of fact for the jury.

3. Counties ⇨142, 222

It was for the court to determine whether the statute which was a measure of the waiver of governmental immunity, encompassed liability against the county which the plaintiffs sought to impose and whether the plaintiff's allegations constituted a cause of action against the county. West's Ann.Gov.Code, §§ 53050, 53051.

4. Counties ⇨222

In action for injuries sustained by a water skier when struck by a motorboat where cause of action against county was based on creation of a dangerous condition of public lake for failure to promulgate adequate safety rules in order to create liability, it was necessary to allege and prove that the lake involved was in fact dangerous and defective. West's Ann. Gov.Code, §§ 53050, 53051.

5. Counties ⇨143

The promulgation by a county of rules and regulations governing the operation of motorboats on a lake is a governmental function and the county cannot be held liable for failure to enact such rules. West's Ann.Gov.Code, §§ 53050, 53051.

6. Counties 143

Water skier, who was injured on a lake when struck by motorboat operated by individual defendants, was not entitled to recover against county because of failure

to promulgate rules and regulations for safety on the lake which was furnished by the county for the use of the public in view that the statute in effect waiving governmental immunity is not designed to protect against moving objects. West's Ann.Gov. Code, §§ 53050, 53051.

Robert S. Butts, Hollywood, and French & Fleming, Brawley, for appellants.

Horton, Knox & Carter and Arthur L. Lockie, Dist. Atty. of Imperial County, El Centro, for respondent.

MUSSELL, Acting Presiding Justice.

This is an action for damages for personal injuries in which the trial court sustained a demurrer as to the defendant Imperial County on the ground that the first amended complaint did not state facts sufficient to state a cause of action against said county. The demurrer was sustained with leave to amend. However, the plaintiffs failed to amend their complaint within the time allowed by the court and thereafter, on motion of the defendant county, a judgment of dismissal as to it was entered. Plaintiffs appeal from this judgment, contending that the allegations of their amended complaint are sufficient to state a cause of action under sections 53050 and 53051 of the Government Code.

On April 11, 1954, plaintiff Jean Seybert was water skiing on Weist Lake, an inland body of water approximately one-half mile wide, located approximately seven miles northeast of the city of Brawley. She was being towed by a motor boat operated by her husband, plaintiff C. W. Seybert, and was struck by a motor boat owned and being operated by the individual defendants herein, causing her to suffer serious injuries.

It is alleged in the complaint that the defendant county owned said Weist Lake, together with the beaches, approaches, docks and other facilities connected therewith; that said county maintained and operated the lake as a place of public recreation; that the county, through its

officers, agents and servants, so negligently maintained, operated and controlled said lake that the same constituted a dangerous and defective condition of public property in that

(1) The county negligently failed to promulgate and enforce adequate, sufficient or any rules or regulations governing the operation of speed boats upon said lake for the safety of water skiers;

(2) Negligently failed and neglected to post copies of adequate or sufficient rules or regulations or any rules or regulations or other signs or indications of danger to water skiers in or about the waters or beaches of said lake for the protection of said water skiers and the plaintiffs;

(3) Negligently failed to patrol or police the waters of said lake and the beaches thereof;

(4) Failed to provide a numerically adequate personnel or any personnel for the purpose of patrolling and policing the waters and beaches of said lake;

(5) Failed to provide a sufficient number of efficient boats and motor vehicles or any boats and motor vehicles for the transportation of personnel necessary to adequately patrol and police the waters and beaches of said lake;

(6) Failed to provide an efficient and adequate means of communication with and between said personnel or any of them to enable them to efficiently and adequately patrol said waters and beaches;

(7) Failed to provide efficient experienced and trained personnel to patrol and police said waters and beaches for the protection of water skiers;

(8) Negligently failed to supervise, direct and control the activities of said personnel;

(9) Failed to prohibit and prevent speed boats from maneuvering and proceeding at a speed, traffic patterns, and in a manner dangerous to water skiers and the plaintiffs;

(10) Negligently failed to operate, maintain and control said lake and the

publicly owned recreational areas thereof in a safe condition for the use by plaintiffs and other persons using said lake and adjacent premises.

The sole question presented on this appeal is whether the allegations of plaintiffs' complaint are sufficient to state a cause of action under sections 53050 and 53051 of the Government Code.

Section 53050 of the Government Code defines "public property" as meaning public street, highway, building, park, grounds, works, or property, and "local agency" as including a county. Section 53051 provides:

"A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

[1-3] These sections created a liability unknown to common law, and are to be strictly construed against the claim of plaintiffs (*Whiting v. City of National City*, 9 Cal.2d 163, 165, 69 P.2d 990), and the question as to the extent of the duties which are imposed by the statute is one of law, to be determined by the court and not one of fact for the jury. *Campbell v. City of Santa Monica*, 51 Cal.App.2d 626, 629, 125 P.2d 561. It is for the court to determine whether the cited statute, which is the measure of the waiver of governmental immunity, encompasses the liability which plaintiffs seek to impose and whether plaintiffs' allegations constitute a cause of action against the defendant county. *Stang v. City of Mill Valley*, 38 Cal.2d 486, 490, 240 P.2d 980.

[4] In the instant case there are no facts stated in the complaint indicating that the lake involved was dangerous in its physical construction or intended use and appellants maintain that the failure of the defendant county to promulgate and enforce rules and regulations governing the operation of motor boats on said lake constitutes a dangerous or defective condition of public property. We are not in accord with this contention. While it is the rule that a defective or dangerous condition can be created by the use or general plan of operation of government operated property, as well as by a structural defect (*Irvin v. Padelford*, 127 Cal.App.2d 135, 140, 273 P.2d 539; *Collenburg v. County of Los Angeles*, 150 Cal.App.2d 795, 799, 310 P.2d 989), it is necessary to allege and prove that the lake involved was in fact dangerous and defective. In *Farrell v. City of Long Beach*, 132 Cal.App.2d 818, 819, 283 P.2d 296, 297, the court said:

"A child injured accidentally on a public playground cannot recover for his injuries in the absence of proof that he was injured as a result of the dangerous or defective condition of the playground. Government Code, § 53-051; *Schmidt v. City of Vallejo*, 122 Cal.App. 5, 7, 9, 10 P.2d 107. It follows that not only is no cause of action stated in the complaint, but it is not possible to allege a valid cause of action for the reason that the playground itself was not directly responsible for plaintiff's injuries."

A city is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident therefrom. As is said in *Campbell v. City of Santa Monica*, supra, 51 Cal.App. 2d 629, 125 P.2d 563:

"The scope of the protection afforded by the statute is against a physically dangerous or defective condition of streets and sidewalks. The statute is not designed to protect against moving objects such as motor vehicles upon

streets or highways, but only as to risks directly due to a physically dangerous or defective street or sidewalk. Here, the Promenade itself was neither dangerous nor defective."

The principles announced in the foregoing cases are applicable herein. In the instant case it is clear from the pleadings that the accident was caused not by the want of rules and regulations and their enforcement but by the negligent operation of a motor boat on said lake by the individual defendants.

In *Hoel v. City of Los Angeles*, 136 Cal.App.2d 295, 303, 288 P.2d 989, it was held that the failure of a city to direct traffic would be within the exercise of a governmental function and could give rise to municipal liability because not consisting of the use of defective property. And in *Shipley v. City of Arroyo Grande*, 92 Cal.App.2d 748, 751, 208 P.2d 51, 53, the court said: "In the instant case the harm was caused not by the condition of the curb but in the negligent operation of a motor vehicle by a third party. Liability of a city may not be created by the conduct of a motorist who disregards the law or negligently operates his car to the detriment of others." This rule is equally applicable to the circumstances herein to the negligent operation of motor boats on the lake involved.

[5] The promulgation by the defendant county of rules and regulations governing the operation of motor boats on the lake involved is a governmental function and the county cannot be held liable for failure to enact such ordinances or rules. In *Campbell v. City of Santa Monica*, supra, 51 Cal.App.2d 629, 125 P.2d 563, the court said:

"While a city may by ordinance prohibit a misuse or negligent use of its streets and sidewalks, its failure to enforce such an ordinance imposes no liability upon it, in the absence of statute. This is so regardless of whether its failure is occasioned by

want of barricades or signs or by want of necessary police officers. * * * By making and enforcing ordinances regulating the use of streets and sidewalks the city exercises a governmental power, and so for any breach thereof there is no liability".

In *Hoel v. City of Los Angeles*, supra, 136 Cal.App.2d 303, 288 P.2d 994, the court said:

"* * * [t]he conclusion seems almost inevitable that the verdict was based upon a finding that Officer Allen was remiss either in failing to direct traffic or failing to depress and recess the faulty and misleading signal arm.

"If it was the former, failure to direct traffic, it was clearly a theory not sanctioned by the law. Such non-feasance would be within the exercise of governmental function and could give rise to no municipal liability because not consisting of the use of defective property. [Citations.]"

In *Shipley v. City of Arroyo Grande*, supra, 92 Cal.App.2d 748, 751, 208 P.2d 51, 53, the court said: "* * * [t]o repeal or to enforce an ordinance is an incident of governmental power. A failure to do either does not give rise to liability on the part of the city."

[6] No rules and regulations were promulgated herein; hence, there can be no liability for failure to enforce them. The defendant county furnished the lake involved for the use of the public. However, it cannot be held liable under the statute for the failure to direct motor boat traffic thereon so as to prevent accidents. The statute is not designed to protect against such moving objects and there are no facts alleged in the complaint sufficient to state a cause of action against the defendant county.

Judgment affirmed.

GRIFFIN, J., and McCABE, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

E. SUGARMAN, Plaintiff and Respondent,
v.

STATE BOARD OF EQUALIZATION,
Defendant and Appellant.*

Civ. 17816.

District Court of Appeal, First District,
Division 2, California.

July 21, 1958.

Hearing Granted Sept. 17, 1958.

Action to recover a refund of use taxes. Judgment for the plaintiff in the Superior Court, City and County of San Francisco, Thomas M. Foley, J., and the state board of equalization appeals. The District Court of Appeal, Kaufman, P. J., held that the use tax did not violate the export-import clause of the United States Constitution and that where the taxable incident occurred in California waters, the yacht and equipment were subject to the California use tax.

Judgment reversed with directions.

1. Commerce ☞63

A use tax is not on the operation of interstate commerce but on the privilege of use after the commerce is at an end.

2. Shipping ☞6

Payment by owner of customs duty to the United States on a yacht constructed for plaintiff in Holland for use in waters adjoining California did not give the plaintiff right thereafter to use the yacht in California free from the taxing power of the state. West's Ann.Rev. & Tax.Code, §§ 6202, 6352; U.S.C.A.Const. art. 1, § 8, cl. 3; art. 1, § 10, cl. 2.

3. Commerce ☞77

The purpose of the constitutional prohibition against state duties on imports is to prevent a clog in the process of importation, not to prevent a tax on the use of the article after it has reached its destination. U.S.C.A.Const. art. 1, § 10, cl. 2.

4. Commerce ☞77

Where plaintiff had a yacht constructed for him in Holland for use in California waters and the yacht was transported to

California on shipboard, when the yacht and machinery completed their journey, and were put to the use for which they were imported, they lost their tax-exempt status as an import from the California use tax. West's Ann.Rev. & Tax.Code, §§ 6202, 6352; U.S.C.A.Const. art. 1, § 10, cl. 2.

5. Commerce ☞77

Where plaintiff had a yacht constructed for him in Holland and purchased from retailers in California additional machinery to be installed in the yacht by the shipbuilder which was exported by the manufacturer from Detroit directly to the firm in Holland without first being delivered to plaintiff in California and the yacht was purchased with the intent of using it in California and the yacht was personally delivered by plaintiff to a freighter in Holland and on arrival in San Francisco was removed from its protective coverings and placed in California waters, taxable incident occurred in California and the yacht and equipment were subject to California use tax. West's Ann.Rev. & Tax.Code, §§ 6202, 6352; U.S.C.A.Const. art. 1, § 10, cl. 2.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman, Eugene B. Jacobs, Deputies Atty. Gen., for appellant.

Walter E. Drobisch, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

The plaintiff brought this action to secure a refund of \$3,206.83 in use tax, penalties and interest, paid by him on a yacht imported from Holland. The case was tried without a jury. The court held that the tax was prohibited under Article I, section 8, clause 3, and Article I, section 10, clause 2 of the Constitution of the United States, and entered judgment in favor of the plaintiff. Defendant appeals. The sole issue on appeal is whether the yacht lost its constitutional exemption as an import after its arrival and use in this state.

* Opinion vacated 333 P.2d 333.

The facts are not in dispute. The plaintiff E. Sugarman is a resident of the City and County of San Francisco, State of California. On January 25, 1953, the plaintiff entered into a written agreement with a shipbuilding firm in Amsterdam, Holland, for the construction of a yacht for \$65,000. The plaintiff purchased from retailers in California, certain additional machinery which was to be installed in the yacht by the shipbuilder. This additional machinery which was manufactured in Michigan, was exported by manufacturer from Detroit directly to the shipbuilding firm in Amsterdam, without first being delivered to the plaintiff in California. The cost of the additional machinery was \$16,340.23. The total cost of the yacht to the plaintiff was \$81,340.22. The plaintiff purchased the yacht and all equipment with the intent of using them in California.

Between January 10, 1953 and October 25, 1953, the yacht was constructed and the additional machinery installed. On October 25, 1953, the shipbuilding firm delivered the yacht to the plaintiff in Amsterdam, Holland, where the plaintiff had gone for that purpose. The plaintiff was accompanied by a resident of California who was employed by the plaintiff to become skipper of the yacht immediately on delivery. On that day, the Dutch flag was replaced by the flag of the United States. For several days, the plaintiff, accompanied by his skipper and representatives of the shipbuilding firm, who were aboard to check the operations of the yacht, made daily cruises for pleasure and as shakedown runs, in the vicinity of Amsterdam. On November 5, 1953, the yacht was personally delivered by the plaintiff to a freighter at Rotterdam, Holland and consigned to the plaintiff in San Francisco. The plaintiff and representatives of the shipbuilding firm assisted and supervised the loading of the yacht on the upper deck of the freighter. To protect the yacht from damage, it was enclosed in protective coverings and cratings. The plaintiff's skipper accompanied the yacht on the freighter in order to see that these protective coverings remained

secure and to take care of the yacht during the voyage.

On December 7, 1953, the plaintiff paid all duties to the United States Collector of Customs in San Francisco, a sum of \$9,413.40. On December 9, 1953, the freighter carrying the yacht arrived in San Francisco. Twenty-four hours later, the yacht was removed from its protective coverings and crates and lifted into San Francisco Bay. The plaintiff immediately piloted the yacht under its own power to a berth in Sausalito, California. Because of the illness of the plaintiff's wife and certain changes in the yacht necessitated by law and subsequently made by a Sausalito shipbuilding firm, the yacht was not used for about six months after its arrival in Sausalito. During this period the skipper lived aboard the yacht. It is an admitted fact that since that time the yacht has been used by the plaintiff solely for pleasure cruises in California. No sale, use or excise tax has been assessed by or paid to any state or nation with respect to the yacht and its equipment except the tax which is the subject of this action. Within the proper time and in accordance with the procedure prescribed by law, the defendant made two determinations of use tax against the plaintiff; one for the use of the yacht in California and one for the use of the additional machinery in California. After notice of these determinations, the plaintiff petitioned for re-determination. His petition was denied. Thereafter, the plaintiff filed a timely claim for a refund, and on refusal of the claim, the plaintiff filed this action.

The basic contention of the defendant is that the challenged tax does not violate the export-import clause of the United States Constitution, or the commerce clause of the United States Constitution, as found by the court below. Plaintiff relies on Rev. and Taxation Code, section 6352, which expressly exempts from the operation of the use tax any taxes prohibited by the Constitution of the United States. The use tax provides that "Every person storing, using, or otherwise consuming in

this State tangible personal property purchased from a retailer is liable for the tax." (Rev. & Tax.Code, section 6202.) The general purpose, nature and constitutionality of the California use tax have long been determined and need not be discussed in detail. *Douglas Aircraft Co., Inc. v. Johnson*, 13 Cal.2d 545, 90 P.2d 572; *Southern Pac. Co. v. Gallagher*, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586; *Chicago Bridge & Iron Co. v. Johnson*, 19 Cal.2d 162, 119 P.2d 945; *Johnson v. Los Angeles County*, 31 Cal.App.2d 579, 88 P.2d 725; *Brandtjen & Kluge, Inc. v. Fincher*, 44 Cal.App. 2d Supp. 939, 111 P.2d 979. These authorities, however, deal chiefly with the application of the use tax in situations where it was erroneously contended that the tax violated the commerce clause of the United States Constitution. It is not necessary, therefore, to discuss the commerce clause aspect of the judgment appealed from. The question of the applicability of the California use tax in a situation such as this one, where it is contended that the tax violates Article I, section 10, clause 2, has never been presented.

Article I, section 10 of the Constitution of the United States contains an enumeration of those powers that are prohibited to the states. Clause 2 of that section reads as follows: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." In interpreting this provision in *Brown v. Maryland*, 1827, 12 Wheat. 419, at pages 439 and 440, 6 L.Ed. 678, Chief Justice Marshall said:

"It may be conceded, that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government

of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; *that there must be a point of time when the prohibition ceases*, and the power of the state to tax commences; we cannot admit, that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

"The constitutional prohibition on the states to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable, when they do not approach each other, may yet, when the intervening colors between white and black, approach so nearly, as to perplex the understanding, as colors perplex the vision, in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Until they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to

escape the prohibition in the constitution." [Emphasis added.]

In the most recent interpretation of Article I, section 10, clause 2, *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, at page 657, 65 S.Ct. 870, at page 873, 89 L.Ed. 1252, Chief Justice Stone pointed out:

"Although one Justice dissented in *Brown v. Maryland*, supra, from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; *that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported.* *Waring v. The Mayor*, supra, 8 Wall. [110] 122, 123, 19 L.Ed. 342; *Low v. Austin*, 13 Wall. 29, 32, 33, 20 L.Ed. 517; *Cook v. Pennsylvania*, 97 U.S. 566, 573, 24 L.Ed. 1015; *F. May & Co. v. New Orleans*, 178 U.S. 496, 501, 507, 508, 20 S.Ct. 976, 977, 979, 980, 44 L.Ed. 1165; *People of State of N. Y., ex rel. Edward & John Burke v. Wells*, 208 U.S. 14, 21, 22, 24, 28 S.Ct. 193, 195, 196, 52 L.Ed. 370; *Gulf Fisheries Co. v. MacInerney*, 276 U.S. 124, 126, 127, 48 S.Ct. 227, 228, 72 L.Ed. 495; *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 423, 60 S.Ct. 664, 667, 84 L.Ed. 840." [Emphasis added.]

The court went on to say in 324 U.S. at page 665, 65 S.Ct. 877,

"We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In the one case the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not. The regula-

tory effect of a tax, otherwise permissible, is not in general affected by retention of the merchandise in the original package in which it has been transported. *Woodruff v. Parham*, 8 Wall. 123, 19 L.Ed. 382; *Brown v. Houston*, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257; *American Steel & Wire Co. v. Speed*, 192 U.S. 500, 521, 24 S.Ct. 365, 371, 38 L.Ed. 538; *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 508-513, 43 S.Ct. 643-645, 67 L.Ed. 1095; *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 526, 527, 55 S.Ct. 497, 501, 502, 79 L.Ed. 1032."

[1,2] The question here is simply when, if at all, the yacht and machinery lost their tax exempt character as imports and became subject to the taxing power of the state. Plaintiff, on appeal, earnestly contends that by the payment of the customs duty to the United States he also purchased the right to thereafter use the yacht in California free from the taxing power of the state. The same argument was rejected in *Brown v. Maryland*, supra, and *F. May & Co. v. New Orleans*, 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165. Plaintiff's argument appears to be that an imported article never loses its exemption as an import. A use tax is not on the operation of interstate commerce but on the privilege of use after the commerce is at an end. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814.

Plaintiff further contends that we should follow *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80, and *Matson Nav. Co. v. State Bd. of Equal.*, 136 Cal.App.2d 577, 289 P.2d 73. In the former case, the Supreme Court held that the California sales tax could not be levied on oil which the Richfield Company, pursuant to a contract with a foreign government, piped from its storage tanks in California into a vessel of the foreign government. In the latter case, a large steamer sold by the Matson Company to a foreign government in California was held exempt from the California sales tax. His argument is that as the California

use tax and sales tax are complementary, the validity of the use tax is governed by the same principles as the validity of the sales tax. Therefore, he argues if a transaction where oil is sold to New Zealand in California and title passes in California, is not subject to the sales tax, a transaction in which a yacht is manufactured and sold in Holland for importation and use in California and title passed in Holland, is not subject to the use tax. We cannot agree with this argument. In *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330, 64 S.Ct. 1023, 1025, 88 L.Ed. 1304, Justice Frankfurter said: "A sale tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds."

Furthermore, the *Richfield* and the *Matson* case, *supra*, were concerned with export transactions. The issue in the *Richfield* case was whether the process of exportation had begun so as to make the oil exempt; the issue in the *Matson* case was whether a ship was properly an object of export and whether the ship in question was sufficiently committed to the stream of export trade at the time of sale. Even if we were to follow plaintiff's analogy of export cases, in *Cornell v. Coyne*, 192 U.S. 418, at page 427, 24 S.Ct. 383, at page 384, 48 L.Ed. 504, the court said, "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export, and not to the article before its exportation."

[3] The instant case is concerned with an import transaction. The issue is whether the import process has been completed so that the yacht and machinery are subject to the taxing power of the State of California. It is clear that the purpose of

the Constitutional prohibition against state duties on imports is to prevent a clog in the process of importation, not to prevent a tax on the use of the article after it has reached its destination. *Brown v. Maryland*, *supra*; *Henneford v. Silas, Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814. There is no question here that the plaintiff bought the yacht and machinery for use in California, and that they have been so used since their arrival from Holland.

We find a compelling analogy in *Banner Laundering Co. v. Gundry*, 1940, 297 Mich. 419, 298 N.W. 73 and *Tres Ritos Ranch Co. v. Abbott*, 1940, 44 N.M. 556, 105 P.2d 1070. In the *Gundry* case, the taxpayer, a resident of Detroit, Michigan, went to Canada and bought a pair of shoes from a retailer. He returned to Detroit with the shoes and paid the U. S. Customs duties on them. The State of Michigan imposed a use tax on the use of the shoes in Michigan. The Supreme Court of Michigan upheld the imposition of the use tax and rejected the taxpayer's contention that the tax transgressed the power of Congress to regulate foreign commerce. In the *New Mexico* case, the taxpayer bought cattle in Mexico and brought them to his ranch in New Mexico to feed and hold for sale in the United States. The court rejected the taxpayer's contention that the cattle as imports, were exempt from a state tax. The *Tres Ritos* case was recently followed in *State v. Harper*, Tex.Civ.App.1945, 188 S.W.2d 400 certiorari denied 327 U.S. 805, 66 S.Ct. 964, 90 L.Ed. 1030.

[4] We conclude that when the plaintiff's yacht and machinery completed their journey and were "put to the use for which they were imported," they lost their tax exempt status as an import.

[5] We come then to the more difficult question of precisely when the taxable incident occurred. The question is difficult because the plaintiff is a private person who has imported an article for his own use and pleasure. Except for the *Gundry* case, *supra*, in all of the cases beginning with *Brown v. Maryland*, the taxpayer has been

a person importing the article in question for commercial, industrial or manufacturing purposes. In this context the "original package" doctrine is easier to apply as a practical adjustment of the right of the state to revenue and the obligation of the state to leave the regulation of foreign commerce to the federal government. The original package doctrine is applied by analogy to both foreign commerce and interstate commerce. *Brown v. Maryland*, 12 Wheat. 419, 6 L.Ed. 678; *Hooven v. Allison Co. v. Evatt*, 324 U.S. 652, 65 S.Ct. 870, 89 L.Ed. 1252; *Southern Pac. Co. v. Gallagher*, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586. Some of the foreign commerce cases seem to indicate that the import loses its tax exempt status when the "original package" is broken. *Brown v. Maryland*, supra; *Mexican Petroleum Corp. v. City of South Portland*, 1922, 121 Me. 128, 115 A. 900, 26 A.L.R. 965; *E. J. Stanton & Sons v. County of L. A.*, 78 Cal.App.2d 181. In *Southern Pacific Co. v. Gallagher*, supra, which upheld the imposition of the California Use Tax on personal property purchased outside of the state by an interstate railroad and kept available for use as part of its transportation facilities in California, the court said in 306 U.S. at page 177, 59 S.Ct. at page 393 "We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun." The court further indicated in 306 U.S. at page 181, 59 S.Ct. at page 395 that, "the taxable event is the exercise of the property right in California". We think the problem in the instant case can be solved by the following from *Hooven & Allison v. Evatt*, 324 U.S. 652, at pages 664 and 665, 65 S.Ct. 870, at page 877:

"For the purpose of the immunity it has not been thought, nor is there reason for supposing, that it matters

whether the imported merchandise is stored in the original package in the importer's warehouse at the port of entry or in an interior state. The reason for the original package doctrine, as fully expounded in *Brown v. Maryland*, supra, is that unless the immunity survives to some extent the arrival of the merchandise in the United States, the immunity itself would be destroyed. For there is no purpose of taxing importation, itself, even its ultimate suppression, which could not be equally accomplished by laying a like tax on things imported after their arrival and while they are in the hands of the importer.

"On the other hand the immunity is adequately protected and the state power to tax is adequately safeguarded if, as has been the case ever since *Brown v. Maryland*, supra, an import is deemed to retain its character as such 'while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported,' see *Brown v. Maryland*, supra, 12 Wheat. 442, 6 L.Ed. 678, or until put to the use for which it was imported. Chief Justice Marshall, in *Brown v. Maryland*, supra, 12 Wheat. at pages 442, 443, 6 L.Ed. 678, rejected the suggestion that 'an importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.' Plainly if and when removed from the package in which they are imported or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end. It is quite another matter to say, and Chief Justice Marshall did not say, that because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported. He said, 12 Wheat. at page 443, 6 L.Ed. 678: 'The same observations [i. e., the importer has mixed the goods with

the common mass of property, rendering them taxable] apply to plate, or other furniture used by the importer.'"

It is our view therefor that the defendant properly determined that a use tax was properly due and that the judgment of the lower court is in error.

Judgment reversed, with directions to the trial court to enter judgment in favor of defendant.

DOOLING and DRAPER, JJ., concur.



162 Cal.App.2d 239

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Carlton HAMBRICK, Defendant and
Appellant.
Cr. 1364.

District Court of Appeal, Fourth District,
California.

July 18, 1958.

Defendant was convicted of second degree burglary with three prior felony convictions. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment of conviction and denied application for probation and motion for new trial, and defendant appealed. The District Court of Appeal, Mussell, Acting P. J., held, inter alia, that, where defendant testified that he had worn two pairs of trousers because of his tubercular condition, trial judge's cross-examination of defendant to determine whether defendant had worn the inner pair of trousers, tied at the ankle, for the express purpose of concealing pilfered merchandise was proper.

Judgment and order affirmed.

1. Witnesses $\S$ 246(1)

Trial judge has right to question a witness for purpose of developing all the pertinent facts.

2. Witnesses $\S$ 246(1)

If trial judge desires to be further informed on certain points mentioned in the testimony, he may ask proper questions for purpose of developing all the facts in regard to them, and considerable latitude is allowed him in this respect as long as a fair trial is indicated both to the accused and to the people.

3. Judges $\S$ 24

Courts are established to discover where lies the truth when issues are contested, and final responsibility to see that justice is done rests with the judge.

4. Witnesses $\S$ 282½

Where, in burglary prosecution, defendant testified that he had worn two pairs of trousers because of his tubercular condition, trial judge's cross-examination of defendant to determine whether defendant had worn the inner pair of trousers, tied at the ankle, for the express purpose of concealing pilfered merchandise was proper.

5. Criminal Law $\S$ 1036(2)

A trial judge's examination of a witness may not be assigned as error on appeal if no objection was made when the questioning occurred.

6. Criminal Law $\S$ 1035(3), 1119(3)

Where, in criminal proceeding, no objections were made to trial judge's tone of voice in his cross-examination of defendant, and there was no reference thereto contained in the record on appeal, such an objection could not be made on appeal.

7. Criminal Law $\S$ 656(2)

Where, in burglary prosecution, witness for prosecution testified that defendant had been previously arrested for shoplifting under circumstances similar to those charged in the prosecution but thereafter stated he was not certain whether defendant was the person involved in the prior ar-

rest, trial court's questioning of witness in an endeavor to clarify his testimony as to the identification was proper and did not show advocacy for the prosecution.

8. Criminal Law ☞1035(3)

Where, in burglary prosecution, timely objections were not interposed in the trial court as to manner and tone trial judge used while questioning prosecution witness as to identification of defendant as person involved in prior shoplifting incident, argument that trial judge's manner and tone indicated to jury that judge was satisfied that defendant had been satisfactorily identified as the person involved in the prior incident could not be considered on appeal.

9. Witnesses ☞267

In criminal prosecution, trial judge has duty to restrict cross-examination of witnesses to reasonable limitations.

10. Criminal Law ☞1170(1)

Where, in burglary prosecution, defendant, who was charged with shoplifting other merchandise from grocery store, stated that he had purchased a watermelon and left it in the grocery store prior to leaving the store with the other merchandise, and defendant's counsel had questioned co-owner of store extensively as to whether the watermelon had been so purchased and whether it was on the counter when defendant was returned to the store, trial court's statement that unless defendant had watermelon concealed in "his pants", as was the other merchandise, court was not much concerned about it, did not constitute exclusion of material evidence prejudicial to defendant nor an abuse of court's discretion.

11. Criminal Law ☞1153(4)

Witnesses ☞267

In criminal prosecution, scope of cross-examination of a witness is matter within trial judge's sound discretion, and his rulings will not be disturbed on appeal in absence of a clear abuse of discretion.

12. Burglary ☞2

When defendant entered grocery store with intent to commit larceny therein,

crime of burglary was complete regardless of value of property sought to be stolen. West's Ann.Pen.Code, § 459.

Yale, Wilson, Summers & Yale and Dean E. Yale, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and Carl Boronkay, Deputy Atty. Gen., for respondent.

MUSSELL, Acting Presiding Justice.

Defendant was charged with the crime of Burglary in that on or about October 20, 1957, he did wilfully enter a building known as Valu-Mart in the city of San Diego with intent to commit theft. Three prior felony convictions alleged in the information were admitted and, after trial by jury, defendant was found guilty of the crime of burglary in the second degree. His application for probation and motion for new trial were denied and he was sentenced to the State's prison. He appeals from the judgment and from the order denying a new trial.

Appellant does not question the sufficiency of the evidence to support the judgment of conviction but contends that he was deprived of due process of law because of the trial court's misconduct, and that the court unduly restricted the cross-examination of the prosecution's witness.

On October 20, 1957, the appellant entered the Valu-Mart grocery store in the city of San Diego at about 4:30 p. m. At the time he was wearing two pairs of trousers, one over the other, with the inside pair tied at the ankles with string or shoe laces. Richard E. Reilly, co-owner of the store, who was working at the check stand, observed the appellant and asked Mr. Cooper, a partner in the store, to go upstairs and watch him. Reilly saw the defendant attempting to put a package of bacon down the front of his trousers and a few minutes later observed appellant standing at the check stand. He had nothing in his hands, did not attempt to make a purchase, but appeared to be waiting for someone. Cooper testified that he went to the back of the

store and upstairs where he could observe the whole store; that he watched the appellant through a set of binoculars and observed him slipping two packages of bacon over his belt and into his trousers; that the appellant then proceeded across the store, picked up a pound of sausage, returned to his previous location, and put the sausage in his trousers; that he repeated this operation with a pound of bacon or another pound of sausage, and started toward the front of the store; that he (Cooper) then started down stairs. Appellant left the store through the front door and Reilly and Cooper followed him and asked him to reenter the store and to remove the bacon and sausage from his trousers. This appellant refused to do and Cooper and Reilly started to remove the groceries through the bottom of the legs of the inner pair of appellant's trousers. After the merchandise was removed, the police officers were called and the appellant was placed under arrest.

Officer Reiersen of the San Diego police department had a conversation with appellant on October 21, 1957, in which the appellant stated that they had caught him stealing and admitted that he went into the store to steal. When asked why he tied his pant legs, appellant stated that he didn't, that he had "the stuff" in his hands. However, he later admitted that he had the merchandise in his trousers, and that he tied his pant legs before he had gone into the store so that he could put the merchandise into them.

At the trial appellant testified that he entered the market at the time alleged, took a watermelon from the vegetable stand, paid 40¢ for it, "set it in the door", and then decided to get some bacon and sausage; that he had "it in my hand" when he went back to pay for it; that he stood at the check stand for a while and then went around it and out the front door, leaving the watermelon; that just as he started through the door, the checker called him back, searched him, and found the merchandise in his pant legs; that at the time he entered the market he did not in-

tend to steal anything but went there for the purpose of purchasing a watermelon and some lunch meat and intended to pay for it, but that when he saw the "people was busy there", he left the watermelon and walked out the door.

[1-6] The first contention made by appellant is that the trial court's cross-examination of the appellant amounted to advocacy for the prosecution. The record shows that following appellant's testimony as to the circumstances of his apprehension by the proprietors of the grocery store and the cross-examination by the prosecutor as to appellant's hiding groceries in his trousers, the trial court proceeded to ask the defendant a number of questions relating to the manner in which he was dressed at the time he entered the store. Appellant was asked whether the second pair of trousers were tied at the bottom to keep out the draft and how many pounds the appellant could carry in his pants without it "jumping out of your sock." He was also asked whether he knew how much his pants would hold and whether he wore them to keep warm. Appellant argues that from the form of these questions and the manner and tone of the trial judge the jury inferred that the judge disbelieved appellant's testimony. However, the right of a trial judge to question a witness for the purpose of developing all of the pertinent facts is not disputed. It has been repeatedly held that if a judge desires to be further informed on certain points mentioned in the testimony it is entirely proper for him to ask proper questions for the purpose of developing all the facts in regard to them. Considerable latitude is allowed the judge in this respect as long as a fair trial is indicated both to the accused and to the People. Courts are established to discover where lies the truth when issues are contested, and the final responsibility to see that justice is done rests with the judge. *People v. Lancellotti*, 147 Cal.App.2d 723, 730, 305 P.2d 926. Appellant in his direct testimony had explained that since 1954 he had worn two pairs of trousers, one over the other, because of his tubercular con-

dition. It was proper for the trial judge to inquire into appellant's explanation of the unusual manner of dress. It is apparent that the judge was attempting to determine whether appellant wore the inner pair of trousers, tied at the ankle, for the express purpose of concealing pilfered merchandise. In *People v. Corrigan*, 48 Cal. 2d 551, 559, 310 P.2d 953, 958, it is said:

"The judge was obviously seeking to elicit or clarify testimony on material points, and it is the right and the duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence."

No objection was made to the questions asked the witness by the judge, nor did appellant make a motion to strike the questions or answers. A judge's examination of a witness may not be assigned as error on appeal where no objection was made when the questioning occurred. *People v. Corrigan*, supra, 48 Cal.2d 551, 556, 310 P.2d 953. No objections to the tone of the voice of the judge were made in the court below and there is no reference thereto contained in the record on appeal. Therefore, no objection thereto can now be made on appeal. *People v. Sakelarlis*, 151 Cal.App.2d 758, 759, 312 P.2d 263.

[7,8] Mr. William Buono, a witness for the prosecution, testified that appellant, in December, 1956, was arrested in Buono's Market for shoplifting under circumstances almost identical to the instant case. He stated he was not certain whether appellant was the same person involved in the December, 1956, incident. The court then said, "Q. Look at him again. Do you think it is the same fellow?", to which Mr. Buono replied, "A. He looks to be the same person." Appellant asserts that the identification of appellant as the person involved in the December, 1956, incident was and should have been a question of fact for the determination of the jury. However, it was proper for the court to question the witness in an endeavor to clarify his testimony and appellant's assertion that the question shows "advocacy for the

prosecution" is unfounded. *People v. Lancellotti*, supra, 147 Cal.App.2d 723, 730, 305 P.2d 926; *People v. Corrigan*, supra, 48 Cal.2d 551, 559, 310 P.2d 953. Appellant further asserts that by reason of the manner and tone of the trial judge while asking such question, together with his emphasis on certain words, it was clearly indicated to the jury that the judge was satisfied that Mr. Buono had satisfactorily identified appellant as the same person involved in the December, 1956, incident. No timely objections were interposed in this connection and for the reasons hereinabove stated, this argument cannot be considered on appeal.

[9-11] Appellant's contention that the trial court unduly restricted the cross-examination of Mr. Cooper is without merit. After appellant's counsel had questioned Cooper extensively as to whether appellant had purchased a watermelon upon entering the store and whether a melon was on the counter when appellant was returned to the store, the court stated that unless the appellant had the watermelon in "his pants", he (the court) was "not much concerned about it." It is the duty of the trial judge to restrict the cross-examination of witnesses to reasonable limitations (*People v. Spreckels*, 125 Cal.App.2d 507, 514, 270 P.2d 513), and it does not appear that appellant was prejudiced by the exclusion of any material evidence in this connection. The scope of the cross-examination is within the sound discretion of the trial judge and his rulings will not be disturbed on appeal in the absence of a clear abuse of discretion. *People v. Apodaca*, 132 Cal.App.2d 340, 341, 282 P.2d 182. No abuse of discretion appears herein.

[12] It is claimed that the court erred in excluding testimony as to the value of the merchandise taken by appellant. However, the crime of burglary was complete when appellant entered the store with intent to commit larceny therein (Pen.Code, Sec. 459) regardless of the value of the property sought to be stolen (*People v. Bayne*, 136 Cal.App. 341, 348, 28 P.2d 1068).

A review of the entire record herein fails to disclose prejudicial misconduct on the part of the trial judge. The judgment and order denying new trial are affirmed.

GRIFFIN, J., and McCABE, J. pro tem.,
concur.



162 Cal.App.2d 293

**John G. OPPENHEIMER, Plaintiff and
Appellant,**

v.

**W. D. TAMBLYN et al., Defendants,
Wayne S. Vance, Defendant and Respondent.**
Civ. 22744.

District Court of Appeal, Second District,
Division 3, California.

July 22, 1958.

Action to recover damages for malicious prosecution. Judgment sustaining a demurrer of one defendant to the complaint without leave to amend in the Superior Court of Los Angeles County, Kenneth N. Chantry, J., and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that sustaining the demurrer without leave to amend was reversible error.

Judgment reversed.

1. Malicious Prosecution ⚡16

The elements of a cause of action for malicious prosecution are a judicial proceeding favorably terminated, want of probable cause and malice.

2. Malicious Prosecution ⚡51

Where complaint alleges no facts from which it can be concluded that the prior proceedings terminated favorably to the plaintiff, the complaint fails to state a cause of action for malicious prosecution. West's Ann.Code Civ.Proc. § 340, subd. 3.

3. Pleading ⚡225(1)

Unless it is clear that a complaint cannot be amended to state a cause of action, it is error to sustain a demurrer without leave to amend.

4. Pleading ⚡225(1)

In action for malicious prosecution, though there was no statement in the complaint of the grounds for dismissal of the criminal proceedings against plaintiff, demurrer should not have been sustained without leave to amend where it did not appear that the complaint could not have been amended to allege the fact that the proceedings against the plaintiff were dismissed on some ground which established or tended to indicate his innocence. West's Ann. Vehicle Code, § 679; West's Ann.Code Civ. Proc. § 340, subd. 3; West's Ann.Pen.Code, §§ 1008, 1378, 1382, subd. 3, 1385.

5. Limitation of Actions ⚡180(3)

In action for malicious prosecution where the complaint was filed October 15, 1956 and it alleged that the criminal proceedings were instituted February 15, 1955, complaint was not subject to demurrer on the ground that it was barred by the one year statute of limitations where the complaint did not allege the date of the dismissal. West's Ann.Code Civ.Proc. § 340, subd. 3.

6. Limitation of Actions ⚡31

The period of limitations applicable to an action for malicious prosecution is one year.

7. Limitation of Actions ⚡180(2)

The bar of the statute of limitations must affirmatively appear upon the face of the complaint in order to justify a dismissal thereof.

8. Pleading ⚡225(1)

Uncertainty in a complaint would not render a complaint fatally defective so as to preclude the right to amend upon sustaining demurrer.

John G. Oppenheimer, appellant, in pro.
per.

Roger Arnebergh, City Atty., William B. Burge, Deputy City Atty., Los Angeles, for respondent.

SHINN, Presiding Justice.

The present action is against W. D. Tamblin, R. C. Briggs, Irving Gordon and Wayne S. Vance to recover damages for malicious prosecution. Vance demurred to the complaint. The court sustained his demurrer without leave to amend and entered judgment in his favor. Plaintiff appeals from the judgment dismissing the action as to Vance.

The complaint alleges: On or about February 15, 1955, defendants maliciously and without probable cause "instituted, caused, procured and instigated a criminal prosecution against the plaintiff for purported violation of section 679 of the Vehicle Code * * *." Defendants "acted with oppression, fraud and malice" toward plaintiff. Plaintiff posted \$53 bail and paid \$50 for the services of an attorney in defending against the charge. Plaintiff also alleges: "After due proceedings had in said criminal prosecution, it was dismissed, and plaintiff's bail was exonerated." The prayer is for recovery of the attorney's fee and substantial general and exemplary damages.

Vance interposed a general and special demurrer; the grounds of general demurrer were that the complaint failed to allege that the prosecution terminated in a manner favorable to plaintiff and that the action is barred by the provisions of section 340, subdivision 3 of the Code of Civil Procedure. The special demurrer specified two respects in which the complaint was uncertain and ambiguous, viz., it did not allege whether the prosecution had been terminated, and, if so, whether it had been terminated in plaintiff's favor. The record does not disclose the ground or grounds on which the demurrer was sustained.

[1,2] The elements of a cause of action for malicious prosecution are: (1) A judicial proceeding favorably terminated; (2) want of probable cause; and (3) malice.

Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775. Where the complaint alleges no facts from which it can be concluded that the prior proceedings terminated favorably to the plaintiff, it fails to state a cause of action. *Roos v. Harris*, 203 Cal. 201, 263 P. 225; *Prentice v. Bertken*, 50 Cal.App.2d 344, 123 P.2d 96; *Barrier v. Alexander*, 100 Cal.App.2d 497, 224 P.2d 436. And, as the Supreme Court said in *Jaffe v. Stone*, supra, 18 Cal.2d 146, at page 150, 114 P.2d 335, at page 338: "It is not enough, however, merely to show that the proceeding was dismissed. The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort * * *. [I]f the criminal proceeding goes to trial, it is ordinarily necessary, as a foundation for a malicious prosecution suit, that the plaintiff should have been acquitted. (Citations.) The same fundamental theory is applied in testing a dismissal or other termination without a complete trial on the merits. If it is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination."

[3,4] There is no statement in Oppenheimer's complaint of the ground for dismissal of the proceedings against him. The complaint was therefore subject to demurrer. But it does not follow that the demurrer should have been sustained without leave to amend. A violation of Vehicle Code § 679 (operating a vehicle upon a highway in an unsafe condition) is a misdemeanor. The court is authorized to dismiss a prosecution for misdemeanor upon any of the following grounds: A failure to bring the accused to trial within 30 days after his arrest (Penal Code § 1382, subdivision 3); the sustaining of a demurrer to the accusatory pleading without leave to amend

(Penal Code § 1008); a compromise between the accused and the injured party in cases where the latter has a civil remedy (Penal Code § 1378); in the furtherance of justice, upon the court's own motion or upon application by the prosecuting attorney (Penal Code § 1385). But it does not appear that the complaint could not have been amended to allege the fact, if it be the fact, that the proceedings against Oppenheimer were dismissed on some ground which established or tended to indicate his innocence. Unless it is clear that a complaint cannot be amended to state a cause of action, it is error to sustain a demurrer without leave to amend. (39 Cal.Jur.2d 244.) We think that the court committed error in denying plaintiff leave to file an amended complaint.

The second ground of demurrer was that the action is barred by the statute of limitations. We do not believe that the demurrer could properly have been sustained on that ground.

[5-7] The complaint was filed October 15, 1956. As we said earlier, it alleges that the criminal proceedings were instituted February 15, 1955. Respondent argues that a suit for malicious prosecution must be brought within one year following the act complained of, and that more than a year elapsed before the present action was filed. The argument cannot be maintained.

The period of limitations applicable to an action of this nature is indeed one year. Code Civ.Proc. § 340, subd. 3; *Simons v. Edouarde*, 98 Cal.App.2d 826, 221 P.2d 203. However, plaintiff's cause of action did not accrue until the proceedings against him were dismissed. *Berson v. Ewing*, 84 Cal. 89, 23 P. 1112; *Goland v. Peter Nolan & Co.*, 2 Cal.2d 96, 38 P.2d 783. This is necessarily so, since no cause of action can exist before the prosecution has been terminated. The complaint does not allege the date of the dismissal. It is elementary that the bar of the statute of limitations must affirmatively appear upon the face of the complaint. *Kraner v. Halsey*, 82 Cal. 209, 22 P. 1137; *Pleasant v. Samuels*, 114 Cal. 34,

45 P. 998; *Corea v. Higuera*, 153 Cal. 451, 95 P. 882, 17 L.R.A.,N.S., 1018.

[8] Respondent did not urge that the complaint was uncertain in failing to allege the date of the dismissal, but if the point should be raised, uncertainty in that particular would not render the complaint fatally defective so as to preclude the right to amend.

The judgment is reversed.

PARKER WOOD, J., and NOURSE, J.
pro tem., concur.



162 Cal.App.2d 428

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Louis ZACK, William Rich, Burllee Leon
Andrews and Richard McFall,
Defendants.**

**Burllee Leon Andrews, Appellant.
Cr. 6096.**

District Court of Appeal, Second District,
Division 3, California.

July 30, 1958.

Proceeding for writ of error coram nobis. The Superior Court, Los Angeles County, Edward R. Brand, J., denied petition, and petitioner appealed. The District Court of Appeal, Shinn, P. J., held that petitioner, who alleged that prior foreign conviction, on basis of which he was subjected to increased punishment, was invalid, was not entitled to vacation of judgment in absence of showing that facts upon which he relied, could not, by exercise of reasonable diligence, have been discovered by him in time to be pre-

sented at trial in which he admitted foreign conviction.

Affirmed.

1. Criminal Law §1130(4)

Where prisoner filed petition for writ of error *coram nobis*, attorney appointed for purpose of filing brief reported that there was no merit in appeal from denial of writ and that filing of brief would be unjustified, prisoner was so advised but did not file brief in his own behalf, reviewing court would make an independent examination of record.

2. Criminal Law §998

In order to present a meritorious application for vacation of judgment there must be a strong showing of existence of some fact which was unknown to defendant at time of trial and which could not have been ascertained by him in exercise of reasonable diligence and fact must be one which, if it had been known, would have prevented rendition of judgment.

3. Criminal Law §998

Defendant, who alleged that prior foreign conviction, on basis of which he was subjected to increased punishment, was invalid, was not entitled to vacation of judgment in absence of showing that facts upon which he relied, could not, by exercise of reasonable diligence, have been discovered by him in time to be presented at trial in which he admitted foreign conviction.

4. Criminal Law §997(4)

Coram nobis is not appropriate remedy to inquire into asserted imposition of an excessive sentence.

5. Criminal Law §163

Prior conviction of attempted burglary could properly be alleged as to two counts of information charging defendant with being an accessory to crime of robbery on successive days and defendant was not, by virtue of such allegation, placed in double jeopardy for same of-

fense. West's Ann.Pen.Code, §§ 32, 33, 3024(c).

6. Criminal Law §1208(3)

Where sentence imposed upon defendant could have been for two consecutive terms of five years each, but Adult Authority fixed sentence at two years on each count or total of four years, pursuant to amendment to statute, it could not be contended that defendant received an excessive sentence. West's Ann.Pen.Code, §§ 33, 3024(c).

Burlice Leon Andrews, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen. of State of Cal., for respondent.

SHINN, Presiding Justice.

This is an appeal from an order denying a petition for writ of error *coram nobis*.

An information was filed against appellant in 1956, charging him in Count I with a violation of Section 32 of the Penal Code on October 3, 1955, in being an accessory to the crime of robbery, and in Count II, with committing a like offense on the following day. It was also alleged, with respect to each count, that appellant had previously been convicted of a felony, to-wit, attempted burglary, and had served a term of imprisonment therefor in the Oregon State Prison.

Appellant pleaded guilty as charged in the information and admitted the prior conviction. Probation was denied and he was sentenced to prison for the term prescribed by law, the sentences as to each count to run consecutively. Judgment was rendered February 14, 1956.

April 23, 1957, the instant petition was filed, setting forth various grounds for issuance of the writ. These are: The prior conviction was void and was not available to subject appellant to increased punishment as a subsequent offender; the allegation of a prior conviction as to both counts of the information placed him in double

jeopardy for the same offense; in fixing the length of his prison term, the Adult Authority imposed an excessive term of imprisonment. The court below denied the petition, but the record does not disclose the ground or grounds for the ruling.

[1] Upon application of appellant for appointment of counsel, this court appointed an attorney for the purpose of filing a brief, if, upon examination of the record, he found any justification for a brief. The attorney reported to this court that he had examined the record and that, in his opinion, there was no merit in the appeal and the filing of a brief would be unjustified. Appellant was duly so advised and was given the opportunity to file a brief in his own behalf. No brief has been filed. In accordance with our practice we have made an independent examination of the record. See, *People v. Logan*, 137 Cal.App.2d 331, 290 P.2d 11.

[2] In our opinion the writ was properly denied. In order to present a meritorious application for vacation of a judgment there must be a strong showing of the existence of some fact which was unknown to the appellant at the time of trial and which could not have been ascertained by him in the exercise of reasonable diligence and the fact must be one which, if it had been known, would have prevented the rendition of the judgment. *People v. Adamson*, 34 Cal.2d 320, 326-327, 210 P.2d 13, and cases cited.

[3] It was alleged in the petition that appellant was accused of an offense of attempted burglary in the Circuit Court of Coos County, Oregon, in October 1950; that he appeared in court without counsel and did not waive his right to representation by counsel; that he "waived his fundamental right to indictment and indicated a plea of guilty before he was aware, if he ever was, that he had a right to have counsel appointed"; and that these facts establishing the invalidity of the Oregon conviction were unknown to him

and to the court when judgment was rendered in the instant case. Aside from any question as to his right to attack the Oregon judgment in this proceeding appellant has made no showing that the facts upon which he relied could not, by an exercise of reasonable diligence, have been discovered by him in time to be presented at his trial in which he admitted the Oregon conviction. The facts alleged in his petition were manifestly insufficient to justify a disturbance of the judgment.

[4,5] With respect to appellant's attack upon his sentence, it is settled that *coram nobis* is not the appropriate remedy to inquire into the asserted imposition of an excessive sentence. In *re Seeley*, 29 Cal.2d 294, 298, 176 P.2d 24, and cases cited. Furthermore, it does not appear that appellant's sentence was excessive. The prior conviction could properly be alleged as to both counts of the information. (*People v. DiMichele*, 149 Cal.App. 2d 277, 280, 308 P.2d 365), and appellant was not, by virtue of the allegation, placed in double jeopardy for the same offense. In *re Rogers*, 20 Cal.App.2d 397, 402, 66 P.2d 1237; *People v. Dunlop*, 102 Cal.App.2d 314, 316-317, 227 P.2d 281, and cases cited.

[6] At the time of the offenses charged an accessory was punishable by imprisonment in the state prison not exceeding 5 years or in a county jail not exceeding 2 years or by fine not exceeding \$5,000. Pen.Code, § 33. Under the 1957 amendment to Penal Code, § 3024(c), the maximum term of imprisonment prescribed by section 33 was not changed but the minimum sentence of a defendant who has previously been convicted of a felony, but who was not armed with a deadly weapon at the time of his commission of the offense, or with a concealed deadly weapon at the time of his arrest, was reduced from 5 years to 2 years. The Adult Authority fixed appellant's sentence at 2 years on each count, or a total of 4 years, pursuant to the amendment to the statute. Since the sentence could have been for

two consecutive terms of 5 years each, it cannot reasonably be contended that appellant has received an excessive sentence.

The order is affirmed.

PARKER WOOD, J., and PATROSSO, J., pro tem., concur.



162 Cal.App.2d 35

Thelma RODY, Plaintiff and Appellant,

v.

**Harold L. WINN, Margaret Winn, Doe I,
Doe II, Doe III, and Doe IV,
Defendants,**

**Harold L. Winn, Respondent.
Civ. 22728.**

**District Court of Appeal, Second District,
Division 2, California.**

July 8, 1958.

Action against registered owner of automobile and her husband for injuries allegedly caused by negligent operation of automobile by wife. The Superior Court of Los Angeles County, Joseph L. Call, J., denied plaintiff's motion to reopen case and rendered judgment of nonsuit in favor of defendant husband, and plaintiff appealed. The District Court of Appeal, Herndon, J., held that the evidence adduced, augmented by evidence which plaintiff was prevented from introducing by refusal to reopen case after motion for nonsuit, was sufficient to make out a prima facie case for imputing liability to defendant husband under West's Ann.Vehicle Code, § 402.

Judgment of nonsuit reversed.

1. Appeal and Error ⇨927(3)

In considering propriety of nonsuit, reviewing court must accept evidence most

favorable to plaintiff and disregard that which is unfavorable.

2. Appeal and Error ⇨927(3)

In considering propriety of nonsuit, testimony given by defendants under statute, providing for examination by adverse party as if under cross-examination, is to be treated as evidence in the case insofar as it is favorable to plaintiff. West's Ann.Code Civ.Proc. § 2055.

3. Appeal and Error ⇨927(3)

On appeal from judgment of nonsuit, evidence most favorable to plaintiff must be assumed to be true and every reasonable inference in plaintiff's favor must be drawn therefrom.

4. Trial ⇨165

Before a nonsuit is granted plaintiff must be allowed a reasonable opportunity to supply any deficiency in his proof pointed out in motion for nonsuit.

5. Automobiles ⇨244(23)

In action against registered owner of automobile and her husband for injuries allegedly caused by negligent operation of automobile by owner, evidence adduced, augmented by additional evidence which plaintiff was prevented from introducing by refusal to reopen case after motion for nonsuit, was sufficient to make out a prima facie case against defendant husband under statute, imputing to owner of automobile the negligence of a permissive user, on theory that automobile was owned jointly by husband and wife or was their community property and was used by wife with express or implied permission of husband. West's Ann.Vehicle Code, § 402.

6. Automobiles ⇨20

A certificate of registration does not necessarily or conclusively establish ownership of automobile and a different ownership may be shown for purpose of establishing liability under section of Vehicle Code imputing to owner the negligence of a permissive user. West's Ann.Vehicle Code, § 402.

7. Husband and Wife ⇨262(1)

Property acquired by either spouse during marriage is generally presumed to be community property.

8. Automobiles ⇨20

Certificate of registration is not an instrument in writing by which title to motor vehicle is acquired.

9. Evidence ⇨89

A presumption favorable to plaintiff cannot be dispelled by testimony of defendant given under statute, providing for examination by adverse party as if under cross-examination, since a party called to testify under such statute is not treated as witness of adverse party by whom he was called. West's Ann.Code Civ.Proc. § 2055.

10. Automobiles ⇨192(5)

Where automobile is community property of husband and wife, though registered in name of wife, husband is an "owner" within statute imputing to owner the negligence of a permissive user. West's Ann. Vehicle Code, § 402.

See publication Words and Phrases, for other judicial constructions and definitions of "Owners".

11. Automobiles ⇨192(5)

Husband has exclusive right to management and control of automobile which is the community property of husband and wife, and hence it may be inferred from such ownership that operation of automobile by wife is with express or implied permission of husband. West's Ann.Vehicle Code, § 402.

12. Automobiles ⇨192(5)

Provisions of section of Vehicle Code imputing to owner the negligence of a permissive user apply as between husband and wife as co-owners or joint owners of vehicle. West's Ann.Vehicle Code, § 402.

13. Tenancy In Common ⇨55(6)

Upon proof of co-ownership and use of personalty by one co-owner, the inference normally arises, in absence of other evidence upon the issue, that such use is lawful and with consent of absent co-owner.

14. Automobiles ⇨192(5)

Negligence of wife in operation of automobile owned by husband may be imputed to husband on theory of agency, provided such use was with permission of husband.

15. Automobiles ⇨244(23)

Proof that automobile owned by husband was being operated by wife with his express permission makes out a prima facie case authorizing inference, in absence of substantial proof to the contrary, that wife was using automobile as agent of husband.

Lionel T. Campbell, Los Angeles, for appellant.

Jarrett & Morgan, and Wm. Marshall Morgan, Los Angeles, for respondents.

HERNDON, Justice.

Plaintiff appeals from a judgment of nonsuit in favor of defendant Harold Winn. Plaintiff suffered personal injuries when her car was struck from the rear by a certain Buick automobile being driven by Margaret Winn, Harold's wife. Plaintiff joined Harold and Margaret as defendants, alleging that they were "the registered and legal owners" of said Buick automobile, and that at the time of the accident Margaret was operating it "with the knowledge and consent of her co-defendants". By their answer defendants admitted that they were husband and wife and that Margaret was the owner of the Buick but denied ownership in Harold.

Plaintiff examined the defendants under section 2055 of the Code of Civil Procedure. Harold testified that the Buick was purchased by him in 1950 with cash derived from his wages earned after his marriage to Margaret; that he drove the car occasionally; that from the date of purchase the car was registered in his wife's name as registered owner; and that he did not recall any conversation or written agreement with his wife with respect to its ownership.

Margaret testified that she owned the Buick and that it was registered in her name; that at the time of the accident she

was driving the automobile with her sister and the defendants' two children as her passengers; that she had picked up the children at school, and that they were on their way home at the time of the accident.

After plaintiff had rested, a motion for a nonsuit was made on behalf of defendant Harold on the ground that the evidence was insufficient to show that Harold was the owner, or an owner, of the car. After argument in chambers, but before the court ruled on the motion, plaintiff moved to reopen her case for the purpose of introducing additional evidence which would tend to prove that the defendants were co-owners of the Buick, or that it was their community property. Plaintiff's counsel informed the court that since plaintiff's case had been rested, he had been informed that the defendants, in obtaining insurance coverage on the car, had represented to the insurance company that they were co-owners, and that on such representation, the insurance company had insured them as co-owners. Counsel declared that if permitted he would further interrogate the defendant Harold concerning the representations of ownership made by him to the insurance company, and concerning other acts of dominion and control which would tend to prove Harold's ownership. Counsel urged that this additional evidence would supply the basis for an inference either that the car was community property or that the defendants were co-owners. Plaintiff's motion to reopen was denied, and the motion for nonsuit was granted. The case proceeded to trial against Margaret alone, and the jury rendered a verdict in favor of plaintiff against Margaret in the sum of \$1,062.50.¹

Plaintiff contends on this appeal that the trial court erred in granting the nonsuit because there was sufficient evidence to support inferences that Harold was an owner of the Buick and that his wife was driving it with his permission and as his agent. Plaintiff further contends that the trial court erred in denying her motion to reopen for

the purpose of supplying the claimed deficiency in her proof asserted as the ground for the nonsuit.

[1-4] In considering the propriety of the nonsuit, we must accept the evidence most favorable to plaintiff and disregard that which is unfavorable. The testimony of the defendants given under section 2055 is to be treated as evidence in the case insofar as it is favorable to plaintiff. *Crowe v. McBride*, 25 Cal.2d 318, 319, 153 P.2d 727; *Leonard v. Watsonville Community Hospital*, 47 Cal.2d 509, 517, 305 P.2d 36. "On appeal from a judgment of nonsuit the evidence most favorable to the plaintiff must be assumed to be true and every reasonable inference in plaintiff's favor drawn therefrom." *Onick v. Long*, 154 Cal.App.2d 381, 386, 316 P.2d 427, 430; *Hughes v. Oreb*, 36 Cal.2d 854, 857, 228 P.2d 550; *Holtz v. United Plumbing & Heating Co.*, 49 Cal.2d 501, 505, 319 P.2d 617. It is also a settled rule that before a nonsuit is granted a plaintiff must be allowed a reasonable opportunity to supply any deficiency in his proof pointed out in the motion for the nonsuit. *Eatwell v. Beck*, 41 Cal.2d 128, 133, 257 P.2d 643; *Hellings v. Wright*, 29 Cal.App. 649, 656, 156 P. 365; *Sferlazzo v. Oliphant*, 24 Cal.App. 81, 86, 140 P. 289; 16 Cal.Jur.2d 204, § 43.

[5] Accordingly, we may assume, without deciding, that the claimed defect in plaintiff's prima facie case against Harold existed at the time the motion was made. We have no hesitancy in holding, however, that if the evidence actually received had been augmented by that which plaintiff offered to introduce, there would have been ample support for an inference that Harold had rights of ownership in the Buick.

[6] A certificate of registration does not necessarily or conclusively establish true ownership; a different ownership may be shown for the purpose of establishing liability under the provisions of section 402 of the Vehicle Code. Logan

1. It is stated in appellant's opening brief that an appeal from the judgment on this verdict is being perfected.

v. Serpa, 91 Cal.App.2d 818, 822, 206 P.2d 70; McCalla v. Grosse, 42 Cal.App.2d 546, 549-550, 109 P.2d 358; Maguire v. Corbett, 119 Cal.App.2d 244, 251, 259 P.2d 507; Sayles v. Peters, 11 Cal.App.2d 401, 405-407, 54 P.2d 94.

[7-9] It is generally presumed that property acquired by either spouse during marriage is community property. Falk v. Falk, 48 Cal.App.2d 762, 767, 120 P.2d 714; Newell v. Brawner, 140 Cal.App.2d 523, 526, 295 P.2d 460. And it has been held that an automobile acquired during marriage is presumed to be community property notwithstanding that it is registered in the wife's name. In re Estate of Inman, 148 Cal.App.2d 952, 957, 307 P.2d 953. The certificate of registration is not an "instrument in writing" by which title is acquired. Pacific Tel. & Tel. Co. v. Wellman, 98 Cal.App.2d 151, 155, 219 P.2d 506; In re Estate of Inman, supra, 148 Cal.App.2d 952, 957, 307 P.2d 953. A presumption favorable to a plaintiff cannot be "displaced by the testimony of a defendant given pursuant to section 2055 because a defendant called under that section is not treated as the plaintiff's witness." Leonard v. Watsonville Community Hospital, 47 Cal.2d 509, 517, 305 P.2d 36, 41; Smellie v. Southern Pac. Co., 212 Cal. 540, 559, 299 P. 529.

[10,11] In the present case, if the Buick was community property, the defendant Harold was an "owner" within the meaning of Vehicle Code section 402 (Dorsey v. Barba, 38 Cal.2d 350, 353, 240 P.2d 604) and he having the exclusive right to management and control of the vehicle (Wilcox v. Berry, 32 Cal.2d 189, 191, 195 P.2d 414; Cox v. Kaufman, 77 Cal.App.2d 449, 451-452, 175 P.2d 260), the jury could have found that Margaret was driving the car with his permission, express or implied. Cf. Caccamo v.

Swanston, 94 Cal.App.2d 957, 212 P.2d 246; Carroll v. Beavers, 126 Cal.App.2d 828 834, 273 P.2d 56.

[12,13] The provisions of section 402 of the Vehicle Code imputing to an owner the negligence of a permissive user apply as between husband and wife where it is established that they are co-owners or joint owners. Wilcox v. Berry, 32 Cal.2d 189, 191, 195 P.2d 414; Caccamo v. Swanston, 94 Cal.App.2d 957, 963, 967, 212 P.2d 246; Krum v. Malloy, 22 Cal.2d 132, 135, 137 P.2d 18, 20. It is stated in the decision last cited that "In the absence of other evidence upon the issue, an inference normally would arise, upon proof of co-ownership and use of personal property by one co-owner, that such usage was lawful and with the consent of the absent co-owner, * * *"

[14,15] The wife's negligence in the operation of an automobile owned by the husband may be imputed to the husband on the theory of agency where her use was with his permission. Perry v. McLaughlin, 212 Cal. 1, 14, 297 P. 554; DeArmond v. Turner, 141 Cal.App.2d 574, 297 P.2d 57; Irvine v. Wilson, 137 Cal.App.2d Supp. 843, 289 P.2d 895. As stated in Perry v. McLaughlin, supra, 212 Cal. 1, 14, 297 P. 554, 560, "[w]here proof is made that the car in question was owned by the husband, and was being operated by the wife at the time of the accident, with his express consent and permission, there is created a *prima facie* case authorizing an inference by a court or jury, in the absence of substantial proof to the contrary, that the wife was using the car as the agent of the husband." (See also 7 Cal. Jur.2d 196, § 324.)

The judgment of nonsuit is reversed.

FOX, P. J., and ASHBURN, J., concur.

161 Cal.App.2d 808

John L. CAIN, Plaintiff and Appellant,
v.

James T. HUNTER, Defendant and Respondent.

Civ. 17797.

District Court of Appeal, First District,
Division 2, California.
July 3, 1958.

Action by prospective purchaser for amount deposited in connection with purchase of real estate under contract providing that monthly payments not to exceed \$2,500 were to be paid. The Superior Court, Monterey County, Anthony Brazil, J., rendered judgment for vendor, and purchaser appealed. The District Court of Appeal, Dooling, J., held that although provision was subject to construction that exact amount of payment was to be left to future agreement of parties but in no event should exceed \$2,500 per month, it could also be construed to mean that vendor was entitled to demand monthly payments up to but not exceeding \$2,500, and such construction which rendered contract enforceable, would be preferred and that trial court was entitled to find that purchaser understood and admitted immediately after execution of deposit receipt that he had bound himself to pay \$2,500 per month.

Affirmed.

1. Contracts — 153

Courts will give written agreements, if reasonably possible, a construction which will result in their being enforceable contracts. West's Ann.Civ.Code, § 1643.

2. Vendor and Purchaser — 77

Provision in contract for sale of real estate that monthly payments were not to exceed \$2,500 was subject to construction that exact amount of payments was left to future agreement of parties but in no event should exceed \$2,500 per month, but it could also be construed to mean that vendor was entitled to demand monthly payments up to but not exceeding \$2,500, and such construction, which rendered contract enforce-

able, would be preferred. West's Ann.Civ. Code, § 1643.

3. Vendor and Purchaser — 341(3)

In action to recover amount deposited in connection with purchase of real estate under contract providing that monthly payments were not to exceed \$2,500, evidence warranted finding that purchaser understood and admitted immediately after execution of deposit receipt that he had bound himself to pay \$2,500 per month.

4. Contracts — 170(1)

In case of ambiguity, construction put on contract by parties themselves before any controversy has arisen is persuasive of its proper construction and may be looked to by the courts.

5. Vendor and Purchaser — 21

Contract for purchase of property was not rendered uncertain because it contained no provision for interest on deferred installments.

6. Vendor and Purchaser — 21

Contract for purchase of property was not rendered uncertain because it made no provision for security. West's Ann.Civ. Code, § 3046.

7. Vendor and Purchaser — 77

Where contract for sale of realty was silent on subject of security, no obligation to furnish any security other or different than security of vendor's lien was cast on buyer. West's Ann.Civ.Code, § 3046.

8. Contracts — 354

Although court made no express finding that contract, which was alleged to be unenforceable for uncertainty, was certain in the particulars challenged or was enforceable, finding that parties entered into a contract in writing as alleged by party seeking recovery under it was sufficient to support judgment.

9. Appeal and Error — 934(2)

Findings of trial court must be liberally construed to support its judgment.

10. Appeal and Error — 172(1)

Where purchaser's contention that deposit receipt was not a binding contract for

sale of property because there were, in addition to defendant, other owners who did not sign deposit receipt, was not argued to trial court, it was too late to raise question for first time on appeal.

11. Vendor and Purchaser $\S$ 341(3)

In action by prospective purchaser for amount deposited as part of down payment on purchase of realty, evidence sustained finding that by purchaser's refusal to perform contract vendor suffered damages in excess of amount of deposit.

12. Vendor and Purchaser $\S$ 335

Where vendor suffered damages in excess of amount of deposit made by purchaser because of purchaser's breach of contract for purchase of realty, vendor was entitled to retain deposit as set off against the damages.

Rutledge & Patton, Virgil O'Sullivan, Colusa, for appellant.

Noland, Hamerly & Etienne, Salinas, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment in favor of defendant. On March 19, 1952, plaintiff and defendant signed a deposit receipt for the sale to plaintiff by defendant of a motel in Salinas for the total purchase price of \$265,000. Plaintiff made a downpayment of \$5,000. The deposit receipt provided for the payment of the purchase price in the following language: "The total purchase price is \$265,000.00—Dollars and the balance of same is to be paid within _____ days from date hereof, as follows: Another \$15,000.00 to be paid 90 days from date of this deposit; mo. payments not exceed \$2,500.00 Total down payment to be \$50,000.00 and balance of down payment to be completed by Sept. 1, 1952."

Immediately after the signing of the deposit receipt a conference was held at the office of Harry L. Noland, acting as attorney for respondent Hunter and Hunter's son who had negotiated the transaction as

broker. Noland suggested the advisability of drafting a more formal contract and the terms of this more formal agreement were discussed. Thereafter such a document was prepared by Noland and submitted to appellant but never signed. Appellant by letter on May 28, 1952, demanded the return of his \$5,000 deposit and by letter of June 5, 1952, Noland advised appellant that the owners were ready, able and willing to perform in accordance with the terms of the contract. Nothing further having been heard from appellant the motel was sold for the same price to another purchaser in July.

Appellant's action was for the return of the \$5,000 deposit. It was in four counts. The first three counts pleaded the deposit receipt as a contract and alleged various breaches thereof by defendant. The fourth was a common count for money had and received. On appeal appellant relies only on the common count.

It is appellant's theory that the provision for monthly payments of the balance of \$215,000, which reads "mo. payments not exceed \$2,500.00," is too uncertain to constitute the deposit receipt an enforceable contract and for that reason he is entitled to the return of his deposit. *Blake v. Mosher*, 11 Cal.App.2d 532, 54 P.2d 492.

Appellant levels three attacks on the provision for monthly payments 1. the provision for payments not to exceed \$2,500 provides a maximum but no minimum and for that reason the amount to be paid monthly is not agreed to with certainty; 2. no provision is made for the rate of interest on the deferred payments; and 3. no provision is made for the manner in which the payment of the balance is to be secured.

[1-4] It is well settled that courts will give written agreements, if reasonably possible, a construction which will result in their being enforceable contracts. *Civil Code*, § 1643; *Roy v. Salisbury*, 21 Cal.2d 176, 184, 130 P.2d 706; *Long Beach Drug Co. v. United Drug Co.*, 13 Cal.2d 158, 166, 88 P.2d 698, 89 P.2d 386; *Burns v. Peters*,

5 Cal.2d 619, 623, 55 P.2d 1182; *Bradner v. Vasquez*, 102 Cal.App.2d 338, 342-343, 227 P.2d 559. "That a greater degree or amount of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages' has often been declared." *Long Beach Drug Co. v. United Drug Co.*, supra, 13 Cal.2d 158, 164, 88 P.2d 698, 701, 89 P.2d 386. On their face the words "mo. payments not exceed \$2,500.00" may be open to more than one construction. They might mean, as argued by appellant, that the exact amount was left to future agreement of the parties but in no event should exceed \$2,500 per month, but that is not the only reasonable construction. They may as reasonably mean that the seller is entitled to demand monthly payments up to but not exceeding \$2,500. The second construction makes the agreement certain and enforceable and under the authorities above cited is for that reason to be preferred. That construction is further supported by the conduct of appellant immediately following the signing of the deposit receipt. At the meeting at Noland's office on the same day Noland testified that the matter was discussed with appellant. Noland testified from the notes that he had made at that time. "The payments were to be twenty-five hundred dollars per month. * * * Then Mr. Cain brought up the matter of the payments, this twenty-five hundred dollar payment, whether or not it might—in the winter months it might be too much; and I think it was my suggestion or at least we talked it over that we might put in an option. As a matter of fact I have written here option to pay for the months of April, May, June, July, and August, and September, three thousand, a minimum of three thousand, and for the other six months a minimum of two thousand, rather than twenty-five hundred straight through." The trial court was entitled to find from this evidence that appellant understood and admitted immediately after the execution of the deposit receipt that he had bound

himself to pay \$2,500 per month. In case of ambiguity the construction put on the contract by the parties themselves before any controversy has arisen is persuasive of its proper construction and may be looked to by the courts. *Barham v. Barham*, 33 Cal.2d 416, 423, 202 P.2d 289; *Johnston v. Landucci*, 21 Cal.2d 63, 71, 130 P.2d 405, 148 A.L.R. 1355; *Caminetti v. National Guar. Life Co.*, 56 Cal.App.2d 92, 96, 132 P.2d 318; 12 Cal.Jur.2d, Contracts, § 129, p. 341.

The case of *Union Liquors v. Finkel & Lasarow*, 44 Cal.App.2d 706, 113 P.2d 19, relied upon by appellant, is factually different and is not a controlling authority in this case.

[5] The contract contains no provision for interest on deferred instalments. "It is the generally well-settled rule that where a contract makes no provision for the payment of interest no interest can be charged or collected prior to the time that payment falls due." *Upton v. Gould*, 64 Cal.App.2d 814, 817 and cases cited 817-818, 149 P.2d 731, 732. The failure to mention interest at all does not therefore create any uncertainty.

[6,7] The contract is equally silent on the subject of security. Where a contract makes no provision for security it is not thereby rendered uncertain. The law furnishes the security of a vendor's lien (Civil Code, § 3046) and if the contract is silent on the subject, as this one is, no obligation to furnish any other or different security is cast on the buyer. "It is claimed that the memorandum was uncertain, in that the manner of securing the deferred payments did not appear. In the absence of specific agreement by which deferred payments are to be secured in the sale of real property, the law fixes the security through a vendor's lien." *Tutt v. Davis*, 13 Cal.App. 715, 719, 110 P. 690, 692.

[8,9] Appellant complains that the court made no express finding that the con-

tract was certain in the particulars challenged. The court found the allegation of the first count of appellant's complaint to be true, that on March 19, 1952, the parties entered into a contract in writing whereby it is mutually agreed that defendant should sell to plaintiff and plaintiff should buy from defendant the described property on the terms provided in their agreement which was attached to the complaint. Appellant complains that while the court so found it failed to find that the contract was "enforceable." If it was not enforceable it was not a contract. The findings must be liberally construed to support the judgment (*Richter v. Walker*, 36 Cal.2d 634, 639-640, 226 P.2d 593) and it is clear in this case that the trial court decided against appellant on his claim of uncertainty.

[10] Appellant argues that since there were other owners of the property in addition to defendant, who did not sign the deposit receipt, it was not a binding contract. It is sufficient answer that no such question was argued to the trial court and it is too late to raise it for the first time on appeal. *Barrera v. De La Torre*, 48 Cal.2d 166, 172, 308 P.2d 724; *Townsend v. Winger*, 114 Cal.App.2d 64, 68, 249 P.2d 613. If the point had been raised below respondent might well have produced evidence that he was legally authorized to bind his co-owners in this transaction.

[11, 12] The court found that by appellant's breach respondent had suffered damages in excess of \$5,000. No attack is made on this finding which is supported by the evidence and defendant is entitled to retain the deposit as a set-off against the damages. *Royer v. Carter*, 37 Cal.2d 544, 547, 233 P.2d 539; *Gattuccio v. Kallam*, 153 Cal. App.2d 55, 57, 314 P.2d 178.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J.,
concur.

Marsha Carol RUBY, by her Guardian Ad Litem, Bernard Ruby, Frances Jane Ruby, by her Guardian Ad Litem, Bernard Ruby, Sadie Ruth Ruby and Bernard Ruby, Plaintiffs and Appellants,

v.

Joseph H. WELLINGTON and George J. Wellington, doing business under the name and style of the Wellington Cut Rate Drug Co., Williamson Candy Company, a corporation, John Doe Company, a corporation, Cash Wholesale and Tobacco Co., a corporation (sued as John Doe Co., a corporation) John Doe I, John Doe II, John Doe III, doing business under the name and style of John Doe Company, and Jane Doe I, and Jane Doe II, and John Doe III and John Doe IV, Defendants.

Joseph H. Wellington and George J. Wellington, a Co-partnership, doing business as the Wellington Cut Rate Drug Company, Respondents.

Civ. 23087.

District Court of Appeal, Second District,
Division 1, California.

July 15, 1958.

As Modified Aug. 4, 1958.

Personal injury action. From a judgment of the Superior Court, Los Angeles County, William E. Fox, J., dismissing plaintiffs' action, the plaintiffs appealed. The District Court of Appeal, Lillie, J., held that where plaintiffs' counsel, having obtained dates for pretrial and trial of case from clerk of court, telephoned defendants' counsel to verify his availability on those days, but defendants' counsel was absent so he talked with calendar clerk employed by defendants' counsel and asked if defendants' counsel would stipulate to those dates which fell more than five years beyond date of filing of complaint, and clerk informed him that those dates were agreeable without such knowledge, and at no time did defendants' counsel contact plaintiff as to fixing of dates, defendants were not estopped from seeking dismissal of action for failure to bring action on for trial within five-year period.

Judgment affirmed.

1. Appeal and Error $\S$ 907(1)

Where complete record is not before reviewing court, record must be presumed to support and sustain trial court's order.

2. Appeal and Error $\S$ 907(1)

All intendments and presumptions must be indulged to support judgment of trial court on matters as to which record is silent.

3. Estoppel $\S$ 119

The existence of estoppel is a question of fact.

4. Appeal and Error $\S$ 931(1)

In considering an appeal from an order granted on a motion based on affidavits and involving determination of a question of fact, if there is any conflict, those facts favoring respondents are accepted by reviewing court as true, and since all intendments are in favor of ruling of lower court, affidavits in behalf of successful party are deemed not only to establish the facts directly stated therein, but all facts reasonably to be inferred from those stated.

5. Appeal and Error $\S$ 1008(1)

Reviewing court will not disturb implied findings of trial court in absence of a showing of a clear abuse of discretion.

6. Dismissal and Nonsuit $\S$ 50

Where plaintiffs' counsel, having obtained dates for pretrial and trial of case from clerk of court, telephoned defendants' counsel to verify his availability on those days, but defendants' counsel was absent so he talked with calendar clerk employed by defendants' counsel and asked if defendants' counsel would stipulate to those dates, which fell more than five years beyond date of filing of complaint and clerk informed him that those dates were agreeable without such knowledge, and at no time did defendants' counsel contact plaintiff as to fixing of dates, defendants were not estopped from seeking dismissal of action for failure to bring action on for trial within five-year period. West's Ann.Code Civ. Proc. $\S$ 583.

7. Estoppel $\S$ 99

Principle of estoppel appropriately applied in certain inequitable situations may

sometimes furnish a proper excuse for dilatory action, but doctrine is not an omnibus defense nor is it one which will automatically afford relief when an unfortunate situation is but the result of a party's own dereliction.

8. Estoppel $\S$ 52

In order for doctrine of estoppel to be applicable, party to be estopped must know the facts, he must intend that his conduct shall be acted upon or must so act that party asserting estoppel has a right to believe it is so intended, the latter must be ignorant of the true facts, and he must rely on the former's conduct to his injury.

9. Dismissal and Nonsuit $\S$ 60(1)

Statute providing that an action shall be dismissed by court in which it shall have been commenced unless action is brought to trial within five years after plaintiff has filed his action, except where parties have filed a stipulation in writing that time be extended and except where defendant has been absent from state or concealed therein, is mandatory. West's Ann.Code Civ. Proc. $\S$ 583.

10. Dismissal and Nonsuit $\S$ 60(1)

Under statute providing for dismissal unless action is brought to trial within five years after plaintiff has filed his action, estoppel or an oral agreement cannot be employed to extend the statutory time. West's Ann.Code Civ.Proc. $\S$ 583.

11. Appeal and Error $\S$ 948

Party complaining of dismissal of action for failure to prosecute same within five years must establish a clear abuse of discretion on part of trial court in dismissing the action. West's Ann.Code Civ. Proc. $\S$ 583.

Koos & Lindstrom, Edward Clayton Jones, Los Angeles, for appellants.

James V. Brewer, Los Angeles, for respondents.

LILLIE, Justice.

Plaintiffs appeal from an order granting defendants' motion to dismiss pursuant to

the provisions of section 583 of the Code of Civil Procedure and a judgment of dismissal following the order.

On August 14, 1952, the plaintiffs filed a personal injury complaint against defendants Wellington, represented by James V. Brewer, Esq., and other defendants not directly concerned with this appeal. The record does not disclose the action taken during the succeeding four years, but the cause was set for trial June 21, 1956. On that date it was placed off calendar subject to being reset for trial by stipulation at the expiration of thirty days. One year later on June 21, 1957, plaintiffs' counsel, having obtained dates for pre-trial and trial from the clerk in department 1, telephoned defendants' counsel to verify his availability on those days. Unable to contact Mr. Brewer personally, plaintiffs' counsel talked to his calendar clerk, related his conversation with the court clerk and counsel for codefendants and asked her if "Mr. Brewer's office" would stipulate to the dates of October 28, 1957, for pre-trial and December 12, 1957, for trial. Although both of these fell more than five years beyond the date of filing of the complaint, the record does not show that counsel so advised the calendar clerk. Without this knowledge, she told him that both dates were "agreeable" and that if he would prepare the stipulation, Mr. Brewer would execute it. On June 28, 1957, counsel mailed to him a written stipulation restoring the matter to the trial calendar. Receiving no response, counsel telephoned him during the week of August 19th while Mr. Brewer was away from his office. Counsel wrote him again on August 25, 1957, reminding him to sign the stipulation. Receiving no reply he sent another letter on September 21, 1957. On October 2, 1957, defendants Wellington filed their motion to dismiss pursuant to section 583 of the Code of Civil Procedure on the grounds that the action had not been brought to trial within five years after the filing of the complaint and that there had been a want of prosecution. The motion was heard on affidavits

and granted. The lower court entered judgment accordingly.

[1,2] Appellants' main contention is that although the action was not brought to trial within the five-year period, the conduct of respondents' counsel estopped him from invoking section 583 of the Code of Civil Procedure and the trial court erred in dismissing the action. No mention having been made in appellants' brief concerning want of prosecution, one of the grounds upon which the motion was made and granted, we assume that any point in connection therewith is abandoned. However, respondents' mention of it in their brief causes us to comment briefly that the complete record not being before the court it must be presumed to support and sustain the trial court's order in that regard. *Kinley v. Alexander*, 137 Cal.App.2d 382, 290 P.2d 287; *Valley Group Pipe Trades Trust Fund v. L. R. Strain Plumbing & Heating Co.*, 131 Cal.App.2d 432, 280 P.2d 536. All intendments and presumptions must be indulged to support the judgment of the trial court on matters as to which the record is silent. *Chaffin v. Wallace Finance Co.*, 136 Cal.App.2d Supp. 928, 289 P.2d 313.

[3-6] On the issue of estoppel, appellants claim that in reliance upon the calendar clerk's statement and the silence of Mr. Brewer, they did not move the court for a trial date within the five-year period and because of this, respondents are estopped to invoke section 583. The existence of an estoppel is a question of fact. *Safway Steel Products, Inc., v. Lefever*, 117 Cal.App.2d 489, 256 P.2d 32; *Pike v. Rhinehart*, 112 Cal.App.2d 530, 246 P.2d 963. The motion to dismiss was heard entirely on affidavits and counteraffidavits. In considering an appeal from an order granted on a motion based on affidavits and which involves the determination of a question of fact, if there is any conflict therein, those facts favoring the respondents are accepted by the reviewing court as true, and since all intendments are in favor of the ruling of the lower court, the affidavits in behalf of

the successful party are deemed not only to establish the facts directly stated therein, but all facts reasonably to be inferred from those stated: *DeWit v. Glazier*, 149 Cal.App.2d 75, 307 P.2d 1031; *Doak v. Bruson*, 152 Cal. 17, 91 P. 1001; *West Coast Securities Co. v. Kilbourn*, 110 Cal. App. 293, 294 P. 57. This court will not disturb the implied findings of the trial court in the absence of a showing of a clear abuse of discretion. *DeWit v. Glazier*, *supra*; *MacPherson v. West Coast Transit Co.*, 94 Cal.App. 463, 271 P. 509; *Ham v. County of Los Angeles*, 46 Cal.App. 148, 189 P. 462. Under the trial court's ruling there is an implication that the facts did not constitute an estoppel, nor do we believe all of the elements of estoppel are present even though we do not approve of the conduct of Mr. Brewer, designed to result in a dismissal of the action. Viewing the affidavits in the light most favorable to respondents, it appears that counsel's primary object in talking to Mr. Brewer's calendar clerk on June 21, 1957, was to determine the open dates on his calendar for a pre-trial and trial. She told him that his proposed dates were "agreeable." She had authority only to state whether or not certain dates were available but not to sign written stipulations either for setting or continuance. The usual practice was for the calendar girl to make known to the other lawyers the dates available on the calendar and then submit the stipulations to Mr. Brewer or his associates for their signatures. The proposed stipulation was not before the lower court nor is it in the record on appeal. It is conceded, however, that no written stipulation extending the time within which the matter could be tried was executed and no negotiations for settlement were then pending. It is clear that if the operation of the statute is to be waived appellants must rely entirely upon estoppel or an oral agreement.

The record before this court is silent as to any activity in the case between June 21, 1956, and June 21, 1957, with the exception of a letter from plaintiffs' counsel dated April 29, 1957, indicating his interest in set-

ting the matter. We must assume that appellants were no more hampered in setting the action for trial during that year than they were during the four years previous. After a year of apparent silence appellants, less than three months before the five-year period was to expire, became active in resetting the case for trial. Most law offices have a clerk designated to keep court dates and appointments in order. It is difficult to believe that any lawyer could conscientiously urge that a mere statement by a calendar clerk that a certain date was open on the calendar and was "agreeable" for a trial or a hearing could be construed as an agreement, binding on her employer, that a case would definitely go to trial on that day, or that he would try the case after the statutory time had expired, particularly when opposing counsel failed to advise her that the proposed date was beyond the five-year period. Certainly no ordinary calendar clerk has the authority to bind her employer's client; nor had this one, whose authority extended only to advising whether certain dates were available and keeping a specific date open for a specific purpose. Under these circumstances, knowing full well the status of his litigation, we fail to see what right counsel had to rely upon the calendar clerk's statement except to the extent that a certain date was agreeable and would be reserved for a particular hearing. Appellants seek to rely upon her statement as an oral agreement, but even if it could be construed as an oral stipulation that the matter would be tried on a certain date, such agreement surely could not bind Mr. Brewer. Nor did counsel have a right to believe that because of Mr. Brewer's silence in the matter he was willing to and would sign the stipulation. On the contrary, continued silence for three months in the face of numerous communications, the acknowledged passage of time and the known state of the litigation should have caused any reasonable and diligent person to believe that he did not intend to sign the stipulation. The record fails to show that during the three months counsel waited he was in any way prevented from moving the court for

an immediate setting. Appellants claim that during this time they received not the slightest indication that their trust in Mr. Brewer was not warranted and that he would not sign the stipulation. We wonder, after the various communications to Mr. Brewer without response, what additional would be required for appellants to suspect that no stipulation was forthcoming.

[7,8] The argument that the default on appellants' part stems from counsel's misleading conduct is not persuasive. The principle of estoppel appropriately applied in certain inequitable situations may sometimes furnish a proper excuse for dilatory action but the doctrine is not an omnibus defense nor is it one which will automatically afford relief when an unfortunate situation is but the result of a party's own dereliction. Four things are essential for the application of the doctrine: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. *Safway Steel Products, Inc., v. Lefever*, 117 Cal.App.2d 489, 491, 256 P.2d 32; 18 Cal.Jur.2d, Sec. 5, 406, 407.

Appellants' counsel may well have relied upon the calendar clerk's conversation with him to the detriment of his clients, but we fail to see how he had a right to do so. We find in the evidence no oral agreement between the calendar clerk and appellants' counsel binding upon Mr. Brewer and we cannot believe that appellants' counsel was ignorant of the true facts relating to the status of his litigation. The record fails to disclose facts that would justify the court in finding that all of the elements of estoppel were established. Even had the record sustained such a finding, it is clear that the law does not contemplate estoppel or an oral agreement as implied exceptions to section 583 of the Code of Civil Procedure. That section provides in pertinent part as follows:

"Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period. * * *

[9,10] Appellants submit that an oral agreement or estoppel is sufficient to preclude the application of section 583 in that they constitute implied exceptions to the rule set out in the statute. We are bound by the wealth of authority that holds that the provision for dismissal after the lapse of the statutory time is mandatory. *Superior Oil Co. v. Superior Court*, 6 Cal.2d 113, 56 P.2d 950; *Meir v. Superior Court*, 55 Cal.App.2d 675, 131 P.2d 554; *Douglas v. Superior Court*, 94 Cal.App.2d 395, 210 P.2d 853. In the case of *Ellsworth v. United States Metals Corp.*, 110 Cal.App.2d 727, at page 728, 243 P.2d 575, at page 576, the court stated the rule: "The provision for dismissal after the lapse of the statutory time is mandatory (Citation) unless the plaintiff brings the case within one of the exceptions named in section 583 or within one of the implied exceptions engrafted on the statute by the decisions." Neither an oral agreement nor estoppel is expressly provided for in the statute. The implied exceptions established by various decisions all relate to situations in which for some reason it was impossible, impractical or futile to bring the action to trial. Of the many authorities reviewed, none contemplate the employment of estoppel or oral agreement to extend the statutory time. The court, in *Berger v. McMahan*, 116 Cal.App.2d 328, 253 P.2d

Jose V. CARDOSO and Celeste Cardoso,
Petitioners and Appellants,

v.

DEPARTMENT OF ALCOHOLIC BEV-
ERAGE CONTROL of the State of
California, Respondent.

Civ. 9400.

District Court of Appeal, Third District,
California.

July 21, 1958.

543, made this clear. There the plaintiff contended that he had been led to believe through action on the part of counsel that the matter would be negotiated and settled and therefore took no action to bring the case to trial. At page 329 of 116 Cal.App. 2d, at page 544 of 253 P.2d the court, quoting Bank of America Nat. Trust & Savings Ass'n v. Moore & Harrah, 54 Cal. App.2d 37, 128 P.2d 623, said: "Plaintiff first raises the question, 'Do oral stipulations have the effect of stopping the defendant from enforcing section 583, C.C.P.?' The plaintiff has not pointed out the oral stipulations referred to and none are disclosed by the record. However, the code section itself provides for the mandatory dismissal of the action upon motion either of counsel or the court where such action has not been brought to trial within five years after the plaintiff has filed his action except upon the written stipulation of counsel extending the time or where the defendant has been absent from the state or has been concealed within the state."

Appellant relies on Cameron v. Cameron, 110 Cal.App.2d 258, 242 P.2d 408, a case in which there were pending mutual bona fide efforts to compromise. In view of the entirely different factual situation involved therein and an absence of direct holding on the issue at bar, we believe the case not to be in point

[11] It is incumbent upon appellants to establish a clear abuse of discretion on the part of the trial court. Hibernia Sav. & Loan Soc. v. Laufer, 41 Cal.App.2d 725, 107 P.2d 494; Inderbitzen v. Lane Hospital, 17 Cal.App.2d 103, 61 P.2d 514; St. Clair v. Brix, 89 Cal.App. 94, 264 P. 307. No abuse of discretion has been found in the record. The absence of any showing that this case falls within the statutory exception and appellants' failure to bring the cause to trial within the five-year period gave the trial court no alternative but to dismiss.

Judgment affirmed.

WHITE, P. J., and FORT, J., concur.

Mandamus proceeding by liquor licensees seeking review of decision of Department of Alcoholic Beverage Control revoking liquor license. The Superior Court, Sacramento County, James H. Oakley, J., dismissed petition, and licensees appealed. The Third District Court of Appeal, Warne, J. pro tem., held that liquor licensees were not entitled to court review of decision without first appealing to Alcoholic Beverage Control Appeals Board.

Affirmed.

Administrative Law and Procedure ¶228
Intoxicating Liquors ¶108(10)

Liquor licensees were not entitled to a court review of decision of Department of Alcoholic Beverage Control revoking their license without first appealing to Alcoholic Beverage Control Appeals Board. West's Ann.Bus. & Prof.Code, § 23081.

Anthony J. Kennedy, Sacramento, for appellants.

Edmund G. Brown, Atty. Gen., by William T. Chidlaw, Deputy Atty. Gen., for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment of dismissal entered upon an order sustaining a general demurrer to a petition for a writ of mandate without leave to amend.

The petition was filed by appellants, seeking review of a decision of the Department of Alcoholic Beverage Control which re-

voked their on-sale liquor license. Appellants did not appeal the decision to the Alcoholic Beverage Control Appeals Board as provided in Section 23081 of the Business and Professions Code, but instead proceeded from the decision directly to the superior court. The demurrer was sustained on the ground that appellants had failed to exhaust their administrative remedy.

Appellants contend that they had an alternative statutory remedy of judicial review and that the doctrine of exhaustion of administrative remedy has no application.

The contention presents the question: May a liquor licensee seek a court review of a decision of the Department of Alcoholic Beverage Control Board revoking a license without first appealing to the Alcoholic Beverage Control Appeals Board?

The question has been decided adversely to appellants' contention in *Hollywood Circle, Inc., v. Department of Alcoholic Beverage Control*, 153 Cal.App.2d 523, 314 P.2d 1007, and in *Fiscus v. Department of Alcoholic Beverage Control*, 155 Cal.App.2d 234, 317 P.2d 993, in each of which cases a like question was presented. In the *Hollywood Circle* case, *supra* [153 Cal.App.2d 523, 314 P.2d 1010], the court said:

"Referring to *Hollywood Circle's* final contention that it had the right to appeal under Government Code, section 11523, without appealing to the Appeals Board of the Department of Alcoholic Beverage Control. Examination of the constitutional and code provisions as to liquor control refutes this contention. The applicable part of the Constitution is as follows: '* * * When any person aggrieved thereby appeals from a decision of the department * * * revoking any license * * * the board shall review the decision subject to such limitations as may be imposed by the Legislature.' Const., art. XX, § 22.

"Pursuant to this constitutional power the legislature enacted section

23081 of the Business and Professions Code, with its requirement that an aggrieved person had forty days in which to appeal from a decision of the Department."

And in the *Fiscus* case, *supra* [155 Cal. App.2d 234, 317 P.2d 994], after quoting the language which we have quoted from the *Hollywood Circle* case, the court had this to say:

"Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy must be exhausted before the courts will act. *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715. Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. *Abelleira v. District Court of Appeal*, *supra*, 17 Cal.2d at page 293, 109 P.2d at page 942, 132 A.L.R. 715; *United States v. Superior Court*, 19 Cal.2d 189, 194, 120 P.2d 26. The doctrine of exhaustion of administrative remedies applies where a statute provides an administrative remedy, even though the terms of the statute do not make the exhaustion of the remedy a condition of the right to resort to the courts. *First Nat. Bank of Greeley v. Board of County Com'rs*, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784, 788-789. The doctrine, whenever applicable, requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. [Citing many cases.]"

Applying the rule laid down in the *Hollywood Circle* case and the *Fiscus* case, we conclude that the judgment in the instant case must be affirmed.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

162 Cal.App.2d 58

Minnie V. BEANE, Plaintiff and Respondent,
v.

LOS ANGELES TRANSIT LINES, a corporation,
Defendant and Appellant.

Civ. 22964.

District Court of Appeal, Second District,
Division 1, California.

July 9, 1958.

Action by bus passenger against bus company for injuries sustained in a fall on bus. From an order of the Superior Court, Los Angeles County, Joseph L. Call, J., granting passenger's motion for a new trial, the bus company appealed. The District Court of Appeal, Fourth, J., held that the giving or refusing of an instruction will not be reviewed by an appellate court unless the record sets forth the requested or questioned instruction.

Order affirmed.

Appeal and Error ⇨699(2, 4)

The giving or refusing of an instruction will not be reviewed by an appellate court unless the record sets forth the requested or questioned instruction.

Ronald A. Burford, Los Angeles, for appellant.

E. O. Leake and J. J. Leake, San Gabriel, for respondent.

FOURTH, Justice.

This is an appeal from an order granting plaintiff's motion for a new trial.

Plaintiff brought an action for damages for certain personal injuries allegedly sustained after she had fallen in a bus of the defendant while she was a passenger therein. At the trial the verdict of the jury was in favor of the defendant.

The plaintiff made a motion for a new trial upon substantially all of the statutory grounds. The minute entry with reference to the order of the court is as follows:

"Plaintiff's motion for new trial comes on regularly for hearing; E. O. Leake of E. O. Leake & J. J. Leake appearing as counsel for plaintiff and Ronald A. Burford by Gerald E. McCluskey appearing as counsel for defendant.

"Motion is argued. Motion for new trial is by the Court granted, the Court citing the case of Shaw v. Pacific Greyhound Lines 153 ACA No. 1, 43, [314 P.2d 167] and the court's error in instruction of the jury.

"The above minute order is true and correct.

"/s/ A. Yosha [Deputy County Clerk]"

The appellant contends that the court erred in citing Shaw v. Pacific Greyhound Lines, 153 A.C.A. 43, 314 P.2d 167; that it was not error to give *res ipsa loquitur*, even when applicable, unless requested by the plaintiff; that it was not error to give *res ipsa loquitur* and BAJI No. 131 together, and that it was not error to give BAJI No. 131 in the instant case, in the absence of an instruction on *res ipsa loquitur*.

In the order granting the motion for a new trial, no mention whatever is made of instruction BAJI No. 131, or of the giving or not giving of an instruction on *res ipsa loquitur*. The court undoubtedly gave many instructions to the jury, several of which the plaintiff apparently contended were erroneous. The court, in granting the motion for a new trial, determined that it had erroneously instructed the jury, but did not specify in what respect such error had occurred, or what particular instructions were erroneous.

None of the instructions given, nor the instructions refused are in the record before this court, and it is therefore impossible for us to determine whether there was any error in the giving or in the refusing to give any particular instruction. See Thomas v. Laguna, 113 Cal.App.2d 657, at page 660, 248 P.2d 929, at page 931:

"(1) The giving of an instruction will not be reviewed by an appellate court unless the record sets forth the questioned instruction. (Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 27, 276 P. 1017 * * *.)

"(2) The refusing of an instruction will not be reviewed by an appellate court unless the record sets forth the requested instruction. (Alexander v. McDonald, 86 Cal.App.2d 670, 671, 195 P.2d 24 * * *.)"

The order granting the plaintiff's motion for a new trial is affirmed.

WHITE, P. J., and LILLIE, P. J.,
concur.



162 Cal.App.2d 66

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joseph Richard SMITH, Defendant and
Appellant.
Cr. 6162.

District Court of Appeal, Second District,
Division 1, California.

July 9, 1958.

Defendant was convicted of unlawfully committing a lewd and lascivious act upon the body of a five year old female child and from orders of the Superior Court of Los Angeles County, Edward R. Brand, J., granting probation and denying a motion for new trial, the defendant appealed. The District Court of Appeal, Fourt, J., held that a five year old child was a competent witness.

Orders affirmed.

1. Witnesses ⇨40(1)

In prosecution for lewdness, child of five upon whom the acts were allegedly

committed, was a competent witness. West's Ann.Welfare & Inst.Code, § 5504; West's Ann.Code Civ.Proc. § 1880.

2. Criminal Law ⇨1153(2)

Trial court's determination of competency of a trial witness should not be disturbed on appeal in the absence of showing of an abuse of discretion. West's Ann. Code Civ.Proc. § 1880.

3. Witnesses ⇨79(4)

The appellate court, in reviewing the question of competency of a child witness where it has the entire record made by the witness, does not need to restrict itself to the voir dire examination to review the question of her competency. West's Ann. Code Civ.Proc. § 1880.

Ward Sullivan, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Morris Schachter, Deputy Atty. Gen., for respondent.

FOURT, Justice.

In an information in two counts, the defendant was charged in count I with unlawfully committing a lewd and lascivious act upon the body of a five year old female child. In count II, the defendant was charged with a similar act as to the same child. The defendant pleaded not guilty and waived a jury trial. The court found him guilty as to the charge set forth in count II, and not guilty as to the charge set forth in count I. Three doctors were appointed by the court, under the provisions of section 5504, Welfare and Institutions Code, and the defendant was committed to Atascadero State Hospital for observation and diagnosis for a period of not to exceed ninety days. He was found to be not a sexual psychopath.

A motion for a new trial was denied. Imposition of sentence was suspended and defendant was granted five years probation upon specified conditions. The defendant now appeals from the order granting proba-

tion, and from the order denying his motion for a new trial.

The child, age five, lived with her mother and father (defendant herein). No useful purpose would be served by relating all of the testimony or the substance of the testimony in this particular case. Suffice it to say that the evidence does disclose, among other things, that the defendant caused the child to pursue a vulgar and inexcusable course of conduct with reference to his private parts. The defendant told the child that the matter was a secret and that she should not tell her mother, but the child, in any event, did relate the story to her mother.

The child's mother had put the youngster to bed about nine o'clock p. m., on the date in question, and while the mother was in the living room, at about midnight, the child called for her to come to the bedroom. The child then complained to her mother about what had occurred. The defendant was "passed out" in the bedroom, and the mother went to a telephone in a market about two blocks away, and called one Betty Luttrell, and then returned to the apartment. About five o'clock a. m., Mrs. Smith asked the appellant if what the child had stated or complained of was true, and he answered, "If it is, I don't remember." The mother contacted the police shortly thereafter.

On February 22, 1957, at a police station, the appellant made some statements to the police. A policewoman who was there at the time testified in part as follows:

"Mr. Smith was asked about the complaint his daughter had made against him regarding his having her place her mouth on his private parts on the 18th of February. He stated that that was the day he could not well remember because both he and his wife had been drinking very heavily. They had picked the children up where they had left them for the day sometime in the afternoon, and the rest of the afternoon and evening were completely forgotten, as far as he was concerned, because he had been so much intoxicated.

"He stated that approximately two weeks prior to that date, however, that he had his

daughter hold his penis and kiss it, as he put it."

On further examination, this same witness stated:

"By Mr. Powell (Deputy Public Defender) Q. Did you ask him or did he say anything about going about the house without clothes on?

"He stated that he and his wife had walked around in the nude in the front of the children on occasion.

* * * * *

"Yes, as I recall. He can't explain his actions. He complained about being a heavy drinker and he didn't know why he did these things.

* * * * *

"He said he couldn't explain why he did it, as I recall the conversation.

* * * * *

"The Court: Did you ask him how many times this had occurred?

"The Witness: Yes, your Honor. We asked him if it had occurred more than once and he said, that's all, it had happened only once, and the day we mentioned, he couldn't remember that day at all. He had no memory of it, your Honor.

"By Mr. Powell: Q. Had he made denials of doing this prior to this statement of his?

"A. Well, of course, when we started talking, we thought the date was the 18th and we asked him that and he couldn't remember that. He volunteered the two weeks prior without our asking him.

"Q. He volunteered that?

"A. Yes."

Before the child was permitted to testify, certain questions were put to her by the judge and counsel, for the purpose of ascertaining whether she could be a witness. The child gave her correct age and answered that she would tell the truth to the judge and counsel if she were asked questions. She indicated that if she promised to tell the truth she would not be making anything up, and she nodded affirmatively when asked if she would get punished if

she lied. The youngster then related that she went to kindergarten and demonstrated that she could count. When asked about how she had lost two front teeth she said, "Simple."

"Mr. Woodmansee (Deputy District Attorney): How?

"Stephanie Smith: You get them loose and they are out.

"Mr. Woodmansee: And is that what happened to your two front teeth?

"Stephanie Smith: Yes."

[1] She related about her younger three-year-old brother, and told of their living where there were some other children (Juvenile Hall). At the preliminary hearing, the child was asked if she knew what happened to little girls who did not tell the truth, and she answered, "You get put in jail."

The trial court held, in effect, that under section 1880, Code of Civil Procedure, the child did appear capable of receiving just impressions of the facts respecting which she was to be examined, or of relating them truly, and that she would be a competent witness. *People v. Goff*, 100 Cal.App.2d 166, 170, 223 P.2d 27; *People v. Arcia*, 85 Cal.App.2d 127, 129, 192 P.2d 31; *People v. Denton*, 78 Cal.App.2d 540, 545-546, 178 P.2d 524.

[2] The trial judge had the child before him, and he was in a better position to determine her competency than we are, (*People v. Lopez*, 51 Cal.App. 476, 477, 197 P. 144), and in the absence of some showing of an abuse of discretion, the determination of the trial judge should not be disturbed on appeal. *People v. Freeman*, 24 Cal.App.2d 619, 621, 75 P.2d 640.

[3] Furthermore, the trial judge had the opportunity of seeing and hearing the child throughout the trial, and from what took place at the hearing he must have been satisfied that the child was a competent and proper witness. We have the benefit of the entire record made by the witness, and we do not necessarily need to restrict ourselves to the voir dire examination to review the

question of her competency. *People v. Freeman*, supra; *People v. Morcumb*, 28 Cal.App.2d 465, 467, 82 P.2d 714; *People v. Lamb*, 121 Cal.App.2d 838, 844, 264 P.2d 126; *People v. Ernst*, 121 Cal.App.2d 287, 290-291, 263 P.2d 114.

Our reading of the entire record convinces us that the trial judge reasonably concluded that the child had the capacity to receive impressions and to relate them truthfully.

The orders granting probation and denying appellant's motion for a new trial are, and each is, affirmed.

WHITE, P. J., and LILLIE, J., concur.



162 Cal.App.2d 177

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.**

**Ralph CASTRO, Defendant and Appellant.
Cr. 6076.**

District Court of Appeal, Second District,
Division 3, California.

July 16, 1958.

Prosecution for the fatal stabbing of another. From adverse judgment of the Superior Court, Los Angeles County, Richard C. Fildew, J., and from an order denying motion for new trial, the defendant appealed. The District Court of appeal, Parker Wood, J., held that evidence was sufficient to sustain rejection of claim of self defense and to sustain conviction for manslaughter.

Judgment and order affirmed.

I. Homicide ⚔244(1)

Evidence was sufficient to sustain rejection of claim of self-defense and to sustain conviction for manslaughter.

2. Criminal Law §730(3)

In prosecution for the fatal stabbing of a person with an ice pick, question asked by deputy district attorney of prosecution witness if he had had a transaction or "beef" with accused in which an ice pick was used was not prejudicial to defendant in view of negative answer and court's statement that he would strike answer unless it was shown that defendant had a plan of carrying an ice pick.

Robert H. Green, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Herschel T. Elkins, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

[1] Defendant was accused of the crime of murder. It was also alleged in the information that defendant had been convicted of robbery. In a nonjury trial he was adjudged guilty of manslaughter. No determination was made as to the allegation of prior conviction. Defendant appeals from the judgment and the order denying his motion for a new trial.

Appellant asserts that the evidence was insufficient to support the judgment; and that the deputy district attorney was guilty of misconduct.

On March 8, 1957, about 11:30 p. m., the defendant and Raul Estrada, who were in a saloon in Los Angeles, engaged in an argument. Within a few minutes thereafter they were fighting outside, and at the rear of, the saloon. A patron of the saloon stopped the fight. Defendant and Estrada returned to the saloon, and about five minutes thereafter they began fighting inside the saloon. While they were fighting and wrestling they moved to the telephone booth. Defendant backed Estrada into the booth, and they continued wrestling in the booth. When Estrada tried to walk from the booth he fell and collapsed on the floor of the saloon. Defendant walked about half way to the outside door and then ran outside. Estrada died a few minutes after

he fell. There were seven stab wounds on Estrada—one in the neck, just below the jaw; two in the left chest which penetrated the heart; another in the left chest; one in the abdomen; and two in the upper part of the left arm. The wounds were "circular" and were one-eighth inch in diameter. The cause of his death was stab wounds in the chest with penetration of the heart.

A waitress, in the saloon, testified that an ice pick was kept in the back bar; the ice pick was in the back bar on the evening of March 8, 1957; she did not see the ice pick on the "counter" that evening.

About 3:45 a. m. on March 9, a police officer knocked on the front door of defendant's residence and identified himself as a police officer. At that time another officer, who was near the rear door of the residence, flashed a light through the rear screen door, and he saw defendant inside the door with shoes in his hand. Then the defendant, who had started back into the main part of the house, said: "Let them in. They caught me at the back door." Defendant was arrested at that time.

Officer Cutts testified that, in conversations with defendant on March 9 and 10, defendant said: that he had had a running dispute with Estrada about a year and a half—that defendant attended a hair-styling school and as a result of that Estrada had constantly needled him and referred to him as a "queer," and that Estrada had accused him of "beating him [Estrada] out of \$5.00"; that on March 8, when they were at the bar, Estrada began needling him about the \$5.00, and they agreed to go outside and fight; while they were fighting in the rear patio, a patron of the bar, one Gaytan, came out and struck defendant and stopped the fight; they returned to the barroom, and about five minutes thereafter Estrada renewed the fight and jumped on defendant; the defendant had seen an ice pick on the counter, he and Estrada "grappled" for the ice pick and it fell on the floor; then they "went to the floor," and defendant got the ice pick; at that time defendant was struck across his back

with a "cue stick"; when they came up from the floor, the defendant had the ice pick in his right hand; Gaytan struck defendant's right hand with the cue and ordered defendant to drop the ice pick; defendant recalled striking Estrada on the head with the handle of the ice pick "but not with the blade"; they wrestled into the telephone booth, and Estrada's back was against the wall; defendant did not recall stabbing Estrada with the ice pick, but he (defendant) felt that if Estrada was stabbed he must have run into the ice pick; Estrada said, "Okay."; then defendant stepped back, and Estrada began to fall forward; Gaytan chased defendant from the barroom "with the cue stick"; after leaving that place, defendant went in his automobile to a gasoline station where he smashed the ice pick handle, and "broke the blade up," with a hammer; he flushed the broken ice pick down the toilet; then he went home; after he was at home he went to the front door of the house three times because he was afraid that the police, or persons from the barroom, would come after him.

Defendant testified that, before the first fight, Estrada called him a "queer," and said things about defendant's wife, and said that defendant owed him money; after the first fight they returned to the barroom and Estrada sat at the end of the bar, and defendant sat in a chair across the room from the bar; a few minutes thereafter, while defendant was going by the bar (and Estrada) to the rest room, Estrada got off the seat, went in front of defendant and continued the fight; when they were in front of the telephone booth, Estrada began "swinging" at defendant; Estrada had an ice pick in his hand; they were fighting in the telephone booth—Estrada was inside and defendant was outside the booth; the ice pick dropped on the floor; they both tried to get the ice pick, but the seat of the booth kept Estrada from getting it; defendant got the ice pick; at that time three or four persons, who were back of defendant, were hitting de-

fendant on the head with some objects; one person hit him on the head with a "cue stick." Defendant testified further that he did not remember stabbing Estrada; he did not "remember deliberately stabbing him like that [indicating]"; he remembered that Estrada was trying to get out of the booth and that he (defendant) dropped the ice pick; he also remembered that some fellows chased him out, with the stick and with bottles; when defendant left, Estrada was standing and did not appear to be seriously wounded. Defendant also testified that he had been convicted of first degree robbery in 1946; he did not remember using the ice pick; he did not "remember deliberately stabbing him [Estrada]"; if he did use the ice pick, he used it in self-defense; the last he remembered "was dropping it near the entrance" of the barroom; he might have told the officers that he went to a rest room and broke the ice pick into little pieces and flushed it down the toilet.

Appellant's argument, regarding the alleged insufficiency of the evidence, is to the effect that the evidence shows that appellant acted in self-defense. Decedent was stabbed seven times, including a stab in the neck and two stabs in the heart. The trial judge (trier of facts herein) could have concluded, from the fact that such wounds were inflicted, that appellant was not merely defending himself. Evidence which indicated consciousness of guilt was, as follows: Immediately after the stabbing, appellant ran from the barroom; after leaving the barroom, he broke the ice pick into small pieces and flushed the pieces down a toilet; when defendant was inside the rear screen door of his house, after the stabbing, and when one officer was at the front door of the house and another at the rear door, defendant said, "Let them in. They caught me at the back door." Whether appellant was acting in self-defense was a question of fact for the determination of the trial judge. See *People v. Turner*, 86 Cal.App. 2d 791, 799-800, 195 P.2d 809. The evi-

dence was sufficient to support the judgment.

[2] Appellant also contends that the deputy district attorney was guilty of misconduct in that the deputy asked a prosecution witness, Mr. Coria, if he had had a transaction or "beef" with appellant in which an ice pick was used. Counsel for appellant objected to the question on the ground that it was incompetent and immaterial. The deputy said: "[T]he case before your Honor on the transcript, contains within it a suggestion that there was a haggle over an ice pick between two people. This brings in the possibility of a self-defense. If the People have a witness who can show that, as a trademark of the defendant's activities, he customarily went around equipped with an ice pick, that would show considerable light on whether or not there was a haggle over an ice pick. In the transcript transaction, it is being offered for that purpose, to show that on a prior occasion the defendant had trouble with this witness, and the defendant produced from his own person, and used an ice pick." Counsel for appellant said that he felt that such a statement, by the deputy, was misconduct. The judge said that he (judge) did not think it was misconduct but, as he remembered the transcript, the ice pick that was used was taken from the back bar. The deputy said that he had another witness who would testify that "this is not the case, that the bar ice pick was of a different nature than the ice pick that defendant used." The objection was overruled, and the judge said: "I will strike it unless it is connected up to show that this gentleman had a plan of carrying an ice pick, and would have had one there, and you can make your motion to strike it if it is not connected up." The witness answered the question in the negative, i. e., that he had not been involved in such a transaction. The matter was not referred to again. No motion was made to strike that testimony. In view of the statement of the trial judge in overruling the objection, and in view of the

negative answer, it cannot be said that appellant was prejudiced by the question.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and NOURSE, J. pro tem., concur.



162 Cal.App.2d 60

Alta Mae MATTISON, Plaintiff and Appellant,

v.

W. L. LICHLYTER and Jessie Hoeffler, Defendants,

W. L. Lichlyter, Respondent.

Civ. 23100.

**District Court of Appeal, Second District,
Division 1, California.**

July 9, 1958.

Civil action. From an order quashing service of summons, opening a default and vacating a default judgment in the Superior Court of Los Angeles County, William E. Fox, J., the plaintiff appealed. The District Court of Appeal, Fourth, J., held that where nonresident was extradited from Colorado for the purpose of having him appear as a witness in a criminal case, and while in California, he was served with process and a default judgment taken against him, motion of the nonresident to open a default and to vacate the judgment could be made without alleging that he had a meritorious defense to the causes of action.

Order affirmed.

I. Process ☞ 120

Witnesses in attendance on a court outside the territorial jurisdiction of their residences are immune from service of civil process, while attending court, and for a reasonable time before and after, in going to court and returning to their homes.

2. Judgment ⇨145(2)

Where nonresident was extradited from Colorado for the purpose of having him appear as a witness in a criminal case, and while in California, he was served with process and a default judgment taken against him, motion of the nonresident to open a default and to vacate the judgment could be made without alleging that he had a meritorious defense to the causes of action set forth in the complaint. West's Ann.Pen.Code, § 1334.4.

3. Judgment ⇨17(9)

Where nonresident was extradited from Colorado, for the purpose of having him appear as a witness in a criminal case in California, and while in California he was served with process and a default judgment taken against him, the judgment was void. West's Ann.Pen.Code, § 1334.4.

Dally & Saulque, Los Angeles, for appellant.

Enger & Yardum, Beverly Hills, for respondent.

FOURT, Justice.

This is an appeal from an order quashing service of summons, opening a default and vacating a default judgment.

The plaintiff filed her complaint on January 25, 1955, in which she set forth four causes of action. On January 26, 1955, the defendant Lichlyter was personally served with a summons and complaint in the action in Los Angeles county. At the time of the service of the summons and complaint the said defendant was a resident of Colorado, and prior thereto had for two years been a resident of the state of Oklahoma. The defendant was present in the state of California on January 26, 1955, for the sole purpose of appearing as a witness for and in behalf of the People in a criminal action, namely, *People v. Novelli* (Superior Court No. 165,882), then pending in Los Angeles county. Lichlyter arrived in Los Angeles on or about January 24, 1955, and did testify in the criminal case

on behalf of the People, and was in attendance at such trial from January 25, 1955 to February 1, 1955. Immediately after the conclusion of the trial, Lichlyter left the state of California and returned to his residence in Colorado.

It was stipulated at the oral argument, in effect, that Lichlyter was in fact extradited from Colorado for the purpose of having him appear as a witness in the criminal case.

The plaintiff has set forth in an affidavit that she was not aware of the circumstances under which Lichlyter was served.

Lichlyter advised the process server in the first instance that he was a resident of Colorado and explained why he was in the state of California, and that he was immune from service of process as a result thereof. Lichlyter then consulted with the District Attorney and other attorneys and was told, in effect, that he was immune from service and that a default judgment could not be taken against him. He did not discover that a default judgment had, in fact, been entered against him until July 22, 1957, and immediately thereafter made a special appearance and motion, the results of which we are herewith concerned.

The plaintiff, on October 13, 1955, filed a request for the entry of a default dated June 25, 1955. Apparently there was no summons in the Superior Court file at that time. On October 27, 1955, the plaintiff filed another request for entry of default, and filed at the same time the summons showing the service on Lichlyter on January 26, 1955.

During September of 1956, the plaintiff substituted attorneys. In October, 1956, a Richard Elliott was engaged by the plaintiff's attorneys to contact Lichlyter for information to the end that a military affidavit could be prepared and filed. Elliott set forth in an affidavit that he had talked with Lichlyter in Los Angeles county on October 26, 1956, and that he had told Lichlyter that a judgment was held against him, and that he had asked Lichlyter if he would not pay something on it, and further that Lichlyter was told the names of the plaintiff's at-

torneys. (The statement made by Elliott to Lichlyter to the effect that a judgment was held against him by the plaintiff was an obvious untruth for the reason that the judgment was not secured until November 29, 1956, and entered the next day.)

On September 3, 1957, Lichlyter made a motion to quash service of summons, to open the default and to vacate the judgment entered in the action. In support of the motion Lichlyter submitted an affidavit which sets forth how and in what fashion he was served, and other matters some of which have been heretofore set forth. He did not allege generally, nor did he set forth any facts to show that he had a meritorious defense to the causes of action set forth in the complaint, and no evidence was introduced at the hearing to show that he had any meritorious defense. The trial court granted the defendant's motion.

The question before us is, whether such an order can be made without the moving party showing by affidavit or other evidence that he has a meritorious defense to the action.

We believe that under the circumstances of this case the order made by the trial court was proper.

Appellant has cited the cases of *Matson v. John Batto & Sons*, 173 Cal. 800, 801, 161 P. 1144; *Lee v. Colquhoun*, 175 Cal. 16, 164 P. 894; *Brozey v. Alesen*, 116 Cal.App. 641, 3 P.2d 68, to support her contention that a showing of a meritorious defense must be made before a default judgment can be set aside.

A reading of the cases cited, and of the cases cited therein as authority for the decisions arrived at, discloses that none of them is a case involving a witness appearing from a foreign jurisdiction to testify in a criminal case in this state.

The general rule is set forth in 72 C.J.S. Process, § 80, page 1113, wherein it is said:

[1] "It is almost universally recognized, * * * that witnesses in attendance on a court outside the territorial jurisdiction of their residence are immune from service of civil process, while attending court, and

for a reasonable time before and after, in going to court and returning to their homes; and this immunity is not taken away by a statute prohibiting arrest of persons attending courts as witnesses." It is further stated at page 1117, "The exemption of non-resident witnesses or suitors from service of process rests on grounds of public policy and due administration of justice, and, while personal in its nature, is for the benefit of the court rather than of witnesses and parties."

Substantially the same rule is expressed in 42 American Jurisprudence, (Process), sections 135-142.

Many California courts have, in effect, followed the rule as above set forth: see, *Murrey v. Murrey*, 216 Cal. 707, 16 P.2d 741, 85 A.L.R. 1335; *Hammons v. Superior Court*, 63 Cal.App. 700, 219 P. 1037; *Von Kesler v. Superior Court*, 109 Cal.App. 89, 292 P. 544; *Gerard v. Superior Court*, 91 Cal.App.2d 549, 205 P.2d 109; see also, 85 A.L.R. 1335, and note.

In a recent case, *Velkov, v. Superior Court*, 40 Cal.2d 289, at pages 291-292, 253 P.2d 25, at page 26, 35 A.L.R.2d 1348, the court stated:

"It is a rule of general application that, during a period reasonably necessary to the giving of testimony in a judicial proceeding, a nonresident witness who enters a state primarily for that purpose is immune from service of summons. (Citing cases and authority.) The rule is based upon public policy and, even though in derogation of the rights of the individual litigant, is justified by the public interest served by the granting of immunity.

"In its common law inception, the privilege was that of the court and was formulated to prevent interruptions and delays in judicial proceedings occasioned by necessary participants being required to defend against other actions. (Citing case.) The courts increasingly have emphasized the interest advanced by the voluntary appearance of a nonresident who could not otherwise be made to appear. In such cases, immunity is an inducement to the witness to appear and is said to be his substantive

right. See *Murrey v. Murrey*, supra, 216 Cal. at page 710, 16 P.2d 741; note 5 Cal. L.Rev. 347. Under this reasoning, the privilege has been extended to situations other than those involving strictly judicial proceedings. *Thorp v. Adams*, 58 Hun 603 [11 N.Y.S. 479] [appearance before legislative commission]; *Matthews v. Tufts*, 87 N.Y. 568 [62 How.Prac. 508] [hearing before referee in bankruptcy]; *Burroughs v. Cocke & Willis*, 56 Okl. 627, 156 P. 196, L.R.A.1916E, 1170 [taking of deposition]; *Filer v. McCornick*, D.C., 260 F. 309 [bank president attending meeting necessary to the war effort in time of emergency].")

In *Feister v. Hulick*, D.C., 228 F. 821, at pages 822-823, it is said: "Immunity from arrest, or service of process, does not, in cases of this kind, flow from any privilege of the defendant. It is the consequence of the application of a legal principle, the benefit of which a particular defendant happens to get. The principle is founded upon a policy of the law and the recognition of a legal doctrine. It is part of the policy of the courts to brook no interference with their efforts to administer justice. It is the policy of the law that each court shall render to every other court the at least negative aid of not interfering with its administration of justice. Out of the enforcement of this policy has sprung the doctrine of comity. No court will direct its process to be served upon litigants before another court where it would protect its own litigants from a like service. Every court will aid every other court by permitting attendance upon one free from the danger of service of process by another. All courts recognize this principle of immunity involved. They do not, however, give it the same application. Some apply it under circumstances where others do not."

[2] It would be difficult to imagine a case more violative of the policy described in the cases just mentioned, than the case before us, or one more clearly justifying the granting of a proper motion.

In *Murrey v. Murrey*, supra, 216 Cal. at page 710, 16 P.2d at page 742, it is said:

"Defendant admits that if the exemption exists in his favor, it exists solely as a matter of public policy. There is neither a federal nor a local statute conferring the exemption.

"Under the common-law rule as developed in England, there is no doubt that the exemption here claimed did not exist. Under the early common-law rule, the exemption extended only to parties to judicial proceedings and their witnesses, and members of the court, whose duties required their attendance upon the court and whose presence was necessary to the court in the performance of its functions. Originally this privilege of exemption from service was deemed a privilege of the court and not a privilege of the individual. In more recent years, it has come to be recognized as a substantive right of the individual. It has been frequently stated that this 'judicial' privilege exists as a matter of established public policy and rests upon sound principles of justice and right. (Citing cases.)

"This exemption from service of process is, of course, in derogation of the right which every creditor has to collect his debt by subjecting his debtor to suit in any jurisdiction where he may find him. Since this is so, the privilege should not be extended beyond the reason of the rule upon which it is founded. (Citing case.) California, as a matter of public policy, recognizes this 'judicial' exemption. *Hammons v. Superior Court*, 63 Cal.App. 700, 219 P. 1037. * * *

Furthermore, since 1937, section 1334.4 of the Penal Code has been in full force and effect and reads as follows:

"If a person comes into this State in obedience to a subpoena directing him to attend and testify in this State, he shall not, while in this State pursuant to the subpoena or order, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the subpoena."

[3] We conclude that under the facts and circumstances in this case the judgment was void, and there was no necessity for

the defendant to show that he had a good defense to the action. See *Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 369, 41 P. 308; *Cadenasso v. Bank of Italy*, 214 Cal. 562, 6 P.2d 944.

The order appealed from is affirmed.

WHITE, P. J., and LILLIE, J., concur.



161 Cal.App.2d 780

Rudolf LAWATCH, Plaintiff and Appellant,
v.

Gertrude J. LAWATCH, Defendant and Respondent.
Civ. 23026.

District Court of Appeal, Second District,
Division 2, California.

July 2, 1958.

Rehearing Denied July 28, 1958.

Hearing Denied Aug. 28, 1958.

Divorce action. The Superior Court, Los Angeles County, Lloyd S. Nix, J., granted wife divorce, and husband appealed. The District Court of Appeal, Fox, P. J., held that evidence sustained finding that husband was guilty of extreme cruelty.

Affirmed.

1. Appeal and Error ⇨989

When a finding of fact is attacked on the ground that there is no substantial evidence to sustain it, power of reviewing court begins and ends with determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding.

2. Divorce ⇨130

In divorce action, evidence was sufficient to support finding that husband had been guilty of extreme cruelty.

3. Divorce ⇨184(10)

Where decree in earlier action had denied wife divorce because of her con-

donation of husband's cruelty, but there was no condonation of his later acts, finding of cruelty in first action lent support to finding of cruelty in second action.

4. Divorce ⇨127(4)

Principal object of corroboration rule is to prevent collusion between parties, and when it is clear that there is no collusion and divorce is contested, divorce may be granted where evidence is only slightly corroborated.

5. Divorce ⇨127(4)

It is not necessary, when cruelty is charged in a divorce action, that all of the acts of cruelty charged be corroborated, and corroboration of a single act may be sufficient to support a number of charges.

6. Divorce ⇨127(4)

In wife's divorce action grounded on extreme cruelty, wife's testimony was sufficiently corroborated.

7. Divorce ⇨298(1), 312.6(5)

In a divorce proceeding involving custody of minor children, primary consideration must be given to their welfare, and wide discretion of trial court will not be disturbed upon appeal in absence of a manifest showing of abuse.

8. Divorce ⇨301

In divorce action, evidence was sufficient to support award of custody of children to mother.

9. Divorce ⇨298(3)

That wife was guilty of extreme cruelty and other manifold misconduct does not necessarily preclude her from obtaining custody of children.

10. Husband and Wife ⇨272(1)

Ordinarily, a husband's earnings subsequent to a separate maintenance decree are his separate property.

11. Husband and Wife ⇨266

A husband and wife may change the status of their property from separate to community by an executed oral agreement, and it is not necessary to show express agreement, and status may be shown by the

very nature of the transaction or may appear from the surrounding circumstances.

12. Husband and Wife ⇨266

Income tax returns may be indicative of an agreement concerning the character of income reported therein, as separate or community.

13. Internal Revenue ⇨1361

Parties to a separate maintenance decree may not file joint returns for tax periods ending after the entry of such decree. 26 U.S.C.A. (I.R.C.1954) § 6013(d) (2).

14. Divorce ⇨272

In divorce action, evidence was sufficient to support finding that husband's earnings since entry of separate maintenance decree had become transmuted into community property by virtue of an agreement between husband and wife. West's Ann.Civ.Code, § 169.1.

Bodkin, Breslin & Luddy, Henry G. Bodkin, Los Angeles, for appellant.

C. E. Spencer, Gray, Binkley & Pfaelzer, William P. Gray and Orville A. Armstrong, Jr., Los Angeles, for respondent.

FOX, Presiding Justice.

This is the second chapter in the litigation involving the marital difficulties and property rights of Mr. and Mrs. Lawatch.

The first chapter was initiated by Mrs. Lawatch's filing a complaint for separate maintenance which, however, was amended to state a cause of action for divorce. The husband countered with a cross-complaint also seeking a divorce. This first suit resulted in an amended decree on February 18, 1952, denying each party a divorce. The court found that each of the parties was guilty of extreme cruelty but denied either a decree on the ground of recrimina-

tion.¹ However, the court did decree that the wife was entitled to live separate and apart from her husband, and to have the custody of the six minor children; the court ordered the husband to provide for the support and maintenance of the wife and the children, and ordered him to vacate the family home. The court found that all the property of the parties was community property, and that it was to the best interests of the parties not to divide the property at that time. There was no appeal from this decree.

The present action for divorce was commenced by the husband in 1956. The wife filed a cross-complaint also seeking a divorce. The court found that each party was guilty of extreme cruelty, and granted a decree of divorce to each. It held that all the property was community property and divided it equally between the parties. To effectuate this result, the court awarded the wife a lien for approximately \$33,000 on the business known as "Lawatch, Ltd." The court awarded the wife \$400 per month alimony, custody of the six children, and \$100 per month support for each of them.

The husband appeals from those portions of the interlocutory decree which provide:

1. That the wife is entitled to a divorce;
2. That the custody of the minor children is awarded to the wife;
3. That the home is awarded to the wife;²
4. That the wife should have a lien for \$33,335.47 on the property, business and goodwill of Lawatch, Ltd.;
5. That the wife is awarded 250 shares of the stock of Lawatch Display Fixtures, Inc.;² and
6. That the wife shall receive \$400 a month alimony and \$100 a month for support of each of the six children.

1. This decree was rendered prior to *De Burgh v. De Burgh*, 39 Cal.2d 858, 250 P.2d 598.

2. The husband has apparently abandoned his appeal from these portions of the

decree because he has failed to discuss them in his brief. See *Bellon v. Silver Gate Theatres, Inc.*, 4 Cal.2d 1, 17, 47 P.2d 462.

The husband's first contention is that the evidence does not sustain the court's finding that he was guilty of extreme cruelty toward his wife.

We need do no more here than adumbrate the husband's misbehavior since the February 1952 decree: In defiance of the court's order, he remained in the family home for some 14 months after the entry of the decree. He repeatedly told his wife that she was crazy, often in the presence of the children. He told the children many times that they did not have to mind their mother. At times, when the wife had company, he would loiter around outside or underneath the house in an effort to overhear the conversation. Upon occasion the husband was intoxicated in the presence of the wife and children. His failure to pay federal income taxes caused a lien to be filed against the home, thereby greatly disturbing his wife. Although he was not supposed to be living in the house and the custody of the children had been awarded to the wife, on more than one occasion he administered physical punishment to one of the children. The husband's remaining in the home created a difficult situation and caused the wife and children to live under a great deal of tension.

The wife's testimony indicated that the husband's conduct directly and detrimentally affected her health; that her physical condition improved after he finally moved out of the home, pursuant to a subsequent court order.

[1] "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. [Citations.]" *Primm v. Primm*, 46 Cal.2d 690, 693, 299 P.2d 231, 233. In *Keener v. Keener*, 18 Cal.2d 445, 116 P.2d 1, the wife alleged that during the last three years of her married life plaintiff on numerous occasions lost his temper and found fault with her in the presence of

friends and acted in a peculiar manner; that he remarked in the presence of friends that she was not a good or proper wife; that he told her she should get out and support herself, and that he requested her to apply for work. She alleged that these acts caused her grievous mental anguish. At the trial the wife testified regarding the acts of her husband substantially in accord with the allegations of her pleading. She was granted a divorce. On appeal the Supreme Court rejected the husband's contention that the evidence was insufficient to sustain the decree. In the course of the opinion the court stated (18 Cal.2d at pages 447-448, 116 P.2d at page 2): "In each case the infliction of 'grievous mental suffering' is a question of fact to be deduced from the circumstances of the case, in the light of the intelligence, refinement and delicacy of sentiment of the complaining party. [Citations.] A correct decision must depend upon the sound sense and judgment of the trial court. [Citations.] Its conclusion will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion. [Citations.]"

"A course of conduct by which one party to the marriage continually indicates dissatisfaction with the other and makes such dissatisfaction known to friends of the parties may well cause humiliation, embarrassment and mental anguish to a degree constituting extreme cruelty. In the instant case plaintiff [the husband] was a teacher in the public schools and his loss of temper and repeated criticisms of defendant [the wife] in the presence of their friends and his statements, after more than twenty-five years of marriage, that she should support herself were sufficient to constitute extreme cruelty if they prove to have caused her grievous mental suffering. The trial judge was in a position to observe the intelligence, refinement and delicacy of sentiment of the defendant and to determine whether plaintiff's conduct caused her grievous mental suffering. In the absence of an abuse of discretion, his conclusion cannot be disturbed."

In *Bixby v. Bixby*, 120 Cal.App.2d 495, 498, 261 P.2d 286, 287, the court stated: "Proof of extreme cruelty may be made by testimony of cruel remarks made by one spouse to the other." See, also, *Maloof v. Maloof*, 175 Cal. 571, 573, 166 P. 330; *Stevens v. Stevens*, 92 Cal.App.2d 85, 87, 206 P.2d 418.

[2] Applying these principles it cannot be said as a matter of law that the trial court abused its discretion in determining that the conduct of the husband constituted extreme cruelty toward his wife.

[3] The findings in the first action between these parties fortify our conclusion herein. In the first action the court found that the husband was guilty of extreme cruelty. Although he remained in the home some 14 months after the entry of that decree, the evidence clearly shows that they lived separate and apart and that there was no condonation of his misconduct. Under such circumstances the finding of the trial court in the first action lends support to the findings and judgment in the wife's favor in the instant case. *Jenkins v. Jenkins*, 125 Cal.App.2d 109, 115, 269 P.2d 908; *Quagelli v. Quagelli*, 99 Cal.App. 172, 175, 277 P. 1089. In the *Jenkins* case the wife had previously secured a decree of separate maintenance based upon the husband's extreme cruelty. Thereafter, in a suit for divorce, the wife pleaded the decree of separate maintenance, the finding that the husband was guilty of extreme cruelty, that the decree had become final and that since its entry she had lived separate and apart from him and had not cohabited with him or forgiven him any of the offenses on which the finding of cruelty was based. The husband did not disprove the judgment of separate maintenance nor the other facts alleged. The trial court found on the issue of extreme cruelty in accordance with the decree in the maintenance action. The appellate court held that the trial court could properly base its finding of extreme cruelty on the facts proved in the prior action for separate maintenance.

Quagelli v. Quagelli, supra, also supports this principle.

[4-6] The husband also argues that the wife's testimony on the issue of extreme cruelty is not sufficiently corroborated. "The extent of the corroboration necessary for the granting of a decree of divorce is not defined in any of our statutes. It is not necessary to corroborate all of the acts of cruelty charged by the party to whom the decree is granted. Where a number of charges of cruelty have been made, corroboration of a single act of cruelty may be sufficient. [Citations.] Moreover, the rule requiring corroboration is not so strictly applied in hotly contested divorce actions as it is in actions where a decree is demanded upon the default of the opposing party. The principal object of the corroboration rule is to prevent collusion between the parties, and where it is clear from the evidence in a contested action that there is no collusion the court is justified in granting the decree upon evidence which is only slightly corroborated if otherwise the court is satisfied that the prevailing party is entitled to a decree. [Citations.]" *Serns v. Serns*, 70 Cal.App.2d 527, 529, 161 P.2d 417, 418; see, also, *Bixby v. Bixby*, 120 Cal.App.2d 495, 500, 261 P.2d 286; *La Vigne v. La Vigne*, 96 Cal.App.2d 531, 534, 216 P.2d 75; *McGann v. McGann*, 82 Cal.App.2d 382, 386-87, 186 P.2d 424. Tested by these principles the corroboration here was sufficient. It suffices to say that Dorothy Chacon, who worked in the home as a helper, testified that on several occasions she overheard Mr. Lawatch tell the children that they did not have to mind their mother; she also testified concerning the occasions when he inflicted physical punishment upon some of the children.

The husband contends that the portion of the decree ordering him to pay his wife \$400 per month alimony is "contrary to [the] evidence and the law." His position is based solely upon the assumption that there was insufficient evidence to support the finding of extreme cruelty on his part. Since we have already determined that the evidence was sufficient to sustain that find-

ing, it follows that this contention is without merit.

[7-9] The husband makes the unpersuasive contention that the portion of the decree granting the wife custody of the children is "against the evidence and the law." In a divorce proceeding involving the custody of minor children primary consideration must be given to their welfare. "The court is given a wide discretion in such matters, and its determination will not be disturbed upon appeal in the absence of a manifest showing of abuse." *Gudelj v. Gudelj*, 41 Cal.2d 202, 208, 259 P.2d 656, 660; see, also, *Gantner v. Gantner*, 39 Cal. 2d 272, 275, 246 P.2d 923; *Taber v. Taber*, 209 Cal. 755, 757, 290 P. 36. Preliminarily, it should be noted that the decree in the first case awarded custody of the children to the mother. In the instant case the court again awarded her their custody after having observed the parties in court, heard the testimony, visited with the children, and considered the report of the court-appointed investigator. Dorothy Chacon testified that Mrs. Lawatch displayed great affection for all her children. The husband's own witness, Mrs. Sutterle, testified that she had always been of the opinion that Mrs. Lawatch "is a very fine mother." The investigator's report stated that "the school records and statements of school authorities indicated that the children have received excellent care and supervision at least as far as their adjustment and appearance at school are concerned." After having interviewed the children, the father, mother, the school authorities, and various other witnesses, the investigator recommended that "the care, custody and control of the minor children be * * * continued with the mother." He further recommended that the father be given reasonable visitation rights. From the foregoing it is apparent that there is ample evidence to support the trial court's award of custody of the children to the mother, and that there was clearly no abuse of discretion. The husband argues against the award of custody to the wife on the theory that she has prejudiced the older children against him.

There is substantial evidence to negate this charge. Dorothy Chacon, who was constantly present in the home, testified that Mrs. Lawatch always told her children to respect their father; she never heard Mrs. Lawatch tell the children anything to the contrary. The mother stated that she never made derogatory remarks to the children about their father nor objected to his visiting them. The husband also argues that since the court found the wife to have been guilty of extreme cruelty toward him, it abused its discretion in awarding the children to her. It does not necessarily follow from the fact that the wife was guilty of extreme cruelty toward her husband that she was not a good mother and a proper person to have the custody of their children. The court could properly award her the custody of the children even though she was guilty of marital misconduct. *Morgan v. Morgan*, 103 Cal.App.2d 776, 777, 230 P.2d 130; *Newell v. Newell*, 146 Cal.App.2d 166, 179, 303 P.2d 839; *Kettelle v. Kettelle*, 110 Cal.App. 310, 313, 294 P. 453.

The sole basis for the husband's attack upon the award of support for the children is that their custody should not have been granted to the wife. Since we have determined that the award of custody was proper, his attack loses its significance.

[10] The husband's final contention is, in effect, that the evidence is insufficient to support the court's finding that all the property of the parties was community property. He bases this contention on the theory that the first action resulted in a decree of separate maintenance in 1952 and that his earnings since such decree were his separate property. Civ. Code, sec. 169.1. We agree with the husband's assertion that the 1952 decree was in effect a decree for separate maintenance. While it is ordinarily true that a husband's earnings subsequent to a separate maintenance decree are his separate property, the trial court in the instant case was justified in finding to the contrary. In this connection the court found:

"At all times subsequent to February 18, 1952 the parties have considered all of their

assets, including the business conducted under the name 'Lawatch, Ltd.' to be community property, and all of the assets of the parties are now found by the Court to be community property. At all times since February 18, 1952, the parties have also considered their respective earnings to be community property, and such earnings are now found by the Court to have been community property."

[11] It is elementary that a husband and wife may change the status of their property from separate to community by an executed oral agreement. *Kenney v. Kenney*, 220 Cal. 134, 136, 30 P.2d 398, and cases cited therein. "All that is required to show an executed oral agreement of transmutation is proof of the parties' acts and conduct in dealing with their property." *In re Estate of Raphael*, 91 Cal.App.2d 931, 939, 206 P.2d 391, 395. "It is not essential to show an express oral agreement, but the status of the property may be shown 'by the very nature of the transaction or appear from the surrounding circumstances.'" *Long v. Long*, 88 Cal.App.2d 544, 549, 199 P.2d 47, 50; see, also, *Title Insurance & Trust Co. v. Ingersoll*, 153 Cal. 1, 5, 94 P. 94; *Marvin v. Marvin*, 46 Cal.App.2d 551, 556, 116 P.2d 151.

Initially we should point out that it was determined in the first action that all the property of the parties was community. This included the residence, the business known as Lawatch, Ltd., and the real property on which it was located. The court also determined it was in the best interest of the parties not to divide the property at that time. The parties still owned the residence and the business, along with its real property at the time of the present action. So we are concerned only with the husband's earnings since the 1952 decree.

[12-14] After the first decree the husband did nothing to indicate that he was

treating any part of the income from the family business as his separate property. He deposited all such income in the same account and drew upon that account to pay for the operation of the business as well as for the support and maintenance of his wife, the children and himself. He later opened a "reserve account" for business reasons but made disbursements of the same character from that account. Moreover, in procuring a loan in connection with the business, the husband sought the wife's signature on certain documents; in the husband's presence his attorney explained to her the necessity for her signature and stated that she owned half of the business. The husband made no contrary statement. Some of the most significant items of evidence relating to the question before us are the income tax returns of the parties for the years 1952 through 1955. It is well recognized that income tax returns may be indicative of an agreement concerning the character of the income reported therein. *In re Estate of Cummins*, 130 Cal.App.2d 821, 829, 280 P.2d 128; *Handley v. Handley*, 113 Cal.App.2d 280, 284, 248 P.2d 59; *Frymire v. Brown*, 94 Cal.App.2d 334, 339, 210 P.2d 707; *In re Estate of Raphael*, supra, 91 Cal.App.2d at page 939, 206 P.2d at page 395; *Stice v. Stice*, 81 Cal.App.2d 792, 797-798, 185 P.2d 402; *Heck v. Heck*, 63 Cal.App.2d 470, 474-475, 147 P.2d 110. The husband in the instant case filed joint income tax returns for 1952, 1953 and 1955. These returns were of course signed also by the wife. In these returns the husband took advantage of the provisions for the splitting of income. This conduct is highly significant and indicates that they were treating all his income as community property. This is especially true because these returns were filed subsequent to the separate maintenance decree by which the parties became legally separated; under Internal Revenue Code section 6013(d) (2)³ the parties should not even have filed joint returns

3. Section 6013(d) (2) of the 1954 Code, 26 U.S.C.A. § 6013(d) (2), replaced sec-

tion 51(b) (5) (B) of the 1939 Code, 26 U.S.C.A. § 51(b) (5) (B).

after such decree.⁴ In 1954 the parties filed separate returns. However, one half of the total income from the business was reported on each return. This, too, is persuasive evidence of an agreement that the parties' earnings would be community property. It is also to be noted that the husband never claimed that his earnings since the first decree were his separate property until some time after the instant action was filed in 1956. From the foregoing facts and circumstances the trial court reasonably could conclude that the husband's earnings since the first decree had become transmuted into community property by virtue of an agreement between the parties. Thus, it cannot be said as a matter of law that the evidence is insufficient to support the findings on this issue.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

Hearing denied; CARTER, J., dissenting.

4. The cases relied upon by the husband, such as *Commissioner of Internal Revenue v. Ostler*, 9 Cir., 237 F.2d 501, and *United States v. Holcomb*, 9 Cir., 237 F.2d 502, are not in point. They hold merely that Internal Revenue Code section 51(b) (5) (B), which preceded section 6013(d) (2), does not preclude the filing of a joint return by parties who have obtained an interlocutory decree of divorce. The pertinent language in the code section is: "[A]n individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married * * *" (Emphasis added.) The theory underlying the above decisions is that in referring to a "decree of divorce" the legislators meant a final decree terminating the marriage, and since an interlocutory decree of divorce does not terminate the matrimonial status of the parties thereto, they are still married within the meaning of the code section. An altogether different situation exists when a separate maintenance decree is involved. This is illustrated by the court's discussion in *Marriner S. Eccles*, 19 T.C. 1049, affirmed *Commissioner of Internal Revenue v. Eccles*, 208 F.2d 796 (this case was the principal authority relied upon in both the *Ostler* and the *Holcomb* cases). In the *Eccles* case the court stated (19 T.C. at page 1051): "If the

162 Cal.App.2d 232

Jack A. SCHLAG, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION
of The State of California, and the Sub-
sequent Injuries Fund of The State of Cal-
ifornia, Respondents.

Civ. 9419.

District Court of Appeal,
Third District,
California.

July 18, 1958.

Proceeding on petition seeking review and annulment of order of Industrial Accident Commission denying employee benefits from the Subsequent Injuries Fund. The District Court of Appeal, Warne, J. pro tem., held that labor disablement rather than full knowledge on part of employer of injured employee's partial pre-existing disabilities is the essential factor by which

[interlocutory] decree operated as a decree for separate maintenance * * * the respondent [commissioner] must prevail, for as the petitioner must agree the parties to it were legally separated." The court went on to hold that under the laws of Utah the interlocutory decree did not have the effect of a decree for separate maintenance and came to the conclusion that "the parties were not legally separated under a decree of separate maintenance" (at page 1053). It is clear from the opinion that if a separate maintenance decree had been in effect, the petitioner would not have been permitted to file a joint return. An implication to the same effect may be found in *Commissioner of Internal Revenue v. Evans*, 9 Cir., 211 F.2d 378, which dealt with the question of whether alimony payments received by a spouse while an interlocutory decree was in effect were taxable under a provision which used wording similar to that found in section 6013(d) (2). There, as in the *Eccles* case, the court distinguished an interlocutory decree of divorce from a separate maintenance decree (this time under Colorado law), impliedly recognizing that a different result would obtain if a decree for separate maintenance had in fact existed.

From the foregoing it is clear that parties to a separate maintenance decree may not file joint returns for tax periods

to gauge previously sustained disablement in determining whether employee qualifies for an award from Subsequent Injuries Fund.

Award annulled and matter remanded for determination by Commission.

Opinion, 325 P.2d 619, vacated.

Workmen's Compensation § 1030

Labor disablement rather than full knowledge on part of employer of injured employee's partial pre-existing disabilities is the essential factor by which to gauge previously sustained disablement in determining whether employee qualifies for an award from Subsequent Injuries Fund. West's Ann.Labor Code, § 4751.

Harry A. Ackley and Lewis F. Shearer, Woodland, for petitioner.

Everett A. Corten, Daniel C. Murphy, and Melvin S. Witt, San Francisco, for Industrial Accident Commission.

Edmund G. Brown, Atty. Gen., by Irving H. Perluss, Asst. Atty. Gen. and Frederick Girard, Deputy Atty. Gen., for Subsequent Injuries Fund.

WARNE, Justice pro tem.

This court, on its own motion, vacated its decision and ordered a rehearing in this case because our opinion rendered May 23, 1958, was materially based upon four decisions of the District Courts of Appeal which were substantially disapproved in the opinion of the Supreme Court filed June 6, 1958, in the case of *Ferguson v. Industrial Accident Commission*, 50 Cal.2d 469, 326 P.2d 145. The holding in that case requires us to now arrive at a different conclusion.

Petitioner seeks a review and annulment of an order of the Industrial Accident Commission denying him benefits from the Subsequent Injuries Fund.

ending after the entry of such decree. The Ninth Circuit cases dealing with interlocutory decrees of divorce cannot detract from the clear language of the stat-

Petitioner, an iron worker, sustained an injury to his neck arising out of and occurring in the course of his employment. It was determined by the Industrial Accident Commission hereafter referred to as the commission, that he suffered permanent disability from that injury, and he was given a permanent disability rating of 13¼ per cent. He then sought benefits from the Subsequent Injuries Fund under Labor Code, section 4751, for preexisting disabilities.

At the hearing, petitioner testified that he had the following preexisting disabilities and impairments: A right thumb disability, a left leg disability, a right foot disability, a neck disability, a left foot disability, a right ankle disability, a jaw and chest and heart disability. Some of the disabilities were symptomatic and some were asymptomatic just prior to the industrial injury.

The commission found that the petitioner suffered from multiple preexisting disabilities and physical impairment prior to the industrial injury but that the only one known to the employer was a preexisting disability to the neck. A further finding was that the combined disability resulting from the injury of April 7, 1955, and the known preexisting disability amounted to a permanent disability of 51½ per cent, a minimum of 70 per cent disability being required by Labor Code, section 4751, as a condition to an award from the Subsequent Injuries Fund. It was determined and ordered that the petitioner take nothing from the Subsequent Injuries Fund.

Petitioner contended that an employer need only have knowledge of some preexisting partial disability in order to warrant inclusion of all preexisting permanent disabilities and impairments in determining an employee's eligibility for Subsequent Injuries Fund benefits. On the other hand, the respondents contended that knowledge

ute that "an individual who is legally separated from his spouse under a decree * * * of separate maintenance shall not be considered as married * *."

by the employer of "a" preexisting industrial injury does not warrant inclusion (for determining eligibility of an employee for Fund benefits) of other disabilities and impairments preexisting the industrial injury which were unknown to the employer.

In our former opinion we concluded that the contention made by the commission was correct. In so doing, we relied on four opinions by District Courts of Appeal which, at least by implication, hold that proof of knowledge by the employer of a previous disability is a prerequisite to payments under section 4751. The cases are: *State of California, etc. v. Industrial Accident Commission (Baltes)*, 150 Cal.App. 2d 716, 311 P.2d 26; *State of California v. Industrial Accident Commission (Bachrach)*, 147 Cal.App.2d 818, 306 P.2d 64; *Urquiza v. Industrial Accident Commission*, 144 Cal.App.2d 322, 300 P.2d 871; *State of California, etc. v. Industrial Accident Commission (Strauss)*, 135 Cal.App.2d 544, 288 P.2d 31.

In the *Ferguson* case, supra [326 P.2d 150], the Supreme Court concluded that "labor disablement" rather than "employer knowledge" is the essential factor by which to gauge the previously sustained disablement in determining whether that disability qualifies petitioner for resort to the fund, and disapproved all implications to the contrary which may be found in the four above mentioned decisions of the District Courts of Appeal. The court said: "To summarize, we hold that to qualify for resort to the Subsequent Injuries Fund an employee must show that prior to the occurrence of the subsequent industrial injury he had attained the factual status of the 'permanently partially disabled' and that such previously incepted disability was labor disabling, but that previous knowledge thereof by the employer is not inherently as a matter of law required as a condition to an award to the employee of payments from the Subsequent Injuries Fund."

Inasmuch as the Industrial Accident Commission, in the instant case, placed its decision (award denying recourse to the Subsequent Injuries Fund) solely on the

ground that the employer did not have full knowledge (i. e., knowledge other than as to the neck injury) of petitioner's partial preexisting disabilities, and as the decision cannot now be sustained on that limited ground, it follows that the award should be and it is annulled and the matter is remanded for determination by the commission, on the merits, in a manner and on grounds not inconsistent with the views as expressed in *Ferguson v. Industrial Accident Commission*, supra.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



162 Cal.App.2d 187

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Edward CROXTON and William James Ashe,
Defendants.

Edward Croxton, Defendant and Appellant.
Cr. 6168.

District Court of Appeal, Second District,
Division 1, California.
July 17, 1958.

Hearing Denied Sept. 10, 1958.

Defendant was convicted of issuing checks without sufficient funds and from a judgment, verdict of the jury, decision and sentence of the Superior Court of Los Angeles County, Orlando H. Rhodes, J., the defendant appealed. The District Court of Appeal, Lillie, J., held that an appeal did not lie from the verdict of the jury, decision of the court and sentence and that evidence of defendant's fraudulent intent was properly submitted to the jury.

Judgment affirmed.

I. Criminal Law §1023(10)

An appeal lies only from a judgment of conviction and an attempted appeal from

a verdict of the jury, decision of the court, and sentence, must be dismissed. West's Ann.Pen.Code, § 1237.

2. Criminal Law —1144(13)

The evidence must be viewed in the light most favorable to the prosecution on an appeal from a criminal conviction.

3. Criminal Law —1159(2)

Court, on appeal, will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt.

4. False Pretenses —5

The intent of the person who issues a check without sufficient funds cannot be made to depend upon the success of his enterprise for which he seeks to obtain the money represented by the check. West's Ann.Pen.Code, § 476a.

5. False Pretenses —51

In prosecution for issuing checks without sufficient funds, where defendant claimed that he could not have defrauded the complainant on the ground that he told the complainant defendant was trying to start a business on a shoestring and that payment depended upon the success of the enterprise, evidence of defendant's intent to defraud was properly submitted to the jury. West's Ann.Pen.Code, § 476a.

6. Criminal Law —745, 747

It is for the trier of fact to resolve conflicts in the evidence and determine what facts are established and what inferences may be drawn therefrom.

7. Criminal Law —1159(6)

If circumstances reasonably justify the verdict, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant a reversal.

8. False Pretenses —39

In prosecution for issuing a check without sufficient funds, the requisite specific intent to defraud may be inferred

from all the surrounding circumstances. West's Ann.Pen.Code, § 476a.

Al Matthews, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Defendant was charged by information with 7 counts of issuing checks without sufficient funds in violation of section 476a of the Penal Code. The jury convicted him on all counts and he was sentenced to the state prison on count one, the trial court having dismissed the other six.

[1] Although defendant has appealed from the verdict of the jury, the decision of the court and the judgment and sentence, an appeal lies only from the judgment of conviction; and the attempted appeal from the verdict of the jury, decision of the court, and sentence, must be dismissed. Pen.Code, Sec. 1237; *People v. Tallman*, 27 Cal.2d 209, 163 P.2d 857; *People v. Falk*, 113 Cal.App.2d 857, 249 P.2d 60.

This appeal involves count one charging defendant with issuing a \$29.29 check on the Security-First National Bank, Western and Santa Monica Branch, with intent to cheat and defraud Bill Day, Koontz Hardware and the bank, knowing he did not have sufficient funds in, or credit with, the bank to meet the check in full upon its presentation for payment. Appellant's sole contention is that the evidence failed to show an intent to defraud and that he could not have defrauded the complaining witness.

[2] Viewing the evidence in the light most favorable to the prosecution, as we are required to do on an appeal from a criminal conviction, the record reflects that during the month of June, 1957, neither defendant nor Rim of the World had an account or arrangement of credit with the Security-First National Bank. On June 15, 1957, defendant and W. J. Ashe selected some

merchandise in the Koontz Hardware store which they told the salesman, Bill Day, was to be used in the business of the Rim of the World, Defendant, in Day's presence, wrote the face of the check and presented it to him for the merchandise. He did not tell him it was not a good check, or that there was no money in the bank to cover it. On Monday, June 17, 1957, Day received a telephone call from the defendant who said he wanted to replace the check with one on the printed form of Rim of the World and asked him to hold it until the next day for that purpose. The following day he received another call asking him to hold the check until Wednesday. On Wednesday defendant called again and Day promised to hold the check until Thursday, but gave no indication he would hold it longer.

On July 2, 1957, sheriff's deputy Sergeant Ostraff, investigating various checks purportedly written and signed by defendant, asked him if he had an account in any bank. Defendant said he did not but that "they" were opening one that day in the Bank of America, Sunset and Laurel Branch. When asked if he had written any checks on any other banks, defendant replied that he had not. Upon being shown the check in question, defendant then said that "they" were that day supposed to open an account in the Security-First National Bank, too, but did not know whether he had written any check on any other bank. When asked where the money was coming from to open the accounts, defendant said he did not know, nor could he say whether they would be in his own name or that of the Rim of the World.

On July 3, 1957, sheriff's deputy Sergeant Knowles talked to defendant at the sheriff's station. Defendant told him that he and Ashe had purchased certain items at Koontz Hardware for the manufacture of furniture on the Rim of the World premises. He tried to open a charge account there but could not. He then produced the check, although he had no account at the bank in question in his name or that of Rim of the World at that time. He knew

the check was not good but told the clerk to hold it because they were in the process of organizing the Rim of the World business and establishing a bank account in that bank. He said he had never had an account at the Security-First National Bank.

Again, on the day of the preliminary hearing, defendant told Knowles he knew at the time he presented the check there were no funds in the bank on which it was written.

At the trial Ashe testified that defendant assured him the check would be made good on Monday; subsequently told him that the people at Koontz Hardware would hold the check and that Luke Pachalis was going to give him \$1,500. Later, defendant said that Pachalis was having trouble raising the money.

Defendant, previously convicted of issuing checks without sufficient funds, testified that he did not intend to defraud or cheat anyone and that at the time he wrote the check he was expecting a loan from Mr. Pachalis, but that Pachalis had difficulty raising the money. He notified Mr. Day of this who said he would hold the check. He stated that when he and Ashe were in Koontz Hardware, he told Day they needed material but had no money and were just starting out in business; that Day gave him a card to fill out for a credit reference to open an account; and that then he gave him the check. He thought he was getting the money on Monday and could make the check good, but when he could not he called Mr. Day for an extension of time, which Day gave him. He further testified that he told Day at the time he gave him the check they were having trouble establishing credit. However, upon being confronted by the district attorney with Day's testimony that at no time did defendant tell him that the check was not good, defendant then changed his testimony and testified that after all he did not believe it was Mr. Day who waited on them. Defendant stated that another person than Pachalis was to lend him money and that he was going to open accounts in three banks but did not go to

them to ask for credit because of the dilapidated condition of the building. He said he was confused and nervous while talking to Sergeant Ostraff and did not know what he told him, but that he did say some people were at the Security Bank opening an account and that he had heard from them on Monday and that they said they would take care of the checks. He denied telling Ostraff that he did not know where the money was coming from to open the account and testified that he had an appointment on that afternoon with a man who was to lend him money. Defendant did not call Mr. Pachalis as a witness.

[3] In urging that the evidence failed to show an intent to defraud, appellant is asking this court to reweigh the testimony, reevaluate the credibility of the witnesses and draw inferences contrary to those drawn by the jury. The court in *People v. Newland*, 15 Cal.2d 678, at page 681, 104 P.2d 778, at page 779, laid down the general rule to be followed by appellate courts in considering the claim of insufficiency of the evidence: "The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances

might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

Appellant contends that he could not have defrauded the complaining witness because he was trying to start a business on a shoestring and told him so; that the materials obtained from Koontz Hardware were taken only a short distance and could have been retrieved; that the materials were never disposed of or concealed and that Koontz Hardware suffered no loss. On the issue of reasonable expectation of payment, appellant argues that the evidence negates any intent to defraud in that it shows he had a reasonable expectation of financial aid from one Whitman and Pachalis.

[4] In connection with defendant's alleged difficulties in financing the business and the lack of loss on the part of the complaining witness, the court had this to say in the case of *People v. Cortze*, 108 Cal.App. 111, at page 114, 290 P. 1083, at page 1084: "It has been repeatedly held, however, that when a fictitious check has been drawn, issued, and delivered to the payee with intent to defraud, and there is no money in the bank with which to pay the same, and the drawer has knowledge of such want of funds, the crime is complete, even though the person to whom the check is delivered suffers no financial detriment thereby. In other words, the intent of the person who issues the check, contrary to the provisions of section 476a of the Penal Code, cannot be made to depend upon the success of his enterprise. *People v. Williams*, 69 Cal.App. 169, 230 P. 667; *People v. Kahn*, 41 Cal.App. 393, 182 P. 803; *People v. Sherman*, 100 Cal.App. 587, 280 P. 708; *People v. Bowles*, 100 Cal.App. 464, 280 P. 184."

Appellant's claim that he had a reasonable expectation of financial help is not borne out by the evidence. As to Whitman's offer to stand good for certain articles and back him in his business, defendant's own testimony shows that Whitman's willingness to aid him was limited primarily to

providing material through an account at Akron Hardware, and his promise that if he was successful in the business, he would back him. Mr. Whitman in his own testimony denied this. The promise of financial aid from Pachalis is as nebulous and ill-founded. When first questioned by Sergeant Ostraff about how he intended to cover the check, defendant said he didn't know from where the money was coming. It wasn't until after his arrest defendant first injected the name of Pachalis and the proposed loan. The evidence concerning the matter of the loan is very brief and Mr. Pachalis was not called to substantiate defendant's claim. Appellant cites *People v. Griffith*, 120 Cal.App.2d 873, 262 P.2d 355, and other authority for the proposition that reasonable expectation of payment of a check constitutes a good defense. With these authorities there is no quarrel, but in the instant case there is in the record not only ample evidence of deception on defendant's part, but the jury, as it had a right to do, rejected defendant's testimony that he had any expectation of loans or financial backing, gave no credence to defendant's denial he had intent to defraud and found the requisite fraudulent intent. A similar situation was discussed by the court in *People v. Stein*, 157 Cal.App.2d 259, 320 P.2d 519, wherein appellant contended that the intent to defraud was lacking because there was a reasonable expectation of payment. In upholding the judgment of conviction and citing section 476a of the Penal Code, the court said 157 Cal.App.2d at page 265, 320 P.2d at page 523: "During a period of several weeks before and after the making and delivery of the check, the defendant did not have sufficient funds in the bank for the payment of the check. No part of the check has been paid. The evidence was sufficient to prove fraudulent intent on the part of defendant in issuing the check." In the instant case at no time during the month of June did defendant have any funds or arrangements for credit with the bank on which the June 15th check was written. From this, together with other evidence in the record, the jury could

have reasonably inferred the requisite intent to defraud. The Griffith case was cited by appellant in *People v. Whisenhunt*, 155 Cal.App.2d 534, at page 537, 318 P.2d 153, at page 155, and the court said: "In support of his contention that the evidence is insufficient to support the judgment, appellant argues that the evidence establishes that there was a lack of intent to defraud because when he issued the two checks in question he intended to make a deposit in his account sufficient to cover the amount of the checks prior to the time that the checks could be presented to the bank during the ordinary course of business and also at the time he presented the two checks he informed the payees that there were insufficient funds at the time and asked them to hold the checks for several days in order to permit him to make the necessary deposit. Appellant relies upon the cases of *People v. Griffith*, 120 Cal.App.2d 873, 262 P.2d 355, and *People v. Wilkins*, 67 Cal.App. 758, 228 P. 367, in which it was held that where the evidence establishes that the drawer informed the payee that there were insufficient funds to cover the check, such fact precludes a finding of guilt upon a charge of violating Penal Code, section 476a.

"Respondent does not take issue with these decisions but points out that in the instant case there is sufficient evidence upon which the jury could conclude and obviously did conclude that the statements of the appellant at the time he passed the checks in question were different from those which he related at the trial. * * *

[5] In the instant case defendant testified that at the time he gave the check to Mr. Day he told him he had no money and was having trouble establishing credit and asked him to delay cashing the check. To the contrary, Mr. Day testified that nothing was said by defendant about the check not being good or that there was no money in the bank. Defendant further testified that on Monday after he gave Mr. Day the check, he called him and asked him to hold the check because he was having trouble getting the money. Mr. Day stated that

the only reason given to him for asking him to hold the check was that defendant wished to replace it with one on the printed form of Rim of the World. Defendant testified he was expecting a loan with which to open an account, whereas Sergeant Ostraff testified that defendant told him he did not know from where the money was coming. The jury not only resolved these discrepancies and other conflicts in his testimony adverse to the defendant, but it also had before it for its consideration certain statements of the defendant, if found by it to be false and contradictory in nature, as evidence of consciousness of guilt. *People v. Porter*, 105 Cal.App.2d 324, 233 P.2d 102; *People v. Turner*, 86 Cal.App.2d 791, 195 P.2d 809; *People v. Darrow*, 212 Cal. 167, 298 P. 1. In this connection is defendant's denial to Sergeant Ostraff that he had written checks on any banks other than the Bank of America. Also significant was defendant's detailed testimony at the trial regarding his conversation with Mr. Day at the time he gave him the check wherein he asked him to hold it, and then his statement that he did not believe that it was Mr. Day who waited on him when confronted with Day's testimony that at no time did defendant say to him that the check was not good.

[6-8] It is, of course, for the trier of the fact to resolve conflicts in the evidence and determine what facts are established and what inferences may be drawn therefrom. The authorities are clear that if the circumstances reasonably justify the verdict the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant a reversal. *People v. Newland*, supra, 15 Cal.2d 678, 104 P.2d 778; *People v. Weiss*, 123 Cal. App.2d 487, 266 P.2d 924. It is well settled, too, that the requisite specific intent to defraud may be inferred from all the surrounding circumstances. *People v. Weiss*, 123 Cal.App.2d 487, 266 P.2d 924. It is quite evident from all the circumstances in the case at bar, including inconsistent

statements and discrepancies in defendant's testimony, that the jury concluded defendant wrote the check and passed it to the payees knowing he did not have sufficient funds on deposit in the bank to cover the check without informing them of that fact and without requesting that the check be held for that reason. The jury also concluded that the defendant had no reasonable expectation of receiving any funds with which to cover the check. Certainly the evidence was sufficient to warrant the inference that appellant intended to defraud the payees. The attempted appeal from the verdict and sentence and decision of the court is dismissed and, for the foregoing reasons, the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**John DEWBERRY, Defendant and
Appellant.***

Cr. 3394.

**District Court of Appeal, First District,
Division 2, California.**

July 22, 1958.

Rehearing Denied Aug. 21, 1958.

Hearing Granted Sept. 17, 1958.

Defendant was convicted of second degree murder and of unlawful carrying of a weapon. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered judgments of conviction and orders denying new trial, and defendant appealed only from judgment and order pertaining to the murder count. The District Court of Appeal, Kaufman, P. J., held, inter alia, that evidence sustained conviction.

Judgment and order affirmed.

Dooling, J., dissented in part.

* Opinion vacated 334 P.2d 852.

1. Homicide $\Rightarrow$ 268, 269, 276

In murder prosecution, it was for jury to resolve conflicts of evidence and to determine credibility of witnesses, whether defendant had the requisite malice, and whether there was sufficient provocation to justify defendant's shooting in self-defense. West's Ann.Pen.Code, §§ 187, 188, 192.

2. Homicide $\Rightarrow$ 332(2)

Upon appeal from judgment of conviction of second degree murder, the District Court of Appeal could not weigh the evidence but could only determine its sufficiency as a matter of law. West's Ann.Pen.Code, § 187.

3. Homicide $\Rightarrow$ 332(2)

Jury's finding in murder prosecution could not be disturbed by the District Court of Appeal as long as there was sufficient evidence to support the finding. West's Ann.Pen.Code, § 187.

4. Homicide $\Rightarrow$ 146

In a case of second degree murder, malice may be implied from the unlawful killing. West's Ann.Pen.Code, §§ 187, 188, 192.

5. Criminal Law $\Rightarrow$ 554

In murder prosecution, jury was not bound to believe defendant's version of the shooting. West's Ann.Pen.Code, § 187.

6. Homicide $\Rightarrow$ 254

Evidence sustained conviction for second degree murder. West's Ann.Pen.Code, §§ 187, 188, 192.

7. Homicide $\Rightarrow$ 347

Where evidence sustained conviction for second degree murder, the District Court of Appeal was not authorized to reduce the judgment. West's Ann.Pen.Code, § 1181, subd. 6.

8. Criminal Law $\Rightarrow$ 829(21)

In prosecution for murder and for unlawful carrying of a weapon, failure to instruct jury that, if they were convinced beyond a reasonable doubt that defendant was guilty of an offense included within the charge of the indictment but entertained doubt as to whether it was murder

or manslaughter, they should convict defendant only of manslaughter was not error, in view of other instructions given. West's Ann.Pen.Code, §§ 187, 1097, 12021.

9. Criminal Law $\Rightarrow$ 829(16)

In murder prosecution, refusal to give defendant's requested instruction pertaining to use jury could make of fact that a witness had been convicted of a felony was not error, in view of other instructions given. West's Ann.Pen.Code, § 187.

10. Criminal Law $\Rightarrow$ 730(12)

In criminal prosecution, prosecuting attorney's reference, in argument to jury, to defendant's past record was not prejudicial, in view of fact that trial court properly cautioned the jury immediately after the incident and gave further cautionary instructions thereafter.

Gladstein, Andersen, Leonard & Sibbett, George R. Andersen, Norman Leonard, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., San Francisco, for respondent.

KAUFMAN, Presiding Justice.

The appellant, John Dewberry, was indicted on two counts: the first for the murder of Rudolph Glover on October 14, 1956, and the second for the unlawful carrying of a weapon in violation of Penal Code, section 12021. The indictment also charged two prior felony convictions: one for assault with a deadly weapon, and the second for a violation of the federal narcotics law. Appellant entered a plea of not guilty. A jury found the appellant guilty of murder in the second degree and of violating Penal Code, section 12021. Appellant moved for a new trial as to both counts. Both motions were denied and the appellant sentenced to the State prison for the term prescribed by law, the sentences to run concurrently. This appeal is taken only from the judgment of conviction of second degree murder and the order denying a motion for a

new trial on the murder count. No questions are presented as to the judgment and order denying a new trial on the second count. The contentions on appeal are: first that the evidence establishes only manslaughter, and second, that the trial court committed certain prejudicial errors in its instructions to the jury.

The circumstances of the shooting, as stated by the eyewitness, Jesse Mosley, are as follows: after his all night job as a door-man at 7:30 a. m. Mosley entered a bar called "The Plantation" located on the north side of Post Street in San Francisco. Mosley sat down at the east and west portion of the bar near the entrance and had two highballs. About forty-five minutes later, the appellant entered. Mosley had seen the appellant around and knew his name, but did not know the appellant personally. Mosley saw the appellant go to the telephone several times. The appellant complained to Mosley about not being able to reach his sister by telephone. The appellant sat down at the north and south portion of the bar about 10 feet diagonally away from Mosley.

The appellant began a conversation with another customer about gambling. During this conversation, the appellant flashed a sizeable roll of bills. Appellant told the customer that he was willing to gamble, but that he did not want any foolishness about his money because he carried his own protection. The appellant showed the man a pistol he was carrying. The two agreed to gamble together. The appellant put the pistol back into his pocket, and left with the other man. A short time later the appellant returned.

About 9 a. m. the deceased, Rudolph Glover, entered the bar with a woman whom he introduced to Mosley and others as Mrs. Glover. Mosley knew Glover as they had worked together as gripmen for the Municipal Railway. Glover and Mrs. Glover sat down at the front of the north and south portion of the bar, near the appellant. The appellant and Glover ex-

changed greetings. Glover had several drinks and then bought a round of drinks for the house. The appellant did likewise. There were about six or seven other customers in "The Plantation".

About 10:45 a. m. the television set in the rear of the bar was turned on to broadcast a professional football game. At this time the appellant said he wanted to straighten up his bar bill. The appellant spread his roll of money out on the bar and then wandered up and down, leaving the money on the bar. Immediately after the television broadcast began, Mosley moved to a booth in the rear in order to see better. However, when several people blocked his view, Mosley moved back to his original position at the front of the bar.

As Mosley was walking toward the front of the bar, he heard the appellant accuse Glover of having taken the money which was spread out on the bar and demanding a return of the money. Glover stated that he was not trying to take any money from the appellant, but had just picked up the money from the bar to keep it for the appellant. The appellant stated that he needed no protection as he had his own protection, and again demanded the money. Both the appellant and Glover were standing up, about three bar stools apart. Mrs. Glover was sitting behind Glover. As Mosley heard the argument he stopped behind and a little to the right of the appellant. Mosley saw Glover put his hand in his pocket and pass something behind him to Mrs. Glover. The appellant then asked Mrs. Glover to put the money back on the bar and then again asked Glover to put the money back on the bar. Glover said his wife had given him the money and he was returning it to her. In the meantime, the appellant drew his pistol from his pocket, cocked it and shot once. Glover turned and fell face down on the floor.

The appellant went over to Glover, rolled him on his back and searched Glover's pockets. Mrs. Glover came over, got on her knees and put her head on Glover's chest

and began to cry. She then started toward the front of the bar, but the appellant asked her for the rest of his money. When she did not give it to him, the appellant hit her and knocked her down, and said, "If you don't give me my money I will kill you, too." Appellant still had the pistol in his hand and was pointing it at Mrs. Glover. Mosley saw some money sticking out of the corner of Mrs. Glover's pocket. Mosley got the money, five one-hundred dollar bills and one fifty dollar bill, and laid it on the bar. The appellant asked the bartender to count the money and then stated that he was still about \$100 short.

As soon as the shooting occurred, someone summoned the police and an ambulance. Officer Dobeman stated that when he entered the bar, he saw the deceased lying on the floor. The appellant was sitting down on a bar stool. When the officer asked him what happened, the appellant said: "He tried to take my money and I did it." When the officer asked for the gun the appellant handed the officer a Colt 38 revolver, with one discharged shell and five full cartridges. About 12:20 a. m. Inspector McDonald of the homicide detail arrived, and asked the appellant what had occurred. In the presence of another police officer, the appellant told McDonald that he had shot Glover because Glover tried to take his money and that he had given the gun to Officer Dobeman. At the time he was being questioned, it appeared to the officers that the appellant had been drinking but was in full control of his faculties as he was steady on his feet, had control of his movements, and his speech was not affected. Inspector McDonald took \$1,252 from the appellant.

The appellant testified that he had been gambling and drinking all of the preceding night in San Mateo. He returned to his home in San Francisco, took a friend home from work and then went to "The Plantation" about 8 a. m. He was waiting in the bar to contact his sister in order to give her some money for the care of his family. While he was waiting, he talked to another customer about gambling but did not show

him a gun. He went up stairs and gambled with this man for about forty-five minutes and won about \$55. After he returned to the bar, he had a brief conversation with the bartender about his bill, and then spread the money, \$1,252 in currency of various denominations, out along the bar so he could arrange it according to denomination. While he was straightening out his money, Mrs. Glover came over and told him to take his money off the bar. He told her to mind her own business and she walked away. Then Glover walked over to the bar and picked up the money. He stopped Glover and asked for the return of his money. Glover tossed the money on the bar, but he could see that the \$100 bills were missing. He asked the bartender to count the money. The bartender did so and found only \$700. When he asked Glover for the rest of the money, he saw Glover reach in his pocket for something. He therefore drew his pistol and after Glover raised his arm and made a move towards him, shot in self-defense, because after one of his repeated requests for the money, Glover told him he would lose more than his money if he did not shut up, and because James McCoy had warned him that Glover was a belligerent person. As to his conduct after the shooting, appellant's testimony substantiated that of Mosley, except that the appellant denied threatening Mrs. Glover or showing his gun to the man with whom he gambled earlier in the evening.

Appellant's first contention is that the evidence does not support the judgment of conviction of second degree murder but only manslaughter. Murder is defined as the unlawful killing of a human being with malice aforethought. Penal Code, section 187. Manslaughter is the unlawful killing of a human being without malice. Penal Code, section 192. In this case, there is no question that the appellant shot the decedent and that the decedent died as a result of the shooting. The only issue is whether the shooting took place with sufficient malice to support a verdict of second degree murder.

Appellant argues that the physical facts established by the testimony of the autopsy surgeon, that the bullet entered the lower portion of decedent's right arm, traveled to the upper portion of the arm and then entered the chest cavity, supports appellant's testimony that the decedent raised his arm in a menacing gesture. He argues that the facts spell out sufficient provocation by the deceased to justify his shooting in self-defense. Appellant's argument, however, ignores the conflict in the evidence between his testimony and that of the other witnesses, as well as the conflicts in his own testimony. Mosley testified that he did not hear the deceased threaten the appellant or see the decedent raise his hand and take a step toward the appellant. James McCoy testified that he had never discussed the decedent with the appellant. Mosley also stated that after the deceased reached into his pocket, the argument continued for several minutes before the shooting occurred. The appellant testified that when he shot Glover, he did not intend to hit him, but fired to the right of Glover, in order to frighten him. On cross-examination, the appellant stated that he had won the gun in the game in San Mateo and that he did not know the gun was loaded when he pulled the trigger.

[1-7] It was for the jury to resolve the conflicts in the evidence, to determine the credibility of the witnesses, to determine whether or not the appellant had the requisite malice, and to determine whether or not sufficient provocation existed. This court cannot weigh the evidence but can only determine its sufficiency as a matter of law. *People v. Thomas*, 25 Cal.2d 880, 156 P.2d 7. The finding of the jury cannot be disturbed by this court so long as there is sufficient evidence to support it. *People v. Sheran*, 49 Cal.2d. 101, 315 P.2d 5. Penal Code, section 188, defines malice as follows:

"Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when

no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

Malice may also be implied from the unlawful killing in a case of second degree murder. *People v. Ross*, 34 Cal.App.2d 574, 93 P.2d 1019. The jury was not bound to believe the appellant's version of the shooting. Having examined the record in this case, we do not feel constrained to hold that the evidence is legally inadequate to support a verdict of murder of the second degree. Therefore, we are not authorized to reduce the judgment under Section 1181 (6) of the Penal Code as requested by the appellant.

[8] Appellant next contends that the trial court erred in refusing the following instruction requested by him.

"You may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, if, in your judgment, the evidence supports such a verdict under my instructions.

"To enable you to apply the foregoing instruction, if your findings of fact require you to do so, I instruct you that the offense of murder, of which the defendant is charged in Count I of the indictment, necessarily includes the crime of manslaughter.

"If you find that the defendant was guilty of an offense included within the charge of the indictment, but entertain a reasonable doubt as to the degree of the crime which he is guilty, it is your duty to convict him only of the lesser offense."

Appellant contends that it is reversible error to fail to instruct upon any included offense. In *People v. Carmen*, 36 Cal.2d 768, 228 P.2d 281, and other cases relied upon by the appellant, no manslaughter instructions were given at all. In the instant case, the trial court properly instructed the jury on the elements of the two degrees of murder, the elements of manslaughter, and

the elements of justifiable homicide and self-defense. The court carefully pointed out the distinction between murder and manslaughter and instructed the jury that if they were convinced beyond a reasonable doubt that the appellant had committed murder but were in doubt as to the degree, then they must give him the benefit of the doubt, and find him guilty of the lesser degree. Appellant's argument boils down to the failure of the court to give the same instruction as to finding him guilty of murder or manslaughter, citing Penal Code, section 1097. That section provides:

"When reasonable doubt as to degree, he can be convicted only of lowest. When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only."

On its face, the section appears to be limited in application to different degrees of the same crime. Appellant does not cite, and we have not been able to find any authority in this state, which indicates that Penal Code, section 1097 applies to anything other than different degrees of the same crime. We think the trial court gave adequate instructions.

[9, 10] Appellant's final contention is that the trial court erred in refusing the following instruction:

"The fact that a witness had been convicted of a felony, if such may be a fact, may be considered by you for only one purpose, namely, in judging the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness's credibility, and it does not raise a presumption that he, the witness, has testified falsely. It is simply one of the

circumstances that you are to take into consideration in weighing the testimony of such a witness."

The record, however, indicates that the matter was adequately covered by the following instruction:

"A witness may be impeached by the party against whom he is called, by contradictory evidence, or by evidence that he has been convicted of a felony. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony."

Nor is there any merit to appellant's argument that the prosecuting attorney's reference to appellant's past record in the argument to the jury was prejudicial. The court properly cautioned the jury immediately after the incident and gave further cautionary instructions to the jury.

We conclude that the case was fairly tried, and that no prejudicial error appears in the record before us.

Judgment and order denying motion for new trial affirmed.

DRAPER, J., concurs in the judgment.

DOOLING, Justice.

I dissent from the portion of the opinion which implies that the instruction as to reasonable doubt of the degree of the crime (Pen.Code § 1097) does not apply to doubt as to whether the homicide is murder or manslaughter. The clear implication of *People v. Marshall*, 120 Cal. 70, 52 P. 129, and *People v. Newcomer*, 118 Cal. 263, 270-271, 50 P. 405, is to the contrary and it is unrealistic to hold that the defendant is not entitled to an instruction that if the jury entertains a reasonable doubt whether the defendant is guilty of murder or manslaughter they should in such case convict him of manslaughter.

161 Cal.App.2d 752

Hal EDWARDS, Plaintiff and Respondent,
v.

CONTAINER KRAFT CARTON AND PAPER SUPPLY COMPANY, Fidelity & Deposit Company of Maryland, and Pacific Employers Insurance Company, Defendants and Appellants.

Civ. 22291.

District Court of Appeal, Second District,
Division 2, California.

July 2, 1958.

Hearing Denied Aug. 28, 1958.

Action by former employee against former employer for malicious prosecution of injunction action whereby employer had sought to restrain employee, who had gone into business for himself, from soliciting old customers. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment for employee and employer and sureties on injunction bonds appealed. The District Court of Appeal, Ashburn, J., held that evidence was sufficient to support findings of want of probable cause and malice, and even though complaint in malicious prosecution action was filed before time to appeal from judgment in injunction action had expired where that judgment had become final before trial of instant action malicious prosecution action could not have been said to have been prematurely brought against defendants who after taking appeal, had done nothing further in prosecution of appeal which was dismissed without any opposing affidavit being filed or appearance made.

Affirmed.

1. Malicious Prosecution ⚡64(2)

In action by former employee against former employer for malicious prosecution of injunction action wherein employer had sought to restrain employee, who had gone into business for himself, from soliciting old customers, evidence was sufficient to support finding of want of probable cause and malice on part of employer.

2. Appeal and Error ⚡989

An appellate court is not charged with duty of reviewing evidence in effort to convince appellant of its sufficiency or to otherwise demonstrate the fact.

3. Abatement and Revival ⚡20

Prematurity of action is merely ground for abatement, and if the ground has ceased to exist before time of trial it cannot then or thereafter prevail.

4. Abatement and Revival ⚡84

Malicious Prosecution ⚡44

Where action for malicious prosecution of injunction action was filed before time to appeal from judgment in injunction action had expired, but judgment therein had become final before trial of instant action against defendants who, after appealing from judgment, made no further prosecution of appeal which had been dismissed upon motion without any opposing affidavit or appearance, and during trial defendant, who counterclaimed, made no objection to evidence or further mention of prematurity, facts would support a finding of waiver of plea of prematurity, and under the circumstances it could not be said that action was prematurely brought. West's Ann.Code Civ. Proc. § 597.

5. Damages ⚡40(3)

Ultimate test in determining whether business destroyed was such a new venture as to render fact of damage too uncertain to sustain any award is whether there has been an operating experience sufficient to permit reasonable estimate of probable income and expense, or whether the nature and occurrence of anticipated profits dependent upon future events can be shown by evidence of reasonable reliability.

6. Malicious Prosecution ⚡64(1)

In action by former employee against former employer for malicious prosecution of injunction action whereby employer had sought to restrain employee, who had gone into business for himself just a few days before, from soliciting old customers, notwithstanding newness of business be-

fore it was temporarily enjoined, award of damages was supported by evidence.

7. Injunction $\S$ 235

Malicious prosecution is not of essence of recovery upon injunction bonds and all that is necessary thereto is a final judgment dissolving injunction plus proof of damages therefrom, and dissolution of injunction fulfills condition of bond.

8. Injunction $\S$ 235

Where former employee brought action for malicious prosecution of injunction action by former employer who had sought to restrain employee, who had gone into business for himself, from soliciting old customers, and joined as defendants were sureties on injunction bonds given upon issuance of temporary restraining order, recovery against sureties was independent of proof of malice and want of probable cause in malicious prosecution action.

Charles Murstein, Los Angeles, and F, Rodman Woelfle, Beverly Hills, for appellants.

Simon Taub, Beverly Hills, for respondent.

ASHBURN, Justice.

Appeal from judgment for damages for malicious prosecution of an injunction action.

Appellants challenge the sufficiency of the evidence to support the findings of want of probable cause and malice; also argue that this action was prematurely brought and that the award of damages is not supported by proof of certainty of loss to plaintiff.

Plaintiff Edwards was employed as salesman for defendant Container Kraft Carton and Paper Supply Company (hereinafter designated as Container) for about five years before he opened his own competitive business. Container is a jobber engaged in selling corrugated containers and paper supplies to the general trade. Edwards had

been bringing in about \$30,000 per month in business; dissatisfied about his earnings and failure of Mr. Garson, who controlled Container, to perform a promise to give him certain stock in the company, Edwards quit on June 3, 1955 and opened his own business. Garson had threatened to kill him if he did so and had made other threats.

On June 8th Container filed an injunction action against Edwards. A restraining order was sought upon the original complaint but was refused, whereupon an amended complaint and supporting affidavit (both signed by Garson) were filed on June 14th, and a temporary restraining order obtained on the 15th. Among other things it enjoined Edwards "from soliciting the customers of plaintiff who were such prior to June 3, 1955." On July 1, 1955, a preliminary injunction to the same effect was obtained by Container. It was dissolved by minute order of September 30, 1955, which also directed judgment for defendant Edwards; said judgment was entered on October 26, 1955. That action was filed and prosecuted upon the theory that Edwards was a director of Container and was violating a fiduciary obligation in establishing and conducting a competing business. The trial court therein found: "That it is not true that the defendant was ever a director of the plaintiff corporation." Also: "That the plaintiff is engaged in the business of jobbing paper boxes and paper supplies and that the defendant, since June 3, 1955, has engaged in a similar business. The customers sold by both the plaintiff and defendant are not of a confidential list and are commonly known to the trade and are called upon by salesmen for various companies and are readily available to anyone. That the plaintiff is in open competition with other jobbers engaged in a similar business; that it is true that in the paper jobbing business there is no assurance of an order unless the salesman can satisfy the customer that his product is cheaper, better or more saleable than that of his competitor." This brings the case within the doctrine of *Continental Car-Na-Var Corp. v. Moseley*, 24 Cal.2d 104, 148 P.2d 9.

In the case now on appeal the trial judge found with respect to the injunction action that the complaint therein alleged that Edwards had been a director of Container, had submitted false and fraudulent purchase orders to it for the purchase of merchandise for certain of its customers, had assigned Container accounts receivable for factoring and had received moneys for said assignment and converted same to his own use, had ordered on behalf of Container certain merchandise and then taken personal possession of same and appropriated it to his own use, and also appropriated money and property belonging to Container to his own use and benefit. Also: "That it is true that the defendant knew that the allegations in the Complaint filed in said action * * * were and are false and untrue and were made with the intent to injure Hal Edwards, plaintiff herein, and were made maliciously and without probable cause; that defendant Container Kraft Carton and Paper Supply Company maliciously and without probable cause wrongfully caused said action to be filed and maintained against Hal Edwards; and that defendant, Container Kraft Carton and Paper Supply Company wrongfully, maliciously and without probable cause caused an injunction to be issued therein restraining plaintiff, Hal Edwards, from soliciting any customers who were customers of Container Kraft Carton and Paper Supply Company prior to June 3, 1955, and from hypothecating or disposing of assets belonging to Container Kraft Carton and Paper Supply Company."

[1, 2] An examination of the testimony and other evidence in the instant case discloses that these findings have the support of persuasive evidence. We recognize no obligation to set it forth herein, for an appellate court is not charged with the duty of reviewing the evidence in an effort to convince appellant of its sufficiency or to otherwise demonstrate the fact. See, *Sonkin v. Hershon*, 130 Cal.App.2d 491, 492, 279 P.2d 156; *Clewett v. Clewett*, 136 Cal.App.2d 913, 915, 289 P.2d 512.

[3, 4] The claim of prematurity of this action for malicious prosecution possesses more of substance. The complaint was filed before the time to appeal from the judgment in the injunction action had expired. But that judgment had become final before the trial of the instant action. California is now definitely committed to the doctrine that prematurity of action is merely ground for abatement, and if the ground has ceased to exist before time of trial it cannot then or thereafter prevail. This is the result of *Radar v. Rogers*, 49 Cal.2d 243, 317 P.2d 17. That case involved a contention that an action against an administratrix was premature because it was filed before presentation of plaintiff's claim to the said personal representative. At page 250 of 49 Cal.2d., at page 21 of 317 P.2d, the court said: "The defense that suit was commenced before the presentation and rejection of claim 'is simply matter of abatement—a defense which is not favored, and must be made by plea, and in proper time, or it is waived.' [Citations.] Here there is no occasion to consider whether the unfavored defense was waived, for it had ceased to exist at the time defendant sought to raise it. 'A consequence of the disfavor with which such pleas are viewed is that matter in abatement must exist at the time of filing of the pleading urging it' (1 Cal. Jur.2d 29-30, § 3) and if the stated ground does not exist at the time of trial it may be disregarded. (*Archibald v. Iacopi* (1953), 120 Cal.App.2d 666, 669 [5] 262 P.2d 40.)" Though not mentioned in the opinion, the case of *Kelley v. Upshaw*, 39 Cal.2d 179, 186-187, 246 P.2d 23, upon which appellants rely, is necessarily modified pro tanto by the *Radar* opinion.

In *Archibald v. Iacopi*, 120 Cal.App.2d 666, 669, 262 P.2d 40, 41, the court said: "Appellant's contention that with respect to the one-third payable by a promissory note twelve months after completion of the work the action was prematurely instituted on March 17, 1950, cannot be sustained. The record does not show the date on which the original complaint was filed. The de-

fense that an action is premature is a dilatory plea not favored in law, and it is considered waived if, as is the case here, it is not specially pleaded and urged in the trial court. *Kelley v. Upshaw*, 39 Cal.2d 179 246 P.2d 23. Moreover at the time of the trial (November, 1951) the stated ground of abatement did not exist any more and then it may be disregarded. 1 Cal.Jur.2d 32." See, also, *Rudneck v. Southern California M. & R. Co.*, 184 Cal. 274, 282, 193 P. 775; *Watkins v. McCartney*, 70 Cal.App. 137, 140, 232 P. 982; *Moore v. Fellner*, 50 Cal.2d 330, 325 P.2d 857; 1 C.J.S. Abatement and Revival § 71b, p. 111; § 85, p. 126.

The facts before us argue strongly for the application of the *Radar v. Rogers* rule. This action for malicious prosecution was filed on November 15, 1955, 20 days after entry of judgment in the injunction action. Thereupon an appeal was taken from that judgment on November 21, 1955. Request for clerk's and reporter's transcripts was filed on the same day. Defendants' answer herein was their first appearance and was filed on December 12, 1955. It alleged by way of separate defense the taking and pendency of said appeal and prayed for dismissal of the action. It did not sound in abatement and no motion to that end was made. Nor was any request made pursuant to § 597, Code of Civil Procedure, for trial of that issue in advance of the merits. No motion for new trial was made and nothing further was done toward prosecution of the appeal though notice of estimated cost of each transcript was given; no payment and no arrangement for payment for either transcript was made. Upon motion of respondent the appeal was dismissed by this court on March 27, 1956, no opposing affidavit being filed, and no appearance made in opposition to the motion.

The trial of the instant action for malicious prosecution occurred on June 25 and 26, 1956, about three months after the former judgment had become final. At the opening of the hearing plaintiff offered in evidence the judgment roll in the former action; defendants' counsel requested that the

entire file go in; that was done and no objection to that evidence was made. The transcript shows no further mention of the plea of prematurity of action and defendants' counsel twice stated in objecting to certain evidence that "that other case is res judicata." Defendants also pursued successfully a counterclaim against Edwards. These facts would support a finding of a waiver of the plea of prematurity (*Seches v. Bard*, 215 Cal. 79, 81, 8 P.2d 835; *Bank of America, etc., Ass'n v. Button*, 23 Cal. App.2d 651, 653, 74 P.2d 81).

Appellants have had a full trial upon the merits in the present action, the findings and judgment are abundantly supported by the evidence, and it seems clear beyond peradventure that the appeal from the judgment in the injunction case was conceived and used merely as a device to defeat upon a highly technical ground the collection of a righteous judgment. In our opinion *Radar v. Rogers*, *supra*, commands that the prematurity argument shall not now prevail and we so hold.

It is urged that plaintiff Edwards was in business only a few days before he was enjoined—June 3 to June 15—and that the new venture rule applies to the subject of damages, establishing that the fact of damage is too uncertain to sustain any award. The court found that plaintiff Edwards was damaged in the sum of \$6,500 by the malicious prosecution of the injunction case; that is a compensatory award, no exemplary damage being allowed. The \$6,500 includes an attorney fee of \$2,500 for defense of the action and the reasonableness of that amount is not questioned.

While it is true that Edwards was in business on his own account only 12 days before he was enjoined, it also appears that he continued during the injunction period to solicit and serve customers who had not been with Container and after the injunction was dissolved he successfully resumed and carried on his business until his place burned down at the end of April, 1956. When employed by Container Edwards' position was unique. He built his own clientele and brought into the company

gross business of \$30,000 a month. The court found, "that Hal Edwards had solicited his own customers during that five-year period and had established his own business clientele. That the gross volume of business accounted for by Hal Edwards while employed with Container Kraft Carton and Paper Supply Company was approximately \$30,000.00 per month, of which the net profit was between ten (10%) per cent and twelve (12%) per cent." During the time Edwards was restrained, his business based upon new customers yielded no net profit, but after the injunction was lifted and he was free to solicit the old customers his gross business, according to his testimony, was as follows: October, \$23,002.11; November, \$27,359.66; December, \$16,947.11; January, \$16,984.23; February, \$15,270.05; March, \$15,598.58; April, \$18,623.48. The gross markup was 28 per cent, the same figure Container had used, and the net profit on the business was 11 per cent. The court found that Edwards lost profits of \$1,666.66 in each of the months of July, August and September. A brief computation shows the soundness of this conclusion. The court accepted the sum of \$20,000 a month as the amount of business done by plaintiff after the injunction was dissolved and "maintained at that level for each month thereafter." This was doubtless based upon a statement given by Edwards to Dun & Bradstreet on February 2, 1956, to the effect that his business grossed \$20,000 a month. A profit of 11 per cent on that amount would be \$2,200 a month. The figure of \$1,666.66 which was used for computation of the damage award thus appears to be conservative. Unless the new venture rule precludes such an award it must be affirmed.

Appellants rely upon the rule stated in *Grupe v. Glick*, 26 Cal.2d 680, 692, 160 P.2d 832, 840: "On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative." But this rule is not an end in itself,

merely an aid to determination of whether the fact of damage, as distinguished from the amount of damage, has been established with reasonable certainty. The court added in the *Grupe* opinion, *supra*, 26 Cal.2d at page 693, 160 P.2d at page 840: "But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. [Citations.] All of these cases recognize and apply the general principle that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent."

[5] *Natural Soda Products Co. v. City of L. A.*, 23 Cal.2d 193, 199, 143 P.2d 12, 17, dealt with damages growing out of defendants' wrongfully preventing the operation of plaintiff's new plant. The court disposed of the contention that the proof was too uncertain to support an award of damages in the following language: "The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery. [Citations.] If, however, there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded. * * * In the present case plaintiff's probable gross receipts could be estimated from its sales in the preceding two years, in view of the evidence that prices were stable. Its unit costs could be estimated on the basis of detailed figures concerning actual expenses, such as labor, depreciation, insurance, taxes, and royalties for the limited operations carried on in 1938. Its plant capacity was conservatively estimated at 90 tons per day, since plaintiff's old plant, using the 'carbonating process' had a proved capacity of from 35 to 40 tons a day, and the capacity of the new 'Mono Process' plant had been increased

from 50 to 100 tons a day. Awards of prospective profits have been sustained on the basis of much less satisfactory evidence. [Citations.] Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated." The ultimate test is whether there has been "operating experience sufficient to permit a reasonable estimate of probable income and expense," as stated in *Natural Soda*, supra; or, as phrased in *Grupe*, supra, 26 Cal.2d at page 693, 160 P.2d at page 840, "anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." To the same effect, see, *Lambert v. Haskell*, 80 Cal. 611, 618, 22 P. 327; *Landon v. Hill*, 136 Cal.App. 560, 567, 29 P.2d 281; *McConnell v. Corona City Water Co.*, 149 Cal. 60, 65, 85 P. 929, 8 L.R.A., N.S., 1171.

[6] The proof of plaintiff's capacity to produce and hold business while working for Container for five years, coupled with his demonstration of ability to do so on his own account for seven months after he was relieved of restraint of a court order, furnished substantial basis at bar for a finding that it was reasonably probable that plaintiff would have made like profits during the said three-month injunction period. That proof leaves no substantial doubt of the fact of loss or of the conservative nature of the court's measurement of same. There was no error in the award of damages.

The foregoing discussion proceeds as if this were solely an action for malicious prosecution, for that is the tenor of the briefs. In fact, the amended complaint is in two counts, the first of which runs against appellants Fidelity & Deposit Company of Maryland and Pacific Employers Insurance Company, as well as Container. It seeks recovery from Fidelity upon a \$2,500 undertaking given by it upon issuance of the temporary restraining order in the former action, and against Pacific upon a \$5,000 bond given upon issuance of the preliminary injunction. The Fidelity bond "promises to the effect, that in case said re-

straining order shall issue, the said Plaintiff will pay to the said party restrained, such damages, not exceeding the sum of Twenty-Five Hundred and no/100 Dollars (\$2,500.00), as such party may sustain by reason of the said restraining order, if the Court finally decides that the said Plaintiff was not entitled thereto." That of Pacific "undertakes in the sum of Five Thousand and No/100 (\$5,000.00) Dollars, and promises to the effect, that in case said injunction shall issue, the said Plaintiff will pay to said party enjoined, such damages, not exceeding the sum of Five Thousand and No/100 (\$5,000.00) Dollars, as such party may sustain by reason of the said injunction, if the said Superior Court finally decides that the said Plaintiff is not entitled thereto." The court found that plaintiff had been damaged to the extent of \$500 by the issuance of the restraining order and \$3,500 by the preliminary injunction, and awarded judgment against the respective sureties for those amounts. After fixing plaintiff's total damage at \$6,500, the court offset a Municipal Court judgment previously obtained by Container against Edwards in the sum of \$2,592.04, plus \$60.21 interest, thus reducing the total recovery to \$3,847.75. The judgment provides that any sums received by plaintiff Edwards from either of the defendants Fidelity and Pacific shall operate pro tanto in satisfaction of the judgment against Container in the sum of \$3,847.75.

[7] Malicious prosecution is not of the essence of recovery upon the injunction bonds. All that is necessary thereto is a final judgment dissolving the injunction plus proof of damage therefrom. The dissolution of the injunction fulfills the condition of the bond. *Rice v. Cook*, 92 Cal. 144, 147, 28 P. 219; *Asevado v. Orr*, 100 Cal. 293, 299, 34 P. 777; 1 Witkin California Procedure, p. 886, § 44.

[8] It thus appears that plaintiff is entitled to recovery against defendants Fidelity and Pacific independently of proof of malice and want of probable cause in commencing and prosecuting the injunction action.

Appellants' criticisms of the findings are found to be without merit. Other arguments have been considered but require no specific discussion.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.



162 Cal.App.2d 100

OIL LEASE SERVICE, INC., a corporation,
Petitioner and Appellant,

v.

M. H. STEPHENSON, Commissioner of Corporations, Defendant and Respondent.

Civ. 22725.

District Court of Appeal, Second District,
Division 1, California.

July 14, 1958.

Rehearing Denied Aug. 1, 1958.

Hearing Denied Sept. 10, 1958.

Proceeding for a writ of mandate. From a judgment of the Superior Court of Los Angeles County, John J. Ford, J., denying the writ, the petitioner appealed. The District Court of Appeal, Lillie, J., held that transactions involving the offering, issuing and dealing in certificates of interest in oil, gas or mining titles required a permit from the corporation's commissioner.

Judgment affirmed.

1. Licenses ⇨18½(10)

In determining whether an instrument is a "security" within the code section respecting permit for the sale of security, the court may look through mere form to substance and consider the facts surrounding its execution to ascertain the true intent of the parties, their mutual purposes and expectations and potentialities of the rights acquired by the purchaser, and the

inquiry goes beyond the mere name of the instrument or the nature of the interest conveyed. West's Ann.Corp.Code, § 25008(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Security".

2. Licenses ⇨18½(10)

Whether a particular instrument is to be considered a security within the code section respecting permit of the sale of securities is a question to be determined in each case. West's Ann.Corp.Code, § 25008(a).

3. Licenses ⇨18½(15)

An "investment contract" as contemplated by the statute respecting permit of the sale of securities is one which contemplates the entrusting of money or other capital to another with the expectation of deriving a profit or income therefrom to be created through the efforts of other persons. West's Ann.Corp.Code, § 25008(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Investment Contract".

4. Licenses ⇨18½(17)

Any certificate of interest or like instrument of conveyance or assignment is within the Securities Act only when it appears directly or inferentially that the buyer contemplates receipt of profits from activities of other persons, such as carrying on a business of drilling an oil well, and the mere conveyance to him of a fractional interest in a piece of land or other type of property is not subject to the statute if the buyer must look to the thing bought or his own efforts to produce a profit to himself. West's Ann.Corp.Code, § 25008(a).

5. Licenses ⇨18½(10)

While the size of the area conveyed may be considered by the court in determining the real substance of the instrument as within the Securities Act, size alone is not determinative, and it is only one factor to be considered with other facts surrounding their execution. West's Ann.Corp.Code, § 25008(a).

6. Licenses $\Rightarrow$ 18½(10)

The name of the instrument making the conveyance is of little consequence in determining application of the Securities Act and no matter how it be disguised, the court may inquire into, and rely upon the facts collateral to the transfer of the interest more than upon the exact type of the interest conveyed. West's Ann.Corp. Code, § 25008(a).

7. Licenses $\Rightarrow$ 18½(16, 17)

Where seller offered to the public United States government oil and gas leases and received from its clients authorization to acquire for them such leases, and on receiving an authorization from a client to acquire a lease of less than 640 acres, seller secured in the name of its secretary a lease on 640 acres selected by it in the area chosen by its client and thereafter assigned to its client its interest in such acreage, transactions involved the "selling, offering, issuing and dealing in certificates of interests in oil or gas or mining titles and leases for value" for which a permit was required from the corporation's commissioner. West's Ann.Corp.Code, § 25008(a).

Ellis D. Reiter, Los Angeles, Thomas J. Kelley, Beverly Hills, R. S. Jones, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Lee B. Stanton, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Petitioner appeals from a judgment denying a petition for writ of mandate.

On November 8, 1954, the corporations commissioner issued a desist and refrain order against petitioner directing it not to deal in, or sell, offer or negotiate for the sale of, any securities consisting of certificates of interest in oil, gas or mining titles or leases.

After a hearing before the commissioner, the order was affirmed and in paragraph IV of his findings of fact the commissioner found:

"That Respondent offers to the public, through advertising in Los Angeles newspapers and its Oil News Letters, United States Government Oil and Gas Leases; that it receives from those members of the public who become its clients, authorization to acquire for them such leases upon a specified number of acres of land which is not described other than by the county and state in which it is located and by a tract number assigned by Respondent to an area within a certain Township and Range in which it can acquire such leases; that Respondent recommends 160 acre leases although leases of 80 acres, 320 acres and 640 acres are also offered; that pursuant to Government regulations the minimum oil and gas lease which may be obtained from the United States Government is 640 acres; that when respondent receives from a client an authorization to acquire for such client a United States Government Oil and Gas Lease of less than 640 acres, such as 160 acres, in an area described as above stated, Respondent secures in the name of its secretary a lease on 640 acres selected by it in the area chosen by its client and thereafter causes its secretary to assign to its client its interest in 160 acres specifically described and chosen by Respondent out of the 640 acres so acquired by it in the name of its secretary."

Thereafter petitioner filed its petition for writ of mandate. No evidence was taken, but a transcript of the testimony at the administrative hearing, the original exhibits and the complete record of the administrative proceedings were filed with the court below. It denied the petition; found the commissioner's findings were supported by substantial evidence and affirmed them; adopted paragraph IV thereof; and expressly concluded that in its transactions petitioner would be "offering, issuing and dealing in 'certificates of interest in oil, gas or mining titles and leases' for value" which constitute securities under the Cor-

porations Code; and that its transactions would be unfair, unjust and inequitable to persons solicited therefor.

Although the issue before this court is whether there is substantial evidence in the light of the entire record to support the trial court's findings, the basic legal question is whether appellant was engaged in the business of "selling, offering for sale, or negotiating for the sale, or dealing in" securities.

The testimony of George Muser, appellant's president, the exhibits and the respondent's return by way of answer to the alternative writ of mandate, not denied or contradicted by proof, establish the business operations of appellant corporation. Its business consisted of obtaining from the government, for members of the public, government oil and gas leases in varying acreage up to 640 acres on unproved government land. Under federal regulations, the minimum oil and gas lease which may be obtained from the government by an individual is 640 acres. The manner in which appellant obtained leases on acreage less than 640 acres was described by it in newspaper advertising, brochures and an Oil News Letter, by which it offered its various transactions to the public.

The Oil News Letter, for example, contained two sketch maps showing tracts Nos. 38-41 in Emery and Grant Counties, Utah, which were open for leasing. In referring to these counties appellant represented therein that:

"Leases are already changing hands at very fancy prices with substantial overriding royalties being held by the original owner. There is little doubt but that *many Government lease holders will become wealthy*, not only from cash bonuses they may receive, but also from monthly royalty checks they will receive because of the overriding royalties they hold.

"It is our sincere opinion that now is the time for you to acquire a U. S. Government Oil & Gas Lease in either Grand or Emery County, Utah, *ahead of the big drilling campaign*. On the

maps of Emery or Grand Counties, on pages 2 and 3 of this letter, we have shown certain areas where we can acquire for you Oil & Gas Leases on U. S. Government land. Our regular schedule of fees for this service is as follows:

640 Acres....\$750.00	160 Acres....\$250.00
320 " 450.00	80 " 130.00

"If you wish, you can take advantage of our time-payment plan which is 20% down and 20% per month for four months. Remember, now is the time to acquire Government Oil & Gas Leases in southeastern Utah. Get in ahead of the drill while opportunities for big profits exist." (Emphasis added.)

On page 5 thereof, the Letter continued

"Our business is serving clients and acquiring for them U. S. Government Oil Leases or assignments in areas that are considered favorable for the production of oil or gas or both. We gather information regarding drilling activities, new fuel discoveries, leasing activities, etc., *in areas that seem to be well located for future production*, also check the records to learn what companies and individuals are leasing and where these activities are taking place. From all of this and other information we locate areas that appear favorable for future development. *We do all the work* necessary to acquire for you a U. S. Government Oil and Gas Lease in your name, and our fees shown below include payment of all Government charges for the first three years. * * * A question frequently asked of us is, *how much money may I expect to make out of a U. S. Government Oil & Gas Lease?* This question is, of course, impossible to answer definitely. However, there are constant examples which we can cite which will show what the possibilities are." (Emphasis added.)

The Letter then referred to situations in other states in which large profits were made by persons who bought oil leases in

known oil structures. Such reference sought to identify the oil land in the instant case with known oil structures in other states while the noncompetitive leases at bar specifically apply "only to lands not within a known geologic structure of a producing oil or gas field."

Another brochure entitled "U. S. Government Oil and Gas Leases" published by appellant is of the same tenor. It refers to the purchasers as "investors" and discusses at length the large profits which they could anticipate.

The lease recommended by appellant, and most commonly sold, was the 160-acre lease. Appellant's profits constituted the difference between what it paid the government for the lease and what it charged its purchaser—for example, on an 80-acre lease the cost was \$52.50, the charge \$130, and the profit \$77.50; on a 640-acre lease the cost was \$330, the charge \$750, and the profit \$420.

The operations of appellant were flexible, the *modus operandi* varying with the circumstances. Of the 450 transactions closed by it, approximately six different types of operation were used. They differed in detail, but common to all were the inducements. By way of advertising and brochures, appellant induced the prospective purchaser to buy an assignment of an interest in an oil lease as an investment in potential oil land representing to him that it would, for a fee, do all the work of selecting the best lease within a general area, using its expert knowledge, and secure the lease from the government. The land was located in unproved territory in another state. The purchaser, who had neither the ability nor the money to prospect for oil on his own account, was to do nothing more than pay the "fee." It was the plan, scheme and intention of appellant to induce the prospective purchaser to part with his money upon the expectation, created by its representations, that he would be able at some future time to assign his interest to some oil producing company for a large cash bonus and profitable overriding royalties when and

after oil was actually discovered on the land. Such event would occur as the result of drilling by an unidentified oil company, or companies.

Of the six types of transactions used the first permitted the purchaser to choose the location of the lease. Appellant discouraged this practice and it was seldom used. In the few instances it was employed the prospective purchaser sent to appellant an authorization slip directing it to secure for him a government oil and gas lease on certain described government land. Upon receipt of this, appellant issued to him a signed confirmation slip confirming receipt of the authorization and describing the section proposed to be leased to him. Then appellant secured a lease thereon direct from the government in his name. A variation of this operation occurred when the purchaser authorized appellant to secure a 640-acre lease in a certain numbered tract containing 23,000 acres in a named county. Appellant then issued the confirmation slip to him and, purportedly using its superior knowledge and skill, selected the best and most promising 640-acres in the tract upon which to secure a lease for him from the government. In a third type of transaction appellant alone selected for the purchaser the land to be leased, purportedly using its special knowledge and skill, and telephoned its representative in Salt Lake City who had been previously supplied with applications for leases already signed by Miss Decker, an officer of appellant, as an individual. The representative filled in the legal description and in fifteen minutes the property was leased in the name of Decker, she and appellant acting as trustees of money and property for the purchaser. When the purchaser paid in full, Decker executed an assignment form to the purchaser of a specific number of acres. The assignment form involved in all of these transactions did not constitute a lease until approved by the government. A fourth and popular type of transaction permitted the single purchaser and six or seven others, by way of authorization slips, to authorize

appellant to secure for each of them an 80-acre lease. Appellant consolidated these authorizations of the eight persons to make up 640 acres and issued its confirmation slip to each generally describing the parcel; purportedly using its superior knowledge and skill selected a specific 640 acres and applied to the government for a lease forwarding the application for the lease in Decker's name as an individual. When the lease in Decker's name was received and as each purchaser completed paying his "fee" Decker executed an assignment of 80 acres to him from the 640-acre master lease. For the eight leases appellant collected \$1,040 for which it paid \$330. Muser admitted that in taking the money and holding title to the master lease appellant and Decker acted as trustees for the purchasers. A fifth and equally popular variation of this transaction was used for the lone purchaser who wanted, for example, an 80-acre lease. The appellant consolidated enough single authorizations from other purchasers to make up 640 acres and issued a confirmation slip to each setting out a general description of the area. Then, purportedly using its special knowledge and skill, appellant selected the best and most promising 640 acres, upon which appellant forwarded to the government an application for a lease in Decker's name as an individual. When the lease in Decker's name was received from the government and the purchaser finished paying the "fee" Decker then executed an assignment of 80 acres from the master lease of 640 acres to him. In taking the money and holding title to the master lease, they acted as trustees for the purchasers. The sixth type of transaction was used when the appellant received, for example, five 80-acre authorizations totaling 400 acres. It issued a confirmation slip to each and then Decker applied for a 640-acre lease in her name. The difference of 240 acres became a part of appellant's inventory which was held in the name of Decker for assignment to any purchaser who subsequently applied. When one requested a 40, 60, or 80-acre lease, appellant immediately selected acre-

age from the inventory and assigned it to him.

Section 25008 of the Corporations Code in pertinent part provides: "Security" includes all of the following: (a) * * * any certificate of interest in an oil, gas, or mining title or lease; * * *".

[1, 2] In determining whether an instrument is a security within the meaning of the code, the court may look through mere form to substance. (*Ogier v. Pacific Oil & Gas Development Corp.*, 132 Cal.App. 2d 496, 282 P.2d 574) and consider the facts and circumstances surrounding its execution to ascertain the true intent of the parties, their mutual purposes and expectations and the potentialities of the rights acquired by the purchaser. The determination of its true character requires an inquiry which goes beyond the mere name of the instrument or the nature of the interest conveyed. *Moore v. Stella*, 52 Cal. App.2d 766, 127 P.2d 300. Whether a particular instrument is to be considered a security within the meaning of the statute is a question to be determined in each case. *People v. Rankin*, 160 Cal.App.2d 93, 325 P.2d 10; *People v. Syde*, 37 Cal.2d 765, 235 P.2d 601. Appellant in its brief has set out isolated features of its business operations and cited various cases to impress this court that it merely sells a service to the public in assisting qualified citizens to acquire oil and gas leases from the government in acreage less than the 640 acres required under the law. It is clear from the record that appellant's business is far more complicated than it would have us believe and actually involves not only the issuance and use of certificates of interest in oil and gas leases and assignments of the same but investment contracts and collateral trust certificates, all of which are included in the statutory definition of "security"—certainly not in keeping with the oil and gas brokerage service appellant claims it operated.

[3, 4] Interestingly enough, appellant itself considered members of the public who did business with it as "investors." Throughout the administrative hearing,

both appellant's counsel and its president referred to prospective purchasers as "investors," as did appellant's brochure, "U. S. Government Oil and Gas Leases." Of course, the mere reference does not in fact make them investors, but a reading of the brochures and Muser's description of appellant's operations leave little doubt that the whole scheme was sold to the public solely as an investment. Significant is the fact that in most of the transactions the purchaser himself did not select any particular 60, 80, or 160 acres for his lease, but as suggested in appellant's brochures entrusted his money to the appellant which made the selection for him and secured his lease on *some* 640 acres within a numbered tract. The purchaser did nothing but pay the "fee" and appellant, as represented by it, did all of the work. Obviously the purchaser gave his money to appellant in the hope and upon its representation that by the use of its superior knowledge, experience, information and skill it would select for his lease areas "that appear favorable for future (oil) development" which he would be able to sell or assign later at a profit when oil was discovered and drilled by oil companies. Both purchaser and appellant knew that the areas involved were unproved land and that the purchaser had neither the knowledge nor experience to choose a potential oil area, nor the ability nor money to prospect or drill for oil. His profits, if any, depended not on his own efforts, or on the lease itself, but entirely on the efforts of others—first, on whether appellant, through its skill, chose for him an oil bearing area and, second, on whether an oil company would discover and drill for oil on that land. In *People v. Chait*, 69 Cal.App.2d 503, 159 P.2d 445, fractional lots of land were sold upon the representation they were either "proven oil lands" or that negotiations were then pending with major oil companies operating in the district and that leases would be made with these companies by virtue of which purchasers would receive large bonuses or royalties. In holding that the transactions constituted investments and hence securi-

ties, the court, citing *Securities & Exchange Commission v. Bailey*, D.C.S.D. Fla., 41 F.Supp. 647, said at page 650: "An 'investment contract,' as contemplated by the Act, is one which contemplates the entrusting of money or other capital to another, with the expectation of deriving a profit or income therefrom, to be created through the efforts of other persons. * * *". *Domestic & Foreign Petroleum Co. v. Long*, 4 Cal.2d 547, 51 P.2d 73; *People v. Jackson*, 24 Cal.App.2d 182, 74 P.2d 1085; *People v. Daniels*, 25 Cal.App.2d 64, 76 P.2d 556; *People v. Yant*, 26 Cal.App.2d 725, 80 P.2d 506; *Moore v. Stella*, 52 Cal.App.2d 766, 127 P.2d 300. This same test was followed by the court in *People v. Rankin*, 160 Cal.App.2d 93, 325 P.2d 10, 12: "It is settled law that any deed, certificate of interest or like instrument of conveyance or assignment falls within the act only when it appears directly or inferentially that the buyer contemplates receipt of profits from activities of other persons, such as carrying on a business, drilling an oil well, or sinking and operating a mine; the mere conveyance to him of a fractional interest in a piece of land or other type of property is not subject to the statute if the buyer must look only to the thing bought or his own efforts to produce a profit to himself."

[5] Appellant's argument that the case of *People v. Anderson*, 35 Cal.App.2d 23, 94 P.2d 627, supports its position could be persuasive only if we are to ignore the details of appellant's business operations. It devotes much of its brief to the contention that the size of the acreage in the leases assigned is determinative on the question whether securities are involved. It is true that the size of the area conveyed may be considered by the court in determining the real substance of the instruments in question, as discussed in cases cited by appellant, but it is also clear from these same authorities that size alone is not determinative; that it is only one factor to be considered with other facts and circumstances surrounding their execution.

Many of appellant's transactions also involved trust arrangements wherein the

money of the purchaser was held by appellant, or its representative, in trust, together with title to the lease until it was assigned. The instrument evidencing this trust relationship was the confirmation slip describing the proposed acreage to be selected by appellant, by the use of its purported expert knowledge and skill, and actually issued to the purchaser by appellant as trustee for the money entrusted to it by him and the 640-acre oil lease obtained in its, or Decker's name, until divided and assigned to purchasers. Moreover, it appears that the confirmation slip employed in this manner clearly constituted a certificate of interest in an oil lease.

Appellant contends that any assignment of a part of a 640-acre lease becomes a distinct and separate lease under federal law and constitutes a lease under California law, not a security. Appellant seeks refuge behind the "U. S. Government" label, implying that it constitutes a stamp of approval on its activities and contending that they are entirely proper in that it deals with the U. S. Government, in U. S. oil and gas leases, on U. S. government land under federal regulations and that the relationship of lessee and lessor is one between the purchaser and the government and not the appellant. Appellant cites certain regulations of the Federal Bureau of Land Management, and government circulars, in its contention that any assignment of a part of a 640-acre lease becomes a separate lease under federal law. In presenting such an argument, appellant overlooks the very feature of its operations that clearly brings most of its transactions within the purview of the corporations code—the use of the assignment form which could not possibly constitute a lease until the assignment of lease was approved by the government. Even a reading of the brochure published by appellant discloses that for an investor to purchase 160 acres, as recommended by appellant, he can do so only by receiving an assignment of a portion of a 640-acre lease. This is accomplished by the assignment form entitled, "Assignment Affecting Record Title to Oil and Gas Lease." It is clear

from Muser's testimony that the only way in which a purchaser could obtain a lease to acreage less than 640 acres was by purchase of an assignment of a portion from a master lease of 640 acres held by appellant or its representative. In the assignment the assignor was the appellant, or one of its representatives, as owner of the record title interest in an oil and gas lease theretofore issued to it by the government. The assignor by this document assigned to the purchaser "the right, title and interest in and to the lands embraced in such lease as specified below." In the ordinary assignment form, the "lands" affected by the assignment were the 160 acres chosen for the purchaser by appellant from a 640-acre lease. Until this assignment form was submitted to the government for its approval of the assignment by appellant from its master lease to the purchaser, the document did not become a lease with the government. This document so employed clearly brings it within the operation of section 25008 of the Corporations Code.

[6] The name of the instrument making the conveyance is of little consequence and no matter how it be disguised, the court may inquire into, and rely upon facts and circumstances collateral to the transfer of the interest more than upon the exact type of interest conveyed. *Moore v. Stella*, 52 Cal.App.2d 766, 127 P.2d 300.

[7] We find no case involving the same factual situation as the one at bar, but it is interesting to note that the representations made by the defendant in *People v. Chait*, 69 Cal.App.2d 503, 159 P.2d 445, were similar to those made in the instant case. There the instruments were securities because the lands were purchased as investments in "proven oil lands." The options to purchase "oil lease assignments" held to be securities in *People v. Rubens*, 11 Cal. App.2d 576, 54 P.2d 98, 1107, were similar to the transactions at bar in that there was no description of the allotted portion covered by the option. Helpful, however, is the court's decision in *Ogier v. Pacific Oil & Gas Development Corp.*, 132 Cal.App.2d

496, 282 P.2d 574. Although the discussion concerning securities arose out of an issue of pleading, the court's views of the facts pleaded, if found to be true, are of interest. The complaint alleged, among other things: "that on specified occasions defendant A. F. Hilding induced her (plaintiff) to buy one of the said certificates of interest; that each defendant knew the land was in unproved territory and that plaintiff had neither the money or ability to prospect for oil; that it was the plan and scheme of defendants to induce plaintiff to part with her money upon her expectation that she would be able at some future time to lease her interest to defendant Pacific Oil and Gas Corporation or some other oil company and thereby receive large and prospective oil royalties when oil was actually discovered on said land as the result of drilling thereon by either the defendant corporation or some other oil company." 132 Cal.App.2d at page 501, 282 P.2d at page 577. The court's first inquiry was whether the deed to land represented as oil bearing constituted a "certificate of interest." In deciding that it did, and considering at length the cases of *People v. Chait*, supra, and *Moore v. Stella*, supra, it stated at page 504 of 132 Cal.App.2d at page 579 of 282 P.2d: "One of the allegations of the complaint is that, in pursuance of the scheme to defraud plaintiff, defendants adopted the 'device of executing grand deeds to plaintiff purporting to convey title to said prospective oil lands, or to a fractional undivided interest therein, but each such instrument was in fact a certificate of interest and a certificate of interest in an oil title.' Under the allegations of the complaint, the triers of the fact could determine that the transactions were not clean-cut transfers of interests in real estate to be held, used or sold by plaintiff without participation with others in profit-sharing ventures but it was intended by both seller and buyer that, while they were conveyances of definite interests in real property, they actually were to transfer rights to participate in earnings or profits in the nature of land-

owners oil royalties that might inure to the benefit of others under leases. This seems to be the test laid down in *Moore v. Stella*, supra, 52 Cal.App.2d 766, 773, 127 P.2d 300." The facts set out in the pleadings in *Ogier v. Pacific Oil & Gas Development Corp.*, 132 Cal.App.2d 496, 282 P.2d 574, are similar to those at bar. An examination of the record discloses substantial evidence to support the findings of the court below that appellant's transactions and operations involved offering, issuing and dealing in certificates of interest in oil, gas or mining titles and leases for value for which a permit is required from the corporations commissioner.

Appellant's discussion of the legislative theory of regulating investments in California and the intent and purpose of the corporate securities law serves to point up the great need for protecting the public and the necessity for our courts to inquire into the circumstances surrounding certain transactions to determine their true character. In the face of the admonition given by appellant, we have used this test to determine the true character of the instruments involved in the instant case and looking through their legal form we find, in reality, certificates of interest in oil leases and assignments thereof, investment contracts and collateral trust certificates employed by appellant which were "particularly adapted to perpetuation of the evil which the statute (corporations code) was designed to eradicate."

No contention having been made that the court erred in finding that appellant's transactions and operations would be and are unfair, unjust and inequitable to persons solicited by it to acquire these securities, we assume that it has abandoned any objection thereto.

Judgment affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SCHAUER, SPENCE and McCOMB, JJ., dissenting.

161 Cal.App.2d Supp. 860

**PEOPLE of the State of California,
Plaintiff and Respondent,**
v.

Eleazar SMITH, Defendant and Appellant.
Cr. A. 3792.

Appellate Department, Superior Court,
Los Angeles County, California.
June 23, 1958.

Prosecution for violation of municipal ordinance making it unlawful for any person to have in his possession any obscene book in any place of business where, among other things, books are sold or kept for sale. The Municipal Court of the Los Angeles District, James H. Pope, J., entered judgment of conviction and defendant appealed. The Superior Court, Appellate Department, David, J., held that book in question was obscene within meaning of such term as used in ordinance in question.

Judgment affirmed.

Swain, J., dissented.

1. Constitutional Law ⚖️90

Los Angeles ordinance providing that it shall be unlawful for any person to have in his possession any obscene book in any place of business, where, among other things, books are kept for sale, does not violate the first amendment of the United States Constitution. U.S.C.A.Const. Amend. 1.

2. Constitutional Law ⚖️90

Obscenity is not within the area of constitutionally protected speech or press. U.S.C.A.Const. Amend. 1.

3. Municipal Corporations ⚖️594(1)

The characterization of writing as "obscene" is not too indefinite to constitute a valid standard for proscribing possession of such writing.

4. Obscenity ⚖️5

In prosecution for violation of municipal ordinance making it unlawful for any person to have in his possession, any obscene book in any place of business where,

among other things, books are sold or kept for sale, book in question was obscene within meaning of such term as used in such ordinance.

5. Obscenity ⚖️2

Police power of the state in regard to control of obscene matter is not restrained by definitions applied by federal courts to federal question of admission of books to the country or to the mails, and the fact that any obscene book or picture may be popular is no ground for holding that it may not be suppressed, as that condition might be exactly the occasion for legislative action against it to protect the public morals, and such legislation pre-eminently falls within state police power.

6. Criminal Law ⚖️470

Question of what psychological effect prurient material in an allegedly obscene book which defendant was charged with unlawful possession of, would have on a normal average person, was not the subject for expert testimony, but was a question for the trier of fact.

7. Criminal Law ⚖️476 Obscenity ⚖️16

In prosecution for unlawful possession of an obscene book, trial court properly excluded testimony by an expert witness as to what psychological effect prurient material in question would have on a normal average person, and also properly excluded evidence as to contents of other books alleged to be no different or even more sexually titillating.

8. Municipal Corporations ⚖️592(1)

Los Angeles ordinance making it unlawful to possess obscene material in certain named places, has the full force of a statute of the state within the limits of the city, except so far as it is in conflict with general laws.

9. Municipal Corporations ⚖️592(1)

Los Angeles ordinance making it illegal for any person to have any obscene material in certain named places, was not in conflict with state statute providing that every person who willfully and lewdly ei-

ther writes, sells, keeps for sale, or exhibits any obscene materials is guilty of a misdemeanor, since the city ordinance is more restrictive in that it eliminates the requirement that a sale be made lewdly, and makes it illegal merely to possess such material in a named place of business irrespective of lewd intent to sell it or keep it for sale, and irrespective of knowledge. West's Ann.Pen.Code, § 311.

10. Criminal Law ⚖️201

A prosecution may be had under an ordinance and a statute where separate, distinct elements are involved in each.

11. Municipal Corporations ⚖️592(1)

Local legislation must be in conflict with general law, before the constitutional grant of the police power to local bodies is inoperative and that vested in the legislature is given priority.

12. Municipal Corporations ⚖️590

No permission from the legislature itself to a city is necessary to the exercise of the local police power under the constitution, and legislative declarations of permission to a city to legislate confer no such power, but only indicate that the legislature in its own opinion has not purported to completely cover the subject matter. West's Ann.Const. art. 11, § 11.

13. Obscenity ⚖️2

A bookseller may be constitutionally prohibited from possessing or keeping an obscene book in a store and convicted of unlawfully doing so even though it is not shown he knows its obscene character, nor that he intends its sale.

14. Criminal Law ⚖️304(1)

It is a matter of common knowledge that booksellers have possessed obscene books, kept in a back room or locked place at their places of business.

Deputy City Atty., Los Angeles, for respondent.

DAVID, Judge.

The defendant Smith appeals from a judgment based upon his conviction under Los Angeles Municipal Code, (Ordinance No. 77,000 as amended) pursuant to the complaint which charged that he violated paragraph 2 of section 41.01.1 thereof, in that he "did wilfully and unlawfully * * * have in his possession an obscene and indecent writing, book, pamphlet, picture, photograph and drawing, to wit: Sweeter Than Life, in a place of business where magazines, books, pamphlets, papers and pictures were sold and kept for sale."

The ordinance provisions in question read in part as follows: "Sec. 41.01.1 Indecent Writings, Etc.—Possession Prohibited:

"It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, * * * in any of the following places:

"1. In any school, school-grounds, public park or playground or in any public place, grounds, street or way within 300 yards of any school, park or playground;

"2. In any place of business where ice-cream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale;

"3. In any toilet or restroom open to the public;

"4. In any pool room or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public; * * *."

Appellant's contentions cannot be sustained:

[1,2] (1) The ordinance does not violate the First Amendment of the United States Constitution. Under the California Penal Code sec. 311 dealing with obscenity, the United States Supreme Court has held that "obscenity is not within the area of

Brock, Easton, Fleishman & Rykoff, Hollywood, for appellant.

Roger Arnebergh, City Atty., Philip E. Grey, Asst. City Atty., William E. Doran,

constitutionally protected speech or press." *Roth v. United States*, (*Alberts v. California*) 1957, 354 U.S. 476, at page 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498.

[3] (2) The characterization as "obscene" is not too indefinite to constitute a valid standard. In the case last cited, the trial judge applied the test laid down in *People v. Wepplo*, 1947, 78 Cal.App.2d Supp. 959, 178 P.2d 853, which was approved by the U. S. Supreme Court in the *Alberts* case, 354 U.S. at page 489, 77 S.Ct. at page 1311.

[4] (3) Under any test, the book concerned in this prosecution was properly held to be obscene by the trial court, and we share such a conclusion upon our independent view of the evidence, if that be necessary in view of the assertion of constitutional right, though such a right is clearly non-existent. *Alberts v. California*, 1957, 354 U.S. 476, 485-486, 77 S.Ct. 1304, 1 L.Ed.2d 1498. Obscenity is not constitutionally protected. The "community standard" is, as in other criminal matters, to be determined by the trier of the fact. *Parmelee v. United States*, 1940, 72 App. D.C. 203, 113 F.2d 729, 741.

[5] The police power of the state in such matters is not restrained by the definitions applied by the federal courts to the federal question of admission of books to the country or to the mails. A national common-denominator of morality may be considerably less than that in a state, which has the right to set, and to adhere to, its own standards in such matters. U.S.Const. Amend. X. That any obscene book or picture may be popular is no ground for holding that it may not be suppressed, since that condition may be exactly the occasion for legislative action against it to protect the public morals. Such legislation preeminently falls within state police power. *Lawton v. Steele*, 1893, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385.

We reach this conclusion, also, when we have considered the book as a whole, under tests that the appellant contends are ap-

plicable. There are obvious common-sense limits to the "over all" view. We are not persuaded that a bawdy house is any the less a brothel, because many of the rooms of the house may be occupied with dining and dancing, in view of what goes on in the bedrooms. A book is not necessarily clean or not obscene because some of the chapters or paragraphs leading to the bedroom, couch, summerhouse or other available place themselves do not describe the details of adulterous fornication nor rape. Cf. *Besig v. United States*, 9 Cir., 1953, 208 F.2d 142, 146.

[6, 7] (4) The defendant offered expert witnesses to testify what psychological effect the prurient material in question would have on a normal average person. In California, this is no more the subject of expert testimony than what the conduct of a reasonable and prudent person would be in a negligence action. This is for the trier of the fact. *People v. Wepplo*, supra, 78 Cal.App.2d Supp. 959, 178 P.2d 853; cf. *United States v. Kennerley*, D.C. 1913, 209 F. 119, 121. Nor was it error to exclude evidence as to the contents of other books, alleged to be no different or even more sexually titillating, on the theory that legislation is invalid which seeks to restrain that which is popular. Pornography has not been popular enough to induce the state and city legislators who represent the populace at large to change the legislative policies, or to redefine the common understanding of the meanings of well-established English words. The great quarrel in this field actually seems not to be with the definition of "obscenity" but with its application, to particular states of fact. We have no such difficulty in this case. We have found that the book in question is obscene, not merely that there is sufficient evidence to support the implied finding of the trial court to that effect, keeping in mind what we said in *People v. Wepplo*, supra, 1947, 78 Cal.App.2d Supp. 959, 961, 178 P.2d 853, in which obscenity was defined in construing Cal.Penal Code sec. 311(3).

[8] (5) The Los Angeles city ordinance No. 77,000 (known as the Los Angeles Municipal Code) section 41.01.1, has the full force of a statute of the state within the limits of the city (*Odd Fellows' Cemetery Ass'n v. San Francisco*, 1903, 140 Cal. 226, 230, 73 P. 987; *Boyd v. City of Sierra Madre*, 1919, 41 Cal.App. 520, 183 P. 230), except so far as it is "in conflict with general laws." Cal.Const. Art. XI, sec. 11; *Simpson v. City of Los Angeles*, 1953, 40 Cal.2d 271, 278, 253 P.2d 464, appeal dismissed 346 U.S. 802, 74 S.Ct. 37, 98 L. Ed. 333, rehearing denied 346 U.S. 880, 74 S.Ct. 118, 98 L.Ed. 387.

In California, this police power of cities is one of the oldest municipal powers. Cal.Const. (1879) Art. XI, sec. 11, perpetuated the power that was granted in the earliest charters and general laws for organization of municipal corporations in California, repeated and applied many times before 1879. (For instance, Charter of Sacramento, Cal.Stats.1850, p. 70, sec. 5; *idem*, San Diego, p. 122, sec. 5; *idem*, San Jose, p. 125, sec. 5; *idem*, for incorporation of towns, p. 128-129, sec. 6; *idem*, for incorporation of cities, p. 87-88, sec. 11). In the 1879 constitution, article XI related to local government, and the same section number, 11, was retained, as formerly pertained to this power in the Act for Incorporation of Cities. Before the Constitution of 1879, such power was conferred by the legislature. Now, it is conferred by the constitution itself. Prior to 1879, the numerous statutes and special charters gave full power to cities to pass ordinances "not repugnant * * * to the laws of this State." Prior to 1879, the laws applying to cities were sometimes general and often special, but in 1879 by Art. IV, sec. 25, the legislature was forbidden to pass "local or special laws * * * Creating offices, or prescribing the powers and duties of officers in counties, cities, cities and counties, townships, election or school districts."

Hence, Art. XI, sec. 11 vested and vests power in cities to pass police regulations "not in conflict with general laws." (Emphasis added.) Appellant asserts that there

is such a conflict here between Penal Code sec. 311 and the ordinance in question.

Under the ordinance, it is illegal for a person to "have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, * * * of any kind in any of the following places: * * * 2. In any place of business where * * * school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale; * * *" (Municipal Code, sec. 41.01.1)

Penal Code sec. 311 provides, so far as applicable: "Every person who wilfully and lewdly, either: * * * 3. Writes, * * * sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; * * * is guilty of a misdemeanor." Municipal Code sec. 41.01.1 is more restrictive since it eliminates the requirement that a sale be made "lewdly" and in making it illegal to possess such material in such a place of business, irrespective of a lewd intent to sell it or to keep it for sale.

The city ordinance is more restrictive than the Penal Code sec. 311. Under the Penal Code section *scienter* is required. The defendant must possess the obscene material "wilfully and unlawfully" and with "lewd" intent. *People v. Wepplo*, supra, 1947, 78 Cal.App.2d Supp. 959, 178 P.2d 853; *Matter of Ahart*, 1916, 172 Cal. 762, 159 P. 160.

[9-12] There is no conflict. Wilful possession of an obscene book in a bookstore is not made an offense under the Penal Code provision, but it is under the city ordinance. Defendant could not have been prosecuted under Penal Code sec. 311 for wilfully and unlawfully possessing the material in a bookstore without more. This fact alone demonstrates that the municipal ordinance is not in conflict with the general law. -A prosecution may be had under an ordinance and a statute (cf. *People v. Burkhart*, 1936, 5 Cal.2d 641, 55 P.2d 846) where separate, distinct elements are involved in each. Local legislation must be *in conflict* with general law, before the constitutional grant of the police power to

local bodies is inoperative and that vested in the legislature is given priority. No permission from the legislature itself to a city is necessary to the exercise of the local power under the constitution. Legislative declarations of permission to legislate confer none, but only indicate that the legislature in its own opinion has not purported to completely cover the subject matter. This relates to statutory construction, and not to power.

In this case, the relation of the local to the state legislation is essentially the same as that in *People v. Commons*, 1944, 64 Cal. App.2d Supp. 925, 148 P.2d 724, where possession of any dangerous or deadly weapon in an automobile was held to be effective, though the state Dangerous Weapons Control Law was less restrictive; *People v. Burkhart*, supra, 1936, 5 Cal.2d 641, 55 P.2d 846, where the ordinance prohibited being drunk in an auto on the highway, and the state statute prohibited driving an automobile while intoxicated. In *re Iverson*, 1926, 199 Cal. 582, 250 P. 681, where the state law permitted a druggist to fill a prescription for 16 ounces of intoxicating liquor, reduced by the Los Angeles ordinance to 8 ounces, and in which the doctrine of "more restrictive legislation" is considered and approved; *In re Hoffman*, 1909, 155 Cal. 114, 99 P. 517, holding valid increased standards for milk solids in milk; *Sternall v. Strand*, 1946, 76 Cal. App.2d 432, 434-435, 172 P.2d 921; *Remmer v. Municipal Court*, 1949, 90 Cal. App.2d 854, 856-858, 204 P.2d 92; *Markus v. Justice's Court*, 1953, 117 Cal.App.2d 391, 396-397, 255 P.2d 883; *Witt v. Klimm*, 1929, 97 Cal.App. 131, 134, 274 P. 1039, upholding additional regulation.

The same conclusion has been reached by the courts of other states which have adopted the provisions or principles of Cal. Const. Art. XI, sec. 11. Cf. *Allen v. City of Bellingham*, 1917, 95 Wash. 12, 163 P. 18, 26, reviewing cases; *City of Shreveport v. Provenza*, 1956, 231 La. 514, 91 So.2d 777; *Jones v. City of Chicago*, 1952, 348 Ill.App. 310, 108 N.E.2d 802, 805, ordinance

raising amounts of insurance to be carried by taxicab operators above amounts set by state statute, the rule being stated "An ordinance, because of local conditions, may impose more rigorous or definite regulations under a proper delegation of power in addition to those imposed by the State"; *State ex rel. Sutton v. Caldwell*, 1940, 195 La. 507, 197 So. 214, 218, citing *Mann v. Scott*, 1919, 180 Cal. 550, 182 P. 281; and *In re Hoffman*, 1909, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75; *City of Garden City v. Miller*, 1957, 181 Kan. 360, 311 P.2d 306, 311; *State ex rel. Woodruff v. Centanne*, 1956, 265 Ala. 35, 89 So.2d 570, 571; *Kansas City v. Henre*, 1915, 96 Kan. 794, 153 P. 548, 549, citing *In re Hoffman*, supra, 155 Cal. 114, 118, 99 P. 517.

[13] Until one of our supreme courts declares otherwise, we are of the opinion that a book seller may be constitutionally prohibited from possessing or keeping an obscene book in his store and convicted of doing so even though it is not shown he knows its obscene character, nor that he intends its sale. He may not, with impunity, adopt as his rule of conduct: "Where ignorance is bliss, 'Tis folly to be wise."

Those who are engaged in selling articles of a particular class to the public, have the first and best opportunity to know or be on notice of their characteristics, even though possession and not sale is involved. Civ.Code, secs. 18, 19. Statutes commonly have forbidden the sale, offering for sale or possession of filthy articles, dangerous or deleterious to the public; or contrary to public morals; or otherwise unlawful; and have placed the duty to know their characteristics upon the possessor. Cf. *People v. Schwartz*, 1937, 28 Cal.App.2d Supp. 775, 70 P.2d 1017; *Escola v. Coca Cola Bottling Co.*, 1944, 24 Cal.2d 453, 463, 150 P.2d 436; *United States v. Dotterweich*, 1943, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48, 49; note 152 A.L.R. 765. The abatement of property used for an unlawful purpose does not depend on the knowledge of the owner. *People v. Mc-*

Caddon, 1920, 48 Cal.App. 790, 192 P. 325.
So with books.

[14] It is a matter of common knowledge that booksellers have possessed obscene books, kept in the back room or the locked case at their places of business. While not displayed for sale, the possession on the premises is validly considered as tending toward exhibition and sale, and hence possession is validly established as a separate offense, without showing of a lewd intent, as provided in Penal Code sec. 311. "Possession" frequently is prohibited, without more, in penal statutes. Consult: fish and game, note 125 A.L.R. 1200; unlawful possession of cane gun or bird net, Cal. Fish & Game Code secs. 2008-2009; idem, secs. 8800-8807, beach nets; salmon, idem, secs. 8212, 8215; narcotics and drugs in prison, Penal Code sec. 4573.6; firearms, Penal Code sec. 4574; counterfeit coin, Penal Code sec. 479; deadly weapons, Stat.1923, p. 696, sec. 2 as amended, Pen. Code. §§ 12001, 12021; machine guns, Deering's Gen.Laws Act 1971, Stat.1927, p. 938, as amended, Pen.Code, § 12200 et seq.

The judgment is affirmed.

BISHOP, P. J., concurs.

SWAIN, Judge.

I dissent.

The legislature by Penal Code sec. 311 (3) has occupied the field of selling and keeping for sale an obscene or indecent book. Therefore, under Article XI, sec. 11 of the Const. of California, that portion of sec. 41.01.1 of the Los Angeles Municipal Code (Ord. No. 77,000) is void which attempts to make it a misdemeanor for a person to have in his possession an obscene and indecent book in a place of business where books etc. are sold or kept for sale. The evidence is undisputed that Smith was the proprietor of a book store in the City of Los Angeles and that he sold and kept for sale the books in question at his store.

The evidence proves a violation of the state law as well as a violation of the ordinance. The problem thus posed is by no means merely academic. A defendant is not guilty of violating Penal Code sec. 311 unless he had knowledge of the character of the material. *People v. Wepplo*, supra, 1947, 78 Cal.App.2d Supp. 959, 964, 178 P.2d 853. To the word "knowledge" we would add "or notice", meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials. To appear profound, we refer to this knowledge or notice as "scienter". Under the city ordinance the prosecution does not have to prove scienter; under the Penal Code section, it does. This is true because the city ordinance uses the words "wilfully and unlawfully", whereas Penal Code sec. 311 uses the words "*wilfully and lewdly*". This interpretation and distinction is pointed out in *People v. Wepplo*, supra, 1947, 78 Cal.App.2d Supp. 959, 963, et seq., 178 P.2d 853. The state law has occupied the field of selling and keeping for sale an obscene writing, paper or book. To sell it and keep it for sale, the defendant had the book in his possession at his store. The city cannot deprive him of the defense of "no scienter" by charging him with possession under the ordinance, *People v. Commons*, supra, 1944, 64 Cal.App.2d Supp. 925, 148 P.2d 724; *People v. Webb*, 1958, 158 Cal.App.2d 537, 323 P.2d 141; the complaint did not state any violation of Penal Code sec. 311 for it failed to charge that the defendant sold or offered for sale the book and magazine *lewdly*. In re *Correa*, 1918, 36 Cal.App. 512, 513, 172 P. 615.

It is true as stated in the majority opinion that there is no declaration by the legislature that it purports to cover the field. Such a declaration is not indispensable. The law as to occupation of the field by the state is well stated in 28 Ops. Atty.Gen. 192 as follows:

"Where the State statute expressly sets forth an intention to completely occupy the whole field of regulation of the sub-

ject matter and actually implements such intention by providing for such regulation, local regulation of the same subject matter is prohibited (*Pipoly v. Benson*, 20 Cal.2d 366, 370 [125 P.2d 482, 147 A.L.R. 515]). On the other hand, the State statute may expressly provide that local regulations may supplement the general law. In such cases reasonable local ordinances imposing supplementary requirements may be enacted (*National Milk Producers Ass'n v. City and County of San Francisco*, 20 Cal. 2d 101, 110-111 [124 P.2d 25]; *In re Iverson*, 199 Cal. 582, 586-588 [250 P. 681]).

"If the State statute contains no outright declaration of intention with respect to local regulation, the determination 'of the question whether the Legislature has undertaken to occupy exclusively a given field of legislation depends upon an analysis of the statute and a consideration of the facts and circumstances upon which it was intended to operate' (*Tolman v. Underhill*, 39 Cal.2d 708, 712 [249 P.2d 280])."

The question in *Tolman v. Underhill*, supra, was whether the Regents of the University of California could require from faculty members a more restrictive oath than that required by the State law in Government Code secs. 3100-3109. The court held they could not.

In *Bowen v. County of Los Angeles*, 1952, 39 Cal.2d 714, 249 P.2d 285, the court held that the state had occupied the same field to the exclusion of an oath required by order of the Board of Supervisors.

It is obvious from a reading of Penal Code sec. 311(3) and the use of "lewdly" therein that the legislature intended to give all proprietors of book stores throughout the State protection of the scienter rule. This is a wise and just provision because those proprietors customarily buy books from advertisements sent out by the publishers. Such dealers order books without an opportunity to read them in advance. I would reverse the judgment.

50 Cal.2d 617

Claude ALARID, Plaintiff and Appellant,
v.

Alexander J. VANIER, Defendant and Respondent.

L. A. 24861.

Supreme Court of California,
In Bank.

July 17, 1958.

Action to recover for personal injuries and property damage suffered when plaintiff's vehicle was struck in rear by defendant's automobile after its brakes failed. The Superior Court, Orange County, Robert Gardner, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Gibson, C. J., held that a jury question was presented on whether defendant had overcome presumption of negligence arising on proof of violation of statute, by acting as an ordinary prudent man who wished to comply with statutory requirements as to brakes.

Affirmed.

Carter and Shenk, JJ., dissented.

Opinion, 317 P.2d 110, vacated.

1. Negligence ⇨121(1)

Presumption of negligence which arises from violation of a statute is rebuttable and may be overcome by evidence of justification or excuse.

2. Automobiles ⇨148

Where brakes on defendant's automobile failed and defendant's automobile crashed into rear end of plaintiff's vehicle which was stopped for traffic light, defendant would be liable as a matter of law in absence of a sufficient excuse or justification for violation of code. West's Ann. Vehicle Code, §§ 670, 670.05, 679.

3. Negligence ⇨121(1)

Where person has violated statute thereby creating presumption of negligence, in determining whether he has overcome presumption correct test is whether person who has violated statute has sustained bur-

den of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

4. Appeal and Error ⇨882(12), 1033(5)

Where plaintiff motorist sought to recover for personal injuries and damage to vehicle caused when defendant's automobile brakes failed and defendant crashed into rear end of motorist's vehicle, although jury instruction to effect that in order to overcome presumption of negligence evidence must show statutory violation resulting from causes or things beyond control of person charged with violation was improper, motorist could not complain since he requested instruction and it was more favorable to him than a statement of the proper rule.

5. Automobiles ⇨245(15)

In motorist's action to recover for personal injuries and property damage sustained when rear of his vehicle was struck by defendant's automobile, after its brakes had failed, evidence presented a jury question as to whether defendant, presumably negligent because of statutory violation, had acted as an ordinary prudent man who wished to comply with statutory requirements as to brakes. West's Ann. Vehicle Code, § 670, 670.05, 679.

6. Negligence ⇨138(2)

It is error to give the mere happening of accident instruction where inference of negligence arises as a matter of law and it is likewise error to give that instruction where presumption of negligence arises as result of defendant's disobedience of a statute.

7. Appeal and Error ⇨1064(1)

In motorist's action to recover for personal injuries and property damage from defendant driver who crashed into rear of motorist's automobile after defendant's brakes had failed, despite error in giving instruction respecting unavoidable accident, record failed to disclose that there had been a miscarriage of justice requiring reversal of judgment for defendant.

Simon & McKinsey and Thomas W. McKinsey, Long Beach, for appellant.

Powell & Banyard, Robert A. Banyard and Robert B. Powell, Santa Ana, for respondent.

GIBSON, Chief Justice.

Plaintiff brought this action to recover for personal injuries and property damage suffered when his car was struck in the rear by an automobile driven by defendant. He appeals from a judgment in favor of defendant, contending that the judgment is contrary to the evidence and that he was prejudiced by certain instructions given at defendant's request.

The manner in which the accident occurred is undisputed. Plaintiff was driving south in the outside lane of a level, four-lane asphalt highway. It was a clear day, and the pavement was dry. He brought his car to a stop approximately 100 feet north of an intersection which had stop signs at all four corners. Five cars had stopped between plaintiff and the intersection, and, after he had been there for 15 or 20 seconds, waiting for the traffic to proceed, he heard a squeal of brakes and the rear of his car was struck by the front of defendant's car.

Defendant testified that he had driven onto the highway two and a half blocks north of the scene of the accident, and, as he proceeded toward the intersection, he observed plaintiff's car coming to a stop. When traveling at 20 miles per hour and about 200 feet from the place where plaintiff had stopped, defendant applied his brakes, but they did not take hold. There was no resistance to the pressure which he applied, and the pedal went all the way to the floor. Defendant could not turn to the left because another automobile was there, and he was afraid to turn to the right, toward a ditch, for fear he might tip over. In the stress of the moment he decided to go straight ahead, and he was so excited he did not think of using the hand brake. Witnesses who examined defendant's car after

the accident testified that the brake pedal, when tested, went down to the floor without resistance and that there were "no brakes."

The parties agree that, under the undisputed evidence, a presumption of negligence upon the part of defendant arose by reason of the operation of sections 670 and 679 of the Vehicle Code as they read at the time of the accident. Section 670 then provided: "(a) No person shall operate on any highway any motor vehicle * * * unless such motor vehicle * * * is equipped with brakes adequate to bring such motor vehicle * * * to a complete stop when operated upon dry asphalt or concrete pavement surface where the grade does not exceed 1 percent at the speeds set forth in the following table within the distances set opposite such speeds: [The stopping distance for a speed of 20 miles per hour was fixed at 37 feet.¹] * * * (c) If a vehicle is equipped with more than one system of brakes, each shall be maintained in good working order. * * *" Section 679 declared that it was unlawful to operate on any highway any vehicle which was in an unsafe condition or was not equipped as required by the code.

[1,2] The presumption of negligence which arises from the violation of a statute is rebuttable and may be overcome by evidence of justification or excuse. *Gallup v. Sparks-Mundo Engineering Co.*, 43 Cal.2d 1, 9, 271 P.2d 34; *Tossmann v. Newman*, 37 Cal.2d 522, 525, 233 P.2d 1. There is no evidence of contributory negligence, and, since it is clear from defendant's admission that the failure of his brakes was a proximate cause of the accident, it follows that defendant would be liable as a matter of law in the absence of a sufficient excuse or justification for violation of the code. It is plaintiff's contention that defendant did not produce enough evidence to rebut the presumption and, therefore, that the trial court erred in denying plaintiff's motion for a directed verdict upon the issue of liability. In passing upon this contention we must consider what rule is to be applied in deter-

1. The provisions relating to stopping distances now appear in section 670.05 of the Vehicle Code, which specifies a max-

imum stopping distance of 25 feet for a car like defendant's when traveling at a speed of 20 miles per hour.

mining whether defendant has overcome the presumption.

A large number of cases, although varying considerably in the language used, stand generally for the proposition that where a person has disobeyed a statute he may excuse or justify the violation by evidence that he did what might reasonably be expected of a person of ordinary prudence acting under similar circumstances who desired to comply with the standard of conduct established by the statute. See *Nevis v. Pacific Gas & Electric Co.*, 43 Cal.2d 626, 633, 275 P.2d 761 ("nonnegligent" ignorance of facts); *Gray v. Brinkerhoff*, 41 Cal.2d 180, 184, 258 P.2d 834, 837, (declaring that the violator could have fulfilled his duty "if he had exercised ordinary care"); *Whitechat v. Guyette*, 19 Cal.2d 428, 436-438, 122 P.2d 47; *Berkovitz v. American River Gravel Co.*, 191 Cal. 195, 198-200, 215 P. 675 (unlighted tail light); *Edgett v. Fairchild*, 153 Cal.App.2d 734, 738-739, 314 P.2d 973; *McEachen v. Richmond*, 150 Cal. App.2d 546, 550, 310 P.2d 122; *Bryant v. Tulare Ice Co.*, 125 Cal.App.2d 566, 569, 270 P.2d 880; *Taylor v. Jackson*, 123 Cal.App. 2d 199, 201-202, 266 P.2d 605; *Fuentes v. Panella*, 120 Cal.App.2d 175, 183-184, 260 P.2d 853; *Driver v. Norman*, 106 Cal.App. 2d 725, 727-728, 236 P.2d 6; *Merry v. Knudsen Creamery Co.*, 94 Cal.App.2d 715, 719 et seq., 211 P.2d 905 (brake failure); *Dennis v. Gonzales*, 91 Cal.App.2d 203, 206, 209-210, 205 P.2d 55; *Matsumoto v. Renner*, 90 Cal.App.2d 406, 411, 202 P.2d 1051 (unlighted tail light); *Takahashi v. White Truck, etc., Co.*, 15 Cal.App.2d 107, 110, 59 P.2d 161 (unlighted tail light); *Nelson v. Signal Oil & Gas Co.*, 10 Cal.App.2d 448, 449-450, 51 P.2d 885 (unlighted tail light); *Hardin v. Sutherland*, 106 Cal.App. 473, 479-480, 289 P. 900; *Rath v. Bankston*, 101 Cal.App. 274, 279-284, 281 P. 1081 (dictum re brake failure); *Phillips v. Pickwick Stages*, 85 Cal.App. 571, 573-574, 259 P. 968 (dictum re brake failure); *Giorgetti v. Wollaston*, 83 Cal.App. 358, 363, 257 P. 109 (unlighted tail light); cf. *M & M Livestock Transport Co. v. California Auto Transport Co.*, 43 Cal.2d 847, 279 P.2d 13.

In a second group of cases it is stated or indicated that justification or excuse for violation of a statute can be found only in causes or things "beyond the control of the person charged with the violation." See *Ornales v. Wigger*, 35 Cal.2d 474, 479, 218 P.2d 531, 534; *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 589, 177 P.2d 279; *Gruss v. Coast Transport, Inc.*, 154 Cal.App.2d 85, 87-90, 315 P.2d 339; *Miller v. Jensen*, 137 Cal.App.2d 251, 256-257, 290 P.2d 52; *Garcia v. Webb*, 131 Cal.App.2d 448, 450-451, 280 P.2d 829; *Jensen v. Southern Pacific Co.*, 129 Cal.App.2d 67, 77-79, 276 P.2d 703; *Kuehn v. Lowthian*, 124 Cal.App.2d 867, 871-872, 269 P.2d 666; *Graf v. Garcia*, 117 Cal.App.2d 792, 797-798, 256 P.2d 995; *Carlson v. Shewalter*, 110 Cal.App.2d 655, 658, 243 P.2d 549; *Parmalee v. Bartolomei*, 106 Cal.App.2d 68, 70-72, 234 P.2d 1019; *Wilkerson v. Brown*, 84 Cal.App.2d 401, 406-407, 190 P.2d 958; *Mecchi v. Lyon Van & Storage Co.*, 38 Cal. App.2d 674, 682-683, 102 P.2d 422, 104 P.2d 26; *Gallichotte v. California Mut., etc., Ass'n*, 4 Cal.App.2d 503, 506, 41 P.2d 349; *Morris v. Purity Sausage Co.*, 2 Cal.App.2d 536, 539-540, 38 P.2d 193. Instructions to this effect are contained in California Jury Instructions, Civil, No. 149 and No. 149.1, but the authors state that these were included in deference to a dictum in *Ornales v. Wigger*, 35 Cal.2d 474, 479, 218 P.2d 531, and that such an instruction sets up a confusing and impossible standard. See 1 Cal. Jury Instns., Civ. (4th Rev.Ed., 1956), pp. 392-393. Many of the cases in this group have not applied the "beyond the control" test strictly but, rather, have used it in the sense that the factors or causes involved would not have been anticipated and guarded against by a person of ordinary prudence who wished to obey the statute.

A third method of expressing what would serve as a justification or excuse is found in an instruction, approved by some cases, which declares that the jury may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to

do otherwise. *Combs v. Los Angeles Ry. Corp.*, 29 Cal.2d 606, 609-611, 177 P.2d 293; see *McEachen v. Richmond*, 150 Cal.App.2d 546, 551, 310 P.2d 122; see also *Cal.Jury Instns.*, Civ. (4th Rev. Ed., 1956), pp. 392-393. However, it has been held not error to refuse to give this instruction because it contains vague and shadowy concepts which lack the precision of good legal definition. *Cucuk v. Payne*, 140 Cal.App.2d 881, 887, 296 P.2d 7. The criticism seems to be valid, since it would be difficult, if not impossible, for jurors to understand from this language what they were expected to look for in passing upon the conduct of the person who is charged with having violated the statute.

[3] In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law. The language contained in the second and third groups of cases referred to above is disapproved insofar as it is inconsistent with the rule just stated.

[4] The jury in the present case was instructed that, in order to overcome the presumption of negligence, the evidence must show that the statutory violation resulted from causes or things beyond the control of the person charged with the violation. Plaintiff, however, is not in a position to complain of this instruction since he requested it and it was more favorable to him than a statement of the proper rule.

[5] When the correct test is applied to the facts of the present case, it appears that the evidence is sufficient to go to a jury on the question whether defendant acted as an ordinary prudent man who wished to comply with the statutory requirements as to brakes. Defendant's automobile was a 1949 model which he had purchased in January 1955, and it was equipped with hydraulic footbrakes and a mechanical hand brake which worked independently. There is evidence that he drove the car to test the brakes when he purchased it and that they

were in good condition. During the five months which elapsed prior to the accident, there was nothing wrong with the brakes and they were "working in perfect condition." Defendant had the car lubricated at a service station in April 1955 and was given a service "receipt and guarantee" which indicated that the wheel brake cables and master cylinder had been inspected and lubricated and that no service or replacements were recommended. A few weeks before the accident a garage did some work on the clutch, and at that time no suggestion was made to defendant that there was anything wrong with the brakes. On the day of the accident defendant drove ten miles to his place of employment, stopping at numerous intersections, and the brakes worked perfectly. The car was parked at 7:45 in the morning and was not driven until defendant's quitting time at 4:30 p. m. After he left his parking place, it was not necessary for him to apply the brakes until he reached the scene of the accident, about two and a half blocks away, and he had no warning of any kind that there was anything wrong with the brakes.

The evidence thus presents a question for the jury as to whether defendant took sufficient steps to meet his obligation to maintain his brakes in good condition, and plaintiff's motion for a directed verdict was properly denied.

[6] Plaintiff is correct in his contention that errors were committed in giving instructions requested by defendant. The court gave the unavoidable accident instruction condemned in *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 661, 320 P.2d 500, 506. The jury was also instructed: "The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent." We have held that, where, as here, the uncontradicted evidence warrants the application of the doctrine of *res ipsa loquitur*, it is error to give the quoted instruction. *Jensen v. Minard*, 44 Cal.2d 325, 329, 282 P.2d 7; see *Shaw v. Pacific Greyhound Lines*, 50 Cal.2d 153, 323 P.2d 391; *Phillips v. Noble*, 50 Cal.2d 163, 323 P.2d

385; *Barrera v. De La Torre*, 48 Cal.2d 166, 170 et seq., 308 P.2d 724; cf. *Brown v. George Pepperdine Foundation*, 23 Cal.2d 256, 261-262, 143 P.2d 929; *England v. Hospital of Good Samaritan*, 22 Cal.App.2d 226, 230, 70 P.2d 692; *Ellis v. Jewett*, 18 Cal.App.2d 629, 634, 64 P.2d 432. For the reasons set forth in the cited cases holding it is error to give the mere happening of the accident instruction where an inference of negligence arises as a matter of law, it is likewise error to give that instruction where a presumption of negligence arises as a result of defendant's disobedience of a statute. The question is whether these errors require a reversal of the judgment. Const. art. VI, § 4½.

[7] No precise formula can be drawn for deciding whether there has been a miscarriage of justice. In each instance the determination whether the probable effect of an instruction has been to mislead the jury and whether the error has been prejudicial so as to require a reversal depends upon all the circumstances, including the evidence and the other instructions given. Here there were instructions that made it clear that under the admitted facts a prima facie case has been proved against defendant and that, in order to escape liability, he must exculpate himself by showing justification or excuse. As we have seen, the evidence on this issue was uncontradicted and amply sufficient to show that prior to the accident defendant took reasonable precautions to see that his brakes were in good working condition. Under the circumstances it does not appear that there has been a miscarriage of justice.

The appeal from the "verdict" is dismissed since no appeal lies therefrom. The judgment is affirmed.

TRAYNOR, SCHAUER and SPENCE, JJ., concur.

McCOMB, J., concurs in the judgment.

CARTER, Justice.

I dissent.

It is my considered opinion that the giving of the two improper instructions caused a miscarriage of justice and that the judgment should be reversed.

The ephemeral constitutional standard for identifying reversible error has not been rendered concrete by judicial effort. Certainly the people of California did not intend to nullify the right to a jury trial guaranteed by article I, section 7, of the California Constitution by adding article VI, section 4½, which requires a miscarriage of justice to justify a reversal.¹ A proper construction would be consonant with the purpose of the amendment which is to relieve the judiciary of the burden of retrying cases merely because of technical errors. It does not license appellate courts to weigh evidence except where it is so massive on one side as to remove the issue from any doubt. The statement of this court in *Herbert v. Lankershim*, 9 Cal.2d 409, at page 476, 71 P.2d 220, at page 253, is pertinent: That article VI, section 4½ may dispel error only if the justice of the case preponderates so obviously that none of the errors could have contributed to the findings below.

To affirm this case because the errors committed were non-prejudicial, this court has been forced to make factual determinations from the record and effectively deprive appellant of his right to a jury trial. The majority has determined that the inference of negligence raised by the doctrine of *res ipsa loquitur* and by statutory violation is rebutted by *defendant's own* testimony.

In *Phillips v. Noble*, 50 Cal.2d 163, 323 P.2d 385, the court instructed the jury that the happening of an accident does not necessarily mean there was negligence. In dissenting (50 Cal.2d at page 169, 323 P.2d at page 388) I suggested the following tests for determining prejudicial error:

1. I have discussed this at length in two dissents: *Buckley v. Chadwick*, 45 Cal. 2d 183, at page 208, 288 P.2d 12, at

page 26, and *People v. Tarantino*, 45 Cal.2d 590, at page 604, 290 P.2d 505, at page 514.

(1) If there is a conflict in the evidence concerning defendant's negligence and weak or non-existent evidence of plaintiff's contributory negligence, the giving of this instruction is prejudicial.

(2) If the evidence of defendant's negligence is weak and there is substantial evidence of contributory negligence, the error is probably non-prejudicial.

(3) If plaintiff makes out a prima facie case based on *res ipsa loquitur* applied as a matter of law, it is always prejudicial error to give the questioned instruction.

This case clearly falls within tests (1) and (3) above stated.

The Effect of the Instructions Upon the Jury

The trial court instructed the jury that if defendant violated the statutory duty to have proper brakes, then he was presumed negligent. The court previously gave the instruction that the occurrence of an accident does not necessarily imply negligence and the unavoidable accident instruction. Although *res ipsa loquitur* applies to this case as a matter of law, no instruction on this doctrine was requested.

The inference arising from defendant's conduct forced him to produce evidence powerful enough to convince the jury that it was not probable that he was negligent. The effect of the instructions was to confuse or erase this impression in the jurors' minds. *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 320 P.2d 500; *Jensen v. Minard*, 44 Cal.2d 325, 282 P.2d 7. This alone has been designated prejudicial error. *Davenport v. Stratton*, 24 Cal.2d 232, 149 P.2d 4; *Hyman v. Market Street R. Co.*, 41 Cal. App.2d 647, 107 P.2d 485; *Scandalis v. Jenny*, 132 Cal.App. 307, 22 P.2d 545. The instruction in the instant case is stronger than in *Butigan* because it omitted the cautionary statement that the defense of unavoidable accident may not be used by a defendant who did not use ordinary care. The addition of the instruction that a collision between two automobiles does not necessarily imply negligence made the error more damaging than was the case in *Butigan*.

These instructions probably confused the jury because:

(1) There could be no evidence of unavoidable accident in this case under the *Butigan* rule. A conscientious juror, reasonably expecting only pertinent instructions, would naturally search his memory for facts which might fit this pattern. The phrase "unavoidable accident" strongly suggests an undefinable area of activity between defendant's non-negligence and his slight negligence. In the instant case the evidence suggests defendant was not grossly negligent. Such negligence as the jury might have found could easily be swept under the carpet of unavoidable accident. Where the issue of negligence is a close one, such an alternative is tempting. The confusion caused by the unavoidability instruction was magnified here by the instruction that an accident of this character does not necessarily imply negligence.

(2) The inferences arising out of facts relating to *this* collision establish negligence on the part of defendant unless he proves otherwise. The jury must begin its reasoning from the side of plaintiff, not from a neutral position. These instructions tell the jury a contrary story and may effectively have eliminated the inferences from the minds of the jurors. To say they did not is to make a finding of fact by judicial prescience. To say it is not clear they did is to place on appellant the burden of showing they did. Just how any appellant is to prove the effect of these instructions upon each juror's trend of thought is a mystery. But by deciding arbitrarily that an appellant must do so the court is taking away the right to trial by jury from appellants with justifiable complaint. This has been held prejudicial. *Russell v. Andersen*, 101 Cal.App.2d 684, see 697, 226 P.2d 350; *Bieser v. Davies*, 119 Cal.App. 659, see 664, 7 P.2d 388.

Because the inferences were obliterated by the instructions the jury did not have to examine defendant's evidence. If the jury did not think the mere malfunctioning of brakes or defendant's sole control of the vehicle was sufficient evidence of his negligence, defendant needed no justification in

their eyes. This court, however, has determined for them that defendant's testimony was true and his actions reasonable even though the Constitution says the plaintiff may have this determined by a jury of his peers. The majority decision here is an excellent example of the mischief perpetrated by this court by taking upon itself the job of fact finding.

Defendant's Testimony Does Not Explain the Failure of His Brakes

According to defendant's own testimony:

(1) During the five months he owned the car its brakes always worked;

(2) He had his clutch repaired at Newton's Garage two to four weeks before the collision. Defendant testified that the employees of the garage did not then recommend any repair of the brakes. There was no testimony that the brakes were even tested at that time!

(3) About two months before the collision, defendant had his car lubricated. The service station gave defendant a service receipt and guarantee which indicated by check marks that the wheel brake cables and master cylinder had been inspected and lubricated in accordance with the company's lubrication guide. No service or replacement was recommended at that time.

All of this was self-interested testimony of defendant and it is open to suspicion for that reason. No inference can be drawn from number (2) as to the condition of the brakes at that time. The value of testimony under (3) is open to these questions:

(a) How thorough was the station's inspection?

(b) How qualified were the personnel to judge the condition of the *whole* brake system?

(c) Did defendant inspect the brakes when he bought the used car? Were his later inspections frequent and thorough enough?

(d) Assuming the master cylinder and cables were in good condition, was the whole system tested? What part of it failed and caused the collision?

The latter is a vital point. The theory of *res ipsa loquitur* is that the defendant must show what caused the injury because only he knows. In this case defendant did not present this evidence. It was incumbent upon him to show his lack of negligence in respect to the *very cause* of the accident if he was able to do so. *Dierman v. Providence Hospital*, 31 Cal.2d 290, 188 P.2d 12. He made no effort to do so nor to explain why he didn't. His evidence is to be viewed with distrust (Code Civ.Proc. § 2061(7)).

It is the jury's function to determine the truthfulness of testimony and it may reject evidence it disbelieves. Therefore the fact that it was uncontradicted does not mean it would have to be believed. It is also a jury function to determine whether particular acts constitute negligence by applying the reasonable man test. The processes of a court are legal, not mechanical. In this case the majority has usurped all of those functions and determined facts from the record. Article VI, section 4½, and article I, section 7, do not permit us this privilege.

I would therefore reverse the judgment.

SHENK, Justice.

I dissent.

The evidence shows conclusively that the plaintiff was entirely faultless in what occurred, causing his personal injuries and damage to his property. The defendant ran into his automobile from the rear and there is not the slightest suggestion of negligence on the part of the plaintiff. The defendant was operating his car with defective brakes in violation of the law. He was thereby presumptively negligent.

The true test of his culpability is not whether he did all that a reasonable man should to have his mechanical brakes kept in good condition, but what he did immediately prior to the accident. By his own admission he neglected to use his hand brakes. His statement that he was too excited to use them did not absolve him from negligence. One of the tragedies of the law is that an innocent victim, one entirely without fault, is subjected to personal injury, and is without redress, as against the

operator of an instrumentality put upon the highway which may because of its defective condition in the hands of the operator, cause harm to another who is entirely without fault. The instructions were admittedly erroneous, and under the circumstances of this case were prejudicial.

There is authority in the second group of cases cited in the majority opinion to support a conclusion of liability in this case as a matter of law. In addition, the judgment could be reversed on the theory of *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952, 60 A.L.R. 475. In my opinion there has been a miscarriage of justice in this case. The judgment should be reversed.



50 Cal.2d 865

Luther HAYS, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California; Patten-Blinn Lumber Company, a corporation; Subsequent Injuries Fund of the State of California, Respondents.

L. A. 24950.

Supreme Court of California,
In Bank.

July 11, 1958.

Workmen's compensation case. The Industrial Accident Commission denied claimant's application for compensation payments from Subsequent Injuries Fund. The Supreme Court, Schauer, J., held that in order to qualify for resort to the Subsequent Injuries Fund, an employee must show that prior to the occurrence of the subsequent industrial injury he had obtained factual status of the permanently partially disabled and that such previously incepted disability was labor disabling, but previous knowledge by the employer is not

required as a condition to an award to the employee of payments from such fund.

Award annulled and matter remitted for determination by the Commission on the merits.

Workmen's Compensation §1030

In order to qualify for resort to the Subsequent Injuries Fund, an employee must show that prior to the occurrence of the subsequent industrial injury he had attained factual status of the permanently partially disabled and that such previously incepted disability was labor disabling, but previous knowledge by the employer is not required as a condition to an award to the employee of payments from such fund.

Edwin Silver and Richard L. McWilliams, Wilmington, for petitioner.

Edmund G. Brown, Atty. Gen., Gerald F. Carreras and Henry K. Workman, Deputy Attys. Gen., Everett A. Corten, San Francisco, and Edward A. Sarkisian, Los Angeles, for respondents.

SCHAUER, Justice.

In this case respondent Industrial Accident Commission denied petitioner's application for compensation payments from respondent Subsequent Injuries Fund. The commission states that its decision was "predicated solely on the fact that the evidence did not show employer-knowledge of any disability pre-existing the [subsequent] industrial injury."

In *Ferguson v. Industrial Acc. Comm.* (1958), 50 Cal.2d 469, 326 P.2d 145, this court held that to qualify for resort to the Subsequent Injuries Fund an employee must show that prior to the occurrence of the subsequent industrial injury he had attained the factual status of the "permanently partially disabled" and that such previously incepted disability was labor disabling, but that previous knowledge thereof by the employer is not required as a condition to an award to the employee of payments from the Subsequent Injuries Fund.

It follows that the award in the present case should be and it is annulled and the matter is remanded for determination by the commission, on the merits, in a manner and on grounds not inconsistent with the views expressed in the Ferguson case.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE, and McCOMB, JJ., concur.



162 Cal.App.2d 256

David FRY, Plaintiff and Appellant,
v.

GEORGE ELKINS CO., a California corporation, Mack Miller and Mildred S. Miller, Defendants and Respondents.

Civ. 22865.

District Court of Appeal, Second District,
Division 2, California.

July 21, 1958.

Action to recover deposit made in connection with contemplated purchase of house. The Superior Court of Los Angeles County, Ben Koenig, J., rendered judgment for purchaser in amount less than he had sought, and he appealed. The District Court of Appeal, Fox, P. J., held that where offer to purchase home was conditioned upon purchaser's obtaining loan, purchaser was advised of unlikelihood of obtaining loan from bank and that it probably could be obtained from named mortgage company, but purchaser made applications only at banks and declined to contact mortgage company when told that loan was available, and it appeared that purchaser had changed his plans and was no longer interested in buying property, purchaser did not in good faith try to obtain loan, he was guilty of breach of purchase agreement and he was only entitled to difference between his deposit and damage sustained by vendors as result of such breach.

Affirmed.

327 P.2d—57½

1. Appeal and Error Ⓒ1008(1)

Where finding of fact is attacked on ground that there is insufficient evidence to sustain it, power of an appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the challenged finding, and where different inferences reasonably can be drawn from evidence, reviewing court is without power to substitute its deductions for those of trial court.

2. Evidence Ⓒ20(1)

It is a matter of common knowledge that lending policies of different classes of financial institutions vary greatly and that is particularly true with respect to period for which a loan may be made.

3. Vendor and Purchaser Ⓒ335

Where offer to purchase home was conditioned upon purchaser obtaining loan, purchaser was advised of unlikelihood of obtaining loan from bank and that it probably could be obtained from named mortgage company, but purchaser made applications only at banks and declined to contact mortgage company, and it appeared that purchaser had changed his plans and was no longer interested in buying property, purchaser did not in good faith try to obtain loan, he was guilty of breach of purchase agreement and he was only entitled to difference between his deposit and damage sustained by vendors as result of breach.

4. Vendor and Purchaser Ⓒ79

Where no restriction with respect to prepayment privilege in event loan was paid during first three years was placed on conditions of loan by prospective purchaser either in deposit receipt or in escrow agreement, purchaser was not entitled to reject loan because of inclusion of such prepayment privilege.

5. Vendor and Purchaser Ⓒ85

Where vendors kept themselves in a position to close deal for sale of property until close of escrow period, vendors and their brokers were insisting that purchaser go through with purchase, purchaser was told that if he refused he would likely be

sued, and second escrow agreement was not entered into by vendors and other prospective purchasers until after expiration of prior escrow, there was not a mutual rescission of prior agreement to purchase property.

6. Brokers 76

Where, by terms of deposit agreement, vendors promised to pay broker a commission of one-half of deposit in event same were forfeited by purchaser, vendors were at all times ready, able and willing to convey property on agreed terms, and deal fell through because purchaser was at fault, vendors became obligated to broker for agreed commission of one-half of deposit and vendors were entitled to retain such amount from deposit.

Leslie & Bernson, Beverly Hills, for appellant.

Robert J. Kelleher, Beverly Hills, for respondents.

FOX, Presiding Justice.

Plaintiff brought this action to recover a deposit of \$4,250 that he made in connection with his contemplated purchase of a home from defendants Miller. The court, however, awarded him a judgment for only \$937.50. Plaintiff has appealed.

On May 20, 1956, plaintiff made an offer in writing, through defendant George Elkins Company, real estate broker, to purchase the Miller home for \$42,500. Plaintiff put up his check for \$4,250. The offer contained this provision: "This offer is further conditioned upon the buyer obtaining \$20,000.00 loan at 5% for 20 years." The buyer was advised at that time that there was a 5 per cent loan on the property on which there was a balance of \$16,650.00; that this loan was held by Western Mortgage Co.; that arrangements could likely be made to refinance the loan in line with the buyer's desire but that a loan upon the required terms could not be obtained from a bank. The owners immediately accepted Fry's offer and agreed in writing to pay the

broker a 5 per cent commission, or one half of the deposit in the event the same was forfeited by the purchaser. A 30-day escrow was opened the next day. It recited the loan above mentioned and then provided: "The completion of this escrow is subject to buyer being able to refinance said loan to \$20,000.00 at 5% per annum, maturing over a period of 20 years."

The buyer did not contact Western Mortgage either personally or by telephone relative to refinancing the loan. At the instance, however, of a representative of the Elkins organization, Mr. Reed, on behalf of Western Mortgage, mailed a loan application on May 28th to Fry, together with a letter stating that his company would consider a \$20,000 loan at 5 per cent over a 15-year period. Reed contacted Fry twice regarding this loan by telephone but at no time did the latter ask whether Western Mortgage would make the loan for a 20-year term. He did, however, complain about the 2 per cent prepayment provision in the loan application in the event of payment within the first three years. On June 11th, Reed, having been told by the broker's representative, that a 20-year loan was essential to a sale, sent Fry another letter stating that Western would consider making the loan for that term. During the early part of June Mrs. Lynch, of the Elkins organization, with whom Fry had had his initial dealings for the purchase of the house, assured him there was a \$20,000 loan at 5 per cent for 20 years waiting for him at Western Mortgage and advised him to get down as quickly as he could and sign the papers. Fry was also told about the same time by both Mr. and Mrs. Miller that the required loan on the stated terms was available at Western Mortgage if he would just file the application papers. Fry, however, failed to file any application therefor. Reed's testimony indicates that if such application had been made by Fry the loan would have been made. It was approximately at this time that Fry told Mrs. Lynch, according to her testimony, that he had lost all interest in the house; that he had changed his plans; and that he was

going to Hawaii as he had planned originally. Fry had in the meantime applied to two banks where he was known for the desired loan. Both banks, however, had rejected his application. Fry thereupon wrote the Millers attempting to rescind the deal because of his inability to obtain the loan on which the transaction was conditioned.

A couple of days after the expiration of the Fry escrow the Millers entered into another escrow with the Rothschilds for the sale of their home for \$40,375 without a broker's commission. But in order to make the sale the Millers had to include certain items of personal property valued at \$937.50. The transaction was concluded on June 27. Western Mortgage made a loan to the new purchasers on the property for \$20,000 at 5 per cent for 20 years. Mr. Rothschild had requested Western Mortgage by telephone on June 14th to send him an application for a loan on this property. In order to get the escrow closed quickly (it was closed in 5 days) the Millers employed an attorney to handle the deal and paid him \$250 for his services. A brokerage commission of \$2,125 on the Fry transaction was retained by Elkins. The trial court deducted the total of these last three items (\$3,312.50) from plaintiff's deposit of \$4,250 and rendered judgment for plaintiff for the difference, viz., for \$937.50. Being dissatisfied with the amount of this award plaintiff has appealed.

In seeking a reversal plaintiff argues that the evidence is insufficient to support certain findings and that the findings do not support the judgment.

[1] Where a finding of fact is attacked on the ground that there is insufficient evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the challenged finding. When different inferences reasonably can be drawn from the evidence, a reviewing court is without power to substitute its deductions for those of

the trial court. *Primm v. Primm*, 46 Cal. 2d 690, 693-694, 299 P.2d 231.

[2, 3] Plaintiff first challenges the finding to the effect that he did not in good faith attempt to refinance the encumbrance on the property by obtaining a \$20,000, 5 per cent, 20-year loan. He bases his argument primarily on the fact that his application for such a loan was rejected by two banks. It is a matter of common knowledge that the lending policies of different classes of financial institutions vary greatly. This is particularly true with respect to the period for which a loan may be made. The fact that a bank is unwilling to make 20-year loans on residential property in a particular locality does not necessarily justify an inference that other lending institutions will not make such a loan. At the initial stage of this transaction plaintiff was advised of the unlikelihood of obtaining the requisite loan from a bank but that it probably could be obtained from Western Mortgage, which already had a substantial loan on the property. Notwithstanding this advice, plaintiff contented himself with making applications only at the banks and made no application or inquiry of Western Mortgage for such a loan and declined to contact that institution when told that the required loan was available upon his signing the application and other necessary papers. Furthermore, there was evidence that plaintiff had changed his plans and was no longer interested in buying the property. From the foregoing evidence the trial court reasonably could infer that plaintiff did not in good faith try to refinance the loan in question.

[4] Plaintiff seeks to justify his position on the ground that the loan application from Western Mortgage contained a two per cent prepayment privilege in the event the loan was paid during the first three years. The simple answer to this argument is that no such restriction was placed on the conditions of the loan by the plaintiff either in the deposit receipt or in the escrow agreement. He was therefore not entitled to reject the loan because

of the inclusion of such a prepayment privilege.

Plaintiff's next contention is that the evidence is not sufficient to support the finding that he refused to perform all the obligations on his part to be performed under the agreement and thereby was guilty of a breach of the agreement. Implicit in the refinancing of the loan in question was the obligation of the plaintiff to put forth a good faith effort to obtain such refinancing on the terms he had specified. The court found, on substantial evidence as we have pointed out, that plaintiff did not in good faith carry out that obligation, which was essential to the consummation of the deal. This was obviously a breach of the agreement between the parties.

[5] Plaintiff makes the unmeritorious contention that the evidence is insufficient to sustain the finding that the parties did not mutually rescind the agreement. Plaintiff is contending, in effect, that the evidence required a finding of mutual rescission as a matter of law. He bases this argument on the fact that he had offered to rescind and on the testimony that Rothschild requested Western Mortgage on June 14th to send him an application for a loan on the property, indicating that he contemplated purchasing it, and the fact that the Millers opened an escrow with the Rothschilds for the purchase of the property two days after the expiration of the instant escrow and Western Mortgage made the loan (for \$20,000 at 5% for 20 years) three days after the new escrow was opened. The record does not show that the Millers did not keep themselves in a position to close the deal with plaintiff until the close of the escrow period. The Millers and their broker were insisting that plaintiff sign the loan application at Western Mortgage and go through with the purchase. Plaintiff was told by Mrs. Lynch of the Elkins Company

that if he refused to go through with the purchase he would likely be sued. It is significant that the new escrow was not entered into and the loan to the Rothschilds was not made until after the expiration of the Fry escrow. The evidence and the reasonable inferences therefrom adequately support the challenged finding.

[6] Plaintiff argues that the Millers were not obligated to pay the Elkins Company, as broker, a commission of \$2,125. By the terms of the deposit agreement the Millers promised to pay the broker a commission of 5 per cent or one half of the deposit (\$2,125.00) in the event the same was forfeited by the purchaser, provided the same did not exceed the full amount of the commission. The deposit was \$4,250, one half thereof (\$2,125) was equal to 5 per cent of the purchase price. It is clear from the record that the Millers were at all times ready, able and willing to convey the property on the agreed terms. It is also clear that the deal fell through because plaintiff was at fault. Under these circumstances the Millers became obligated to the broker for the agreed commission of \$2,125.

There is no merit in plaintiff's final contention that the findings do not support the judgment. The findings make it unmistakably clear that the failure of the proposed sale to come to fruition was due to plaintiff's acts and attitude. The court gave plaintiff a judgment for the difference between his deposit and the total of the specific items of damage shown by the evidence to have been sustained by the Millers as a result of plaintiff's breach.* This is in accordance with the principles stated in *Freedman v. Rector*, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

* Plaintiff does not question the propriety of the allowance (\$250) for handling the Rothschild escrow.

162 Cal.App.2d 143

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Sidney CHERRIE, Defendant and Appellant.
Cr. 6163.

District Court of Appeal, Second District,
Division 2, California.

July 15, 1958.

Hearing Denied Sept. 10, 1958.

Prosecution for unlawful possession of heroin. The Superior Court, Los Angeles County, John G. Barnes, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Fox, J., held that where police officers went to address at which defendant was staying as a result of information which they received from an informer, whose reliability had been previously established, and after knocking on defendant's door, entered his room upon his express invitation, there was no illegal entry, and when one of the officers observed a bindle fall from defendant's person when he moved his body, it was reasonable for the officer to pick up such bindle and examine its contents, and such a search was in no sense unreasonable, and such evidence was properly received and was not subject to exclusion on theory it was obtained by an unlawful search and seizure, even though officers in question did not have a search warrant or a warrant for defendant's arrest.

Judgment affirmed.

1. Criminal Law Ⓒ395

Searches and Seizures Ⓒ7(20)

Where police officers went to address at which defendant was staying as a result of information which they received from an informer, whose reliability had been previously established, and after knocking on defendant's door, entered his room upon his express invitation, there was no illegal entry, and when one of the officers observed a bindle fall from defendant's person when he moved his body, it was reasonable for the officer to pick up such bindle and examine its contents, and such a search was

in no sense unreasonable, and such evidence was properly received and was not subject to exclusion on theory it was obtained by an unlawful search and seizure, even though officers in question did not have a search warrant or a warrant for defendant's arrest. West's Ann. Health & Safety Code, § 11500.

2. Witnesses Ⓒ216

Where police did not arrest defendant in prosecution for unlawful possession of heroin, on information supplied by their informant, but rather arrested defendant on the basis of what they observed after defendant invited them into his room, trial court did not abuse its discretion in not requiring officers to disclose to defendant the name of their informant. West's Ann. Health & Safety Code, § 11500.

Sidney Cherrie, in pro. per.

Edmund G. Brown, Atty. Gen., John A. Vander Lans, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was convicted of possession of heroin in violation of section 11500 of the Health and Safety Code. Two prior convictions were also alleged, one for robbery and the other for a narcotics offense. Both of these prior convictions were found to be true. Defendant was sentenced to the state prison. He has appealed from the judgment.

At approximately 10:30 p. m. on April 14, 1957, Officer Soviak, of the Los Angeles Police Department, received information from an informant, who had previously given him information which had led to the arrest and conviction of two people, that the defendant had been selling narcotics earlier that evening at the corner of Fifth and Stanford Streets, in Los Angeles; that the defendant had gone home but still had some narcotics in his possession; that defendant lived at 460 East Fourth Street, in Room No. 200. About half an hour later Officer Soviak and his partner went to the designated address; Officer Soviak knocked

on the door; a male voice inquired, "Who is there?" Officer Soviak replied, "Police Officers." Defendant came to the door, the officers identified themselves, and defendant let them in. He did not ask what they wanted, but said, "Come in." At about the same time a man who lived across the hall came to the door, and he also went into defendant's room. Defendant was in the nude; he walked to a chair near the center of the room and sat down; after a few minutes he reached over to the television set to get a pack of cigarettes; as he made this movement a yellow bundle fell onto the chair from his rectum. Officer Soviak picked it up. The officer then placed defendant under arrest. Defendant thereupon volunteered the information that he was again selling narcotics; that he was selling for a man on the west side of town, and that he was working on a 60-40 percentage. He explained that his supplier had delivered ten bindles to him at his room the day before, and that in the meantime he had sold four of them. He further related that his supplier had personally used two of the bindles; this accounted for his having only four left. Upon analysis, the substance contained in these bindles was found to be heroin.

Defendant's story was that there was a knock on his door; that he inquired as to who was there, and the response was, "Dobb," a friend who lived across the hall; whereupon defendant got out of bed and opened the door. As he was getting back into bed, two officers rushed in, Dobb following close behind. One of the officers searched the floor and ordered defendant out of bed and to put on his clothes. Defendant denied being shown any bundle while in the room, and denied telling the officers that he was selling narcotics for a fellow on the west side of town on a 60-40 percent basis. Defendant's girl friend corroborated his testimony.

[1] Defendant's first contention is that the evidence presented by the People was obtained by an unlawful search and seizure. The officers went to the address in question as the result of information they had re-

ceived from an informant, whose reliability had been previously established. According to Officer Soviak, the entry of the officers into defendant's room was upon his express invitation. While defendant and his girl friend gave a different version of the entry of the officers, the trial court resolved this conflict against the defendant and impliedly found that defendant consented to the entry of the officers. The resolution of this factual question by the trial court is, of course, binding on this court. See *People v. Gorg*, 45 Cal.2d 776, 782, 291 P.2d 469; *People v. Michael*, 45 Cal.2d 751, 753, 290 P.2d 852; *People v. Burke*, 47 Cal.2d 45, 49, 301 P.2d 241. It is thus plain that there was no illegal entry.

It is equally plain that there was no unreasonable search. Officer Soviak observed a yellow bundle fall from defendant's person when he moved his body in order to reach a pack of cigarettes on the television set. With the information he had received previously, it was reasonable for the officer to pick up the bundle and examine its contents. Such a search was in no sense unreasonable, and the retrieved bundle was properly received in evidence. *People v. Wright*, 153 Cal.App.2d 35, 38, 313 P.2d 868; *People v. Moore*, 140 Cal.App.2d 870, 871, 295 P.2d 969; *People v. Martin*, 45 Cal. 2d 755, 762, 290 P.2d 855.

[2] Defendant also contends that he was entitled to know the name of the informant who supplied the police with the information that led to his arrest. There is no merit in this contention, for the police did not arrest the defendant on the information supplied by their informant but rather the arrest was made on the basis of what they observed after the defendant invited them into his room. The facts in the instant case concerning the part played by the informer are similar to those in *People v. Moore*, 154 Cal.App.2d 43, 315 P.2d 357. What was there said by this court on that question is here apposite. On page 46 of 154 Cal.App.2d on page 359 of 315 P.2d we stated: "The court properly refused to compel the officers to reveal the identity of their informer because he was

just that and nothing more. He simply furnished the information upon which the officers could reasonably entertain a strong suspicion that appellant was violating the law. He played no part in the criminal acts (possession of heroin and marijuana) with which appellant was later charged. The identity of the informant would not have aided the appellant in establishing his innocence for the officers found the contraband in the pocket of a coat which was determined to belong to the appellant. The court did not have to rely on the informant to establish appellant's guilt. The informant was not a participant in the offense." Under the circumstances, the trial court did not abuse its discretion by not requiring the officers to disclose the name of their informant. *People v. Dewson*, 150 Cal.App. 2d 119, 126, 310 P.2d 162.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.



162 Cal.App.2d 114

Delmar L. MAHONEY, General Partner,
Merrill K. Lyon and Audrey Lyon, Limited
Partners, doing business as L. & M.
Enterprises, Plaintiffs and Respondents,

v.

Lee FELKINS, A. T. Felkins, William Leerskov, Individually, and doing business as Felkins Music Co.; Felkins Music Co., a California corporation; Badger Sales Co., Inc.; Pasadena Finance Co.; Richard Ross; Walter E. Heller & Company; Lucerne Finance Co.; et al., Defendants.

Badger Sales Co., Inc., Appellant.

Civ. 22892.

District Court of Appeal, Second District,
Division 1, California.

July 14, 1958.

Buyers of coin-operated vending machine route brought action against sellers and broker, who acted as agent for sellers,

for rescission and cancellation of certain written contracts including note given by buyers to broker as payment of broker's commission on deferred basis, on ground of alleged misrepresentations made by sellers and broker. The Superior Court of Los Angeles County, Lewis Drucker, J., rendered judgment without segregation as to amount against sellers and broker, and broker appealed. The District Court of Appeal, Fournier, J., held that where no separate cause of action alleging fraud and deceit was asserted against broker, Superior Court was limited to ordering restoration of parties to their former situation and could not properly award a joint and several judgment for damages against sellers and broker for all moneys received by each of them, and that recovery as against broker should be limited to amount received by him as partial payment on the note.

Judgment as to broker reversed.

Cancellation of Instruments 58

In action by buyers of coin-operated vending machine route against sellers and broker, who acted as agent for sellers, for rescission and cancellation of certain written contracts including note given by buyers to broker as payment of broker's commission on deferred basis, on ground of alleged misrepresentations made by sellers and broker, wherein no separate cause of action alleging fraud and deceit was asserted against broker, trial court was limited to ordering restoration of parties to their former situation and could not properly award a joint and several judgment for damages against sellers and broker for all moneys received by each of them, and recovery as against broker should be limited to amount received by broker as partial payment on the note.

John H. Dawson, Fullerton, for appellant.

Gordon, Weinberg & Capalbo, Los Angeles, by Leonard D. Weinberg, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal from a judgment in favor of the purchasers for money paid toward the purchase price of a coin-operated vending machine route in the Victorville-Apple Valley area. Judgment was rendered without segregation as to amount, against Lee Felkins, A. T. Felkins and William Leerskov individually and doing business as Felkins Music Co. (hereinafter referred to as "Sellers"), and the business opportunities broker Badger Sales Co., Inc. (hereinafter referred to as "Agent"), which broker acted as Agent for the Sellers. The Agent alone has perfected its appeal.

The action for rescission is based upon certain misrepresentations of fact made by Sellers and Agent that the route was grossing the Sellers a weekly profit of \$1,450, whereas it was found to be grossing less than \$1,000 per week. In the coin-operated vending machine business the term "profit" is defined to mean the route operator's share of the gross money paid into the machine after the location owner has been paid his proportionate share, but before deducting route operating expenses.

On appeal, appellant has argued the following:

1. That the recovery as against the Agent should be limited to \$750, representing a partial payment on the promissory note for \$2,000, which was given as payment of the broker's commission on a deferred basis;

2. That damages were not shown to have been sustained because there was no positive showing that the business actually took in less than represented;

3. That there was no evidence of Agent's intent to defraud purchasers; and

4. That in the absence of evidence of an assignment by Delmar L. Mahoney, General Partner, to Merrill K. Lyon and Audrey Lyon, Limited Partners, the total judgment should be reduced by deducting \$1,500 contributed by Mahoney.

The promissory note for \$2,000 executed in favor of appellant Agent after appel-

lant Agent had agreed to accept the payment of its commission on a deferred basis was the only contract entered into by and between appellant Agent and purchasers, and the sum of \$750 representing two payments thereon is the entire consideration actually received by appellant Agent.

The complaint sued on is for rescission and cancellation of certain written contracts, including said promissory note, and is based upon the fact that certain fraudulent misrepresentations were made to purchasers. The pleadings significantly contain no separate cause of action alleging fraud or deceit as a basis for damages against appellant as agent or representative of the non-appealing defendants, or otherwise. In this important respect, the instant case is clearly distinguishable from *Stirnum v. Adams*, 50 Cal.App. 730, 195 P. 955, upon which respondent has relied.

As is well stated in the case of *Leavens v. Sharp*, 66 Cal.App.2d 425, 428, 152 P.2d 460, 462, "An action in rescission presupposes the relation of vendor and vendee and the restoration of both parties to their former position. In the instant case, there was no contractual relation between the respondent vendees and appellant agent. An action for damages based upon the alleged fraud would have been respondents' only recourse against appellant, but by electing to proceed in rescission, their right of recovery under the pleadings herein was limited to the consideration paid for the property. The fact that appellant, as agent for the vendors, handled the deposit and was empowered by them to direct the disposition through escrow of the balance of the purchase money did not render him personally liable."

In that no action for damages for fraud was pleaded in the instant case, the trial court was limited to ordering a restoration of the parties to their former situation. The trial court could properly divest the parties of that which had been received and could properly order the return of that which had been paid. However, in this action for rescission and cancellation of written instruments, the trial

court could not properly award a joint and several judgment for damages against the defendants for all monies received by each of them, because the obligations under the various written instruments which were ordered cancelled were several and the amounts paid thereunder were paid and applied in full or in partial satisfaction of specific obligations.

In view of the foregoing, the other contentions of appellant need not be considered.

The judgment as to appellant, is reversed.

WHITE, P. J., and LILLIE, J., concur.



162 Cal.App.2d 332

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James BOYD, Defendant and Appellant.
Cr. 3483.

District Court of Appeal, First District,
Division 1, California.

July 25, 1958.

Defendant was convicted of illegal possession of narcotics. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., rendered judgment, and defendant appealed. The District Court of Appeal, Peters, P. J., held that where police officer was informed by party, who on four or five previous occasions had given officer reliable information, that defendant was a runner for a narcotic dealer, it was reasonable for officer to believe informant, officer acted reasonably in arresting defendant and searching premises without warrants, and evidence obtained in search was properly admitted.

Affirmed.

327 P.2d—58

1. Arrest 63(4), 71

An arrest and search may be made solely on basis of information received from a single reliable informant.

2. Criminal Law 394

When officer recounts at trial information received from a single reliable informant, it is not credibility of informant that is in issue in determining whether arrest and search made solely on basis of information received was proper, but credibility of officer, soundness of his reasons for relying upon informant and nature of informant's disclosures, and it is for court to say whether officer acted reasonably under the circumstances.

3. Arrest 63(4), 71

Criminal Law 394

Where police officer was informed by party, who on four or five previous occasions had given officer reliable information, that defendant was a runner for a narcotic dealer, it was reasonable for officer to believe informant, officer acted reasonably in arresting defendant and searching his premises without warrants, and evidence obtained in search was properly admitted in prosecution of defendant.

4. Arrest 63(4)

Searches and Seizures 3(1)

It is reasonable that a police officer may make an arrest or conduct a search without warrant solely on information secured from an informant deemed by officer to be reliable, as long as issue of officer's credibility is submitted to trial court.

Joseph H. Radensky, Lynwood, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

After a trial before the court without a jury, defendant was convicted of the illegal possession of narcotics. He admitted a prior conviction for the same offense. On this appeal his sole contention is that his

arrest and search were illegal because made without warrants and without reasonable and probable cause.

A federal narcotics agent, Prizborowski by name, testified that on May 14, 1957, he received information from an informant that defendant, whom the informant described, was engaged in the narcotics traffic. The informant stated that defendant was a runner for a notorious narcotic dealer who was operating in the Fillmore District and who was known to the agent. The informant also stated that on several occasions he had purchased narcotics from the defendant, and that both the informant and defendant had used narcotics in the defendant's place of abode. The address and apartment number of defendant's residence were given. The agent also testified that the informant had previously given him information on four or five occasions and that such information had proved to be reliable. In each case, as a result of such information, arrests and convictions were secured. The defendant did not request the name of this informant.

The agent testified that several hours after receiving this information he and two other agents visited defendant's apartment. Prizborowski knocked on the door. The defendant opened it just far enough to peek out. The officers identified themselves and the defendant then "opened the door wider and admitted us into the premises." In response to a question from the officers the defendant stated that his name was "James Boyd." As Prizborowski was talking to defendant he noticed what appeared to be old hypodermic needle marks on the hands and forearms of defendant. The defendant was then placed under arrest and the premises searched. In the pocket of a raincoat belonging to defendant two cellophane bags containing heroin were found. One of the officers remarked that it looked as if each bag had contained an ounce of heroin. Defendant then stated: "No, I spilled a spoon of heroin in the bags and the powder that was left kind of stuck to the bags, but they weren't full. They didn't contain an ounce

each." The agent admitted that he had neither a warrant of arrest nor a search warrant.

Defendant testified that the officers demanded admittance to the apartment and that he did not consent to the entry. He admitted that the raincoat in which the heroin was found belonged to him, and that no one else ever wore it, but denied all knowledge of the narcotics or how they got into the pocket of his coat. He admitted talking to the officers about the cellophane bags, but stated that he did not tell them that he had spilled a spoon of heroin in the bags, but simply told the officers that someone must have done so. Defendant admitted that there were old hypodermic marks on his arms.

Defense counsel then stated to the court that he was convinced that this evidence, if admissible, was undoubtedly sufficient to find the defendant guilty, but that he wanted to raise the question that this evidence was inadmissible because secured by means of an illegal arrest and search. His theory is that the officers, under these facts, did not have reasonable or probable cause to believe that a felony had been committed by defendant. In support of this contention defendant challenges the correctness of the rule relied upon in support of the judgment that police officers may make an arrest and conduct a search solely on the basis of information received from a reliable informant, and that such an arrest and search are justified if the trial court believes that the officer reasonably relied on the information thus given to him.

[1,2] There are many cases holding that an arrest and search may be made solely on the basis of information received from a single reliable informant. *People v. Hood*, 150 Cal.App.2d 197, 309 P.2d 856; *People v. Guerrero*, 149 Cal.App.2d 133, 307 P.2d 940; *People v. Gonzales*, 141 Cal. App.2d 604, 297 P.2d 50; *People v. Moore*, 154 Cal.App.2d 43, 315 P.2d 357. When the officer recounts at the trial the information so received, such evidence is not hearsay. *People v. Fischer*, 49 Cal.2d 442, 317 P.2d

967. In such a case it is not the credibility of the informant that is in issue, but the credibility of the officer, the soundness of his reasons for relying upon the informant, and the nature of the informant's disclosures. It is for the court to say whether the officer acted reasonably under the circumstances. *People v. Dean*, 151 Cal. App.2d 165, 311 P.2d 85; *Lorenzen v. Superior Court*, 150 Cal.App.2d 506, 310 P.2d 180.

[3] In the instant case the trial court has necessarily found that the officer reasonably believed the informant, and that on the information divulged the officer acted reasonably in arresting defendant and searching the premises. Under the rules of the cases cited, *supra*, the arrest was legal, the search proper, and the evidence properly admitted.

Defendant, while admitting that this is the rule announced in the cited cases, attacks that rule. He points out that the officer in such a case is not a disinterested witness because the reputation of the agency to which he belongs and his own reputation are in issue, and that he is therefore interested in upholding the arrest and search. Furthermore, the officer is interested because if the search is held to have been illegal he may be subjected to a civil liability.

These arguments are not new. As this court said in *Lorenzen v. Superior Court*, 150 Cal.App.2d 506, 509, 310 P.2d 180, 182: "This is not a new question in California. It has been decided so many times that such information is sufficient that it is an open question no longer."

The defendant may, on cross-examination, attack the credibility of the officer involved. He can request the identity of the informant, and perhaps a refusal to divulge renders the evidence subject to a motion to strike. No such request was here made. The defendant may bring out the fact, if it be a fact, that the informant was addicted to narcotics. That was done here.

[4] It must be remembered that since the decision of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513, the

courts have been struggling to work out reasonable rules governing the search and seizure problem—rules that are reasonably fair to the defendant and reasonably fair to the people. In reference to the problem under discussion the courts have unanimously held that it is reasonable that a police officer may make an arrest or conduct a search without warrants solely on the information secured from an informant deemed by the officer to be reliable, as long as the issue of the officer's credibility is submitted to the trial court. The means available of testing such information are sufficient to protect, reasonably, the rights of the defendant.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Herbert J. MATTSON, Defendant and
Appellant.*
Cr. 1353.

District Court of Appeal, Fourth District,
California.

July 17, 1958.

Hearing Granted Sept. 10, 1958.

Defendant was convicted of a violation of West's Ann.Pen.Code, § 476a, and from judgments of conviction in the Superior Court, San Diego County, William A. Glen, J., the defendant appeals. The District Court of Appeal, McCabe, J. pro tem., held that the defendant voluntarily waived his right to assistance of counsel; that evidence that neither defendant nor his wife's business organization had had a bank account in the Kentucky bank upon which the checks were drawn was admissible and that certain contentions could not be raised for the first time on appeal.

Judgment affirmed.

* Opinion vacated 336 P.2d 937.

1. Criminal Law Ⓒ641(1)

While defendant under the federal and state Constitutions in a criminal case has the right of assistance of counsel, he also has a right which he may exercise to waive his constitutional rights to assistance of counsel. U.S.C.A.Const. Amend. 6; West's Ann.Const. art. 1, § 13.

2. Attorney and Client Ⓒ23

An attorney appointed by the court is the attorney of record, and as such he stands in a dual relationship and represents his client and is an officer of the court and stands before the court as an attorney in the particular case for all purposes.

3. Criminal Law Ⓒ641(1)

A defendant who voluntarily, knowingly and with knowledge of what he was doing waived his right to assistance of counsel by stating that he did not want counsel appointed to defend him but to assist him, and who requested counsel only to assist the defendant in filing papers, waived his right to assistance of counsel and could not raise the point on appeal. West's Ann.Pen.Code, § 476a; U.S.C.A. Const. Amend. 6; West's Ann.Const. art. 1, § 13.

4. Criminal Law Ⓒ641(1)

A defendant in a criminal case has a constitutional right to appear, represent and defend himself.

5. Witnesses Ⓒ393(2)

If witness gave evidence at preliminary hearing inconsistent with his testimony at trial defendant could have used the transcript of that hearing for impeachment purposes. West's Ann.Code Civ. Proc. § 1847.

6. False Pretenses Ⓒ42

In prosecution for issuing a check without sufficient funds, evidence that neither the defendant nor his wife's business organization had had a bank account in the Kentucky bank upon which the checks were drawn and issued by the defendant was admissible to show the intent of the defendant at the time he issued the check. West's Ann.Pen.Code, § 476a.

7. Criminal Law Ⓒ474

In criminal prosecution, it was proper to allow the prosecution to examine the court-appointed psychiatrists on its case in chief as to whether or not the defendant was in a state of amnesia at the time of the offenses charged in view of the defendant's plea of not guilty.

8. Criminal Law Ⓒ1036(2)

Defendant seeking on appeal to disqualify court-appointed physician testifying at trial raised the point too late where no objection to the physician's testimony was interposed in the trial court.

9. Criminal Law Ⓒ1028

Where defendant did not raise his need of Kentucky court records at trial, he could not raise the point for the first time on appeal.

10. Criminal Law Ⓒ1028

Defendant could not raise for the first time on appeal that certain papers were deliberately left by extraditing officers in Kentucky where the issue was not raised in the trial court.

John T. Schall, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and Carl Boronkay, Deputy Atty. Gen., for respondent.

McCABE, Justice pro tem.

Defendant appeals from judgments of conviction of three felonies, rendered pursuant to jury verdicts based upon three counts in the information, each charging a violation of section 476a, Penal Code. Defendant entered pleas of not guilty and not guilty by reason of insanity. After the jury returned the verdicts, defendant withdrew his plea of not guilty by reason of insanity.

Upon this appeal defendant's primary contention is that he was denied the assistance of legal counsel by the court to aid, advise and assist him, thus he was deprived of his constitutional rights.

During the pendency of this appeal defendant petitioned this court for a writ

of mandamus based in part upon the contention set out above. This petition was denied without written opinion.

During the arraignment proceedings and the trial of the action defendant usually referred to himself in the third person as "defendant" or "the defendant". During the arraignment and insofar as the record is pertinent, the following took place at different times:

"The Defendant: The defendant has been trying to get the proper papers so that he could give verified copies, service on the District Attorney, but has no means to do so.

"The Court: You use the term 'the defendant.' You are the defendant, aren't you?

"The Defendant: Yes, and I am acting as my own counsel, your Honor.

"The Court: Why don't you have counsel?

"The Defendant: I had an unfortunate experience in Kentucky and it was through an appeal that I got out of a bad situation because the Court appointed attorney did not call my witnesses and a biased judge forced me to trial. * * *

"The Court: Okay. What do you want to do about the arraignment on the checks?

"The Defendant: The defendant pleads not guilty and not guilty by reason of insanity and asks a jury trial in both instances. * * *

"The Court: 9:15 on Friday morning.

"The Clerk: Your true name is Herbert J. Mattson?

"The Defendant: Legal name, sir.

"The Clerk: You are representing yourself, Mr. Mattson?

"The Defendant: I represent myself.

"The Court: It is my understanding you don't want court appointed counsel.

"The Defendant: I would appreciate Court appointed counsel only for the purpose of assisting me in filing these things, but not to defend myself in a jury trial, no.

"The Court: I don't know where to draw the line.

"The Defendant: Under the Constitution of California I am allowed that, if your Honor thinks it would be more feasible?

"The Court: Well, if we appoint a lawyer for you he will represent you for this case because all the motions you are making, you can't separate the motions from the case.

"The Defendant: I don't want any lawyer to hire—

"The Court: Okay. You represent yourself. * * *

"The Court: Well, the law provides if you enter a plea of not guilty by reason of insanity we have to appoint two psychiatrists. We can't waive the law. I was going to suggest since you are representing yourself and pleading not guilty by reason of insanity, I think you are going to have considerable difficulty. In one breath you say you are insane and in the next breath you want to represent yourself. Maybe that is natural. I don't know."

At the time of the arraignment after the verdicts of conviction and immediately prior to the pronouncement of judgment and sentence, the following occurred:

"This being the time for arraignment for judgment, have you any legal cause to show why judgment should not be pronounced?

"Defendant Mattson: None other than I have stated."

During the entire proceedings and trial of this case the defendant had a complete understanding and knowledge of courtroom procedure. During the trial, he displayed a vast and accurate knowledge in questioning and cross-examining witnesses, rules of evidence, medical terms as ap-

plied to amnesiacs, how to request the court to approach the bench for a conference, the use of the transcript of the preliminary hearing on cross-examination, how to get in and how properly to exclude evidence. As reflected by the record, his abilities far exceed that of many members of the bar who are duly licensed to practice. At no time did the defendant make a motion for a continuance or objection on the ground that he desired to have legal counsel.

Article VI of the Amendments to the Constitution of the United States, provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Article I, Section 13, Constitution of the State of California, provides in part:

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel.
* * *

Section 686 of the Penal Code provides:

"In a criminal action the defendant is entitled:

* * * * *

"2. To be allowed counsel as in civil actions, or to appear and defend in person and with counsel."

The portions of the record set out above clearly reflect not only that defendant was advised of his right to the assistance of counsel, but affirmatively stated "* * * I am acting as my own counsel, your Honor. The Clerk: You are representing your-

self, Mr. Mattson? The Defendant: I represent myself."

Defendant states he didn't want to have counsel appointed to defend him but to assist him. During the proceedings which occurred before trial defendant requested the court to appoint counsel "only for the purpose of assisting me in filing these things, but not to defend myself in a jury trial, no." "These things" apparently referred to papers regarding a writ of habeas corpus and possibly a motion. The trial judge gave defendant advice and assistance in these matters. Defendant is not now complaining about a failure of the trial court to appoint an attorney to assist in filing "these things" but, as previously stated, he complains because counsel was not appointed for the arraignment and trial. The record reflects the trial judge explained in effect that the court-appointed counsel would be of record for all purposes. After this statement, defendant made the representation to the court that he was representing himself.

[1] In principle, defendant is right in the statement that under the federal and state constitutions a defendant in a criminal case has the right of the assistance of counsel. However, a defendant in a criminal action also has a right which he may exercise to waive his constitutional rights to assistance of counsel. *People v. Mimms*, 110 Cal.App.2d 310, 313, 242 P.2d 331.

[2] An attorney appointed by the court is the attorney of record. As such, he stands in a dual relationship: he represents his client and he is an officer of the court. He stands before the court as an attorney in the particular case for all purposes. See, *Delaney v. Husband*, 64 N.J.L. 275, 45 A. 265. Defendant did not desire an attorney to represent him or to be an officer of the court. He desired an advisor. Defendant could have requested the court to appoint an attorney who would be of record. Nevertheless he chose to represent himself.

The waiver of the right to be represented by an attorney may be exercised in various

ways. In *People v. Mimms*, *supra*, the defendant had an intelligent understanding of what he was doing. Upon questions put to him by the court, the defendant stated he wanted to represent himself. In *People v. Ansite*, 110 Cal.App.2d 38, 241 P.2d 1036, the defendant, by his own volition and with full knowledge of what he was doing, moved the court for permission to represent himself, and the appellate court held he had waived the assistance of counsel. See, also, *People v. Chessman*, 38 Cal.2d 166, 173, 238 P.2d 1001; *People v. Pearson*, 41 Cal.App.2d 614, 619, 107 P.2d 463.

[3] Defendant in the instant case voluntarily, knowingly and with knowledge of what he was doing waived his right to the assistance of counsel. Having done so, he cannot successfully raise the point on appeal. *People v. Mimms*, *supra*; *People v. Ansite*, *supra*; *People v. Shapiro*, 85 Cal. App.2d 253, 194 P.2d 731; *People v. Collins*, 117 Cal.App.2d 175, 255 P.2d 59.

[4] Defendant had a constitutional right to appear, represent and defend himself, which right he exercised. *People v. Ansite*, *supra*; *People v. Looney*, 9 Cal.App.2d 335, 49 P.2d 889.

Defendant cites the cases of *People v. Chessman*, 38 Cal.2d 166, 238 P.2d 1001 and *People v. Northcott*, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806 to sustain his position that he was entitled to an advisor. The facts in those cases are readily distinguishable from those presently before this court. In the *Northcott* case, the defendant had an attorney of record who was conducting the trial work. This attorney apparently was employed by defendant. Defendant *Northcott*, against the advice of the trial court, discharged the attorney and then on appeal complained he was forced to relieve his counsel. The Supreme Court found no merit in the contention. In the *Chessman* case, the defendant complained of a ruling of the trial court in not allowing defendant to argue the facts and an attorney to argue the law to the jury. The attorney apparently was not court-appointed. Defendant had represented himself during the trial

and had refused to appear by counsel. The Supreme Court opined that the defendant had "put himself in a position where he cannot complain of the trial court's ruling."

Defendant also cites *Robinson v. Johnston*, D.C., 50 F.Supp. 774 to sustain his contention. Again an examination of the facts of the case are not similar to those present here.

In *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, the Supreme Court said the determination of whether there is a waiver of the constitutional right of legal assistance "must depend, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused", and also, "while an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." In the instant case, the trial judge did not specifically use the word "waiver" but the verbiage used conveys the same meaning.

Although not entirely clear because they are so entwined, intermingled, intermixed and admixed with the primary contention above decided, the following arguments seem to emerge: (1) certain prosecution witnesses did not tell the truth; (2) evidence regarding a bank account in 1945 should not have been admitted; (3) the testimony of the court-appointed psychiatrist was not proper "since basic psychiatry teaches 'systematic psychiatry' described by Webster's dictionary. Testimony is deliberately misleading since any psychiatrist with a California license can describe 'Systematic Amnesia'"; (4) he did not have available to him some allegedly impeaching testimony allegedly contained in an official court record of the state of Kentucky; (5) certain of his papers were left deliberately in a jail in Kentucky at the time he was brought to California.

[5] It is the exclusive province of the jury to determine the credibility of a witness. Section 1847, Code of Civil Proce-

dure. If the witness complained of gave evidence at the preliminary hearing inconsistent with his testimony at the trial the defendant could have used the transcript of that hearing for impeachment purposes. The record reflects defendant knew how to use such a transcript for such a purpose.

[6] The prosecution was allowed to prove that since 1945 or 1946 neither defendant nor his wife's business organization had had a bank account in the Kentucky bank upon which the checks were drawn and issued by defendant. This testimony was proper to show there was no bank account at the bank against which defendant could legally issue a check. There was testimony that defendant knew of this state of facts. This evidence was proper to show the intent of defendant at the time he issued the checks upon which the felony counts were predicated.

[7, 8] The trial court allowed the prosecution to present and examine the court-appointed psychiatrists on its case in chief as to whether or not, in his opinion, defendant was in a state of amnesia at the time of the commission of the offenses charged. This was proper under defendant's plea of not guilty. In his cross-examination of this psychiatrist defendant used such expressions as "hysterical amnesia", "dementia depressive", "amnesia" and "historic amnesia", but at no place in the record, either on direct or cross-examination, was the expression "systematic amnesia" used. Whether by his point (3) on this appeal defendant seeks to show lack of qualification of the doctor or that "amnesia" is different in type or degree from "systematic amnesia" is not clear. If the defendant seeks on this appeal to disqualify the doctor, he has raised the point too late. No

objection to the doctor's testimony was interposed in the trial court. If defendant is seeking to distinguish the diseases, or the type or degree of the disease, there is no testimony in the record to warrant such a distinction, particularly since there is no use of "systematic amnesia" in the record.

[9] If defendant needed the records of the Kentucky court at the trial of his case, he did not reveal this need to the court. This point could have been obviated at the trial court level had defendant raised it. Therefore, defendant cannot raise this point for the first time on this appeal. *Mott v. Smith*, 16 Cal. 533, 555; *Milwaukee Mechanics' Ins. Co. v. Warren*, 150 Cal. 346, 353, 89 P. 93.

[10] It is contended that certain papers were deliberately left at a jail in Kentucky by the officers sent from California to return the defendant to California, and that these papers were material to defendant's case. At the trial, one of the police officers testified for the defendant to the effect that defendant had placed the papers with the jailer in Kentucky, had recovered them before leaving for California, had them while on the "transportation car" coming to California, and that neither the accompanying sergeant nor the police officer had taken them from defendant. There was no contrary evidence. Defendant did not request the court to take any action, or offer to prove the materiality or relevancy of the papers. This issue cannot be raised for the first time on appeal. See, *Mott v. Smith*, *supra*.

The judgments and each of them, affirmed.

MUSSELL, Acting P. J., and GRIFFIN, J., concur.

162 Cal.App.2d 141

PEOPLE of the State of California,
Respondent,

v.

Robert E. WILLIAMS, Petitioner and
Appellant.

Cr. 6333.

District Court of Appeal, Second District,
Division 1, California.

July 15, 1958.

Hearing Denied Sept. 10, 1958.

Prosecution for murder. The Superior Court, Los Angeles County, entered judgment of conviction and denied defendant's request for stay of execution pending appeal, and defendant petitioned for supersedeas. The District Court of Appeal held that where at time prosecution was instituted, defendant was confined in state prison pursuant to a judgment pronounced against him on another charge of murder, and in accordance with an order of the Superior Court, defendant was delivered into the custody of a county sheriff to be brought before Superior Court for trial in case in which judgment of conviction in question was entered, and due notice had not been given to warden under statute requiring due notice to the warden of orders affecting prisoner's status, trial court did not abuse its discretion in denying defendant's request for a stay of execution.

Petition for stay of execution denied.

See also 151 Cal.App.2d 173, 311 P.2d 117.

1. Prisons ⇨13

Under statute dealing with removal of prisoners for court appearances, and providing that certain orders be executed by sheriff whose duty it shall be to bring the prisoner before the proper court, and when his presence is no longer required to return him to the prison from whence he was taken, words when his "presence is no longer required" mean that when the purpose stated in the removal order is accomplished, the duty of the sheriff is to return prisoner to warden unless due notice is

given as provided in such statute, to the warden. West's Ann.Pen.Code, § 2620.

See publication Words and Phrases, for other judicial constructions and definitions of "Presence is No Longer Required".

2. Criminal Law ⇨1001

Where at time murder prosecution was instituted, defendant was confined in state prison pursuant to a judgment pronounced against him on different charge of murder, and in accordance with an order of superior court, defendant was delivered into custody of a county sheriff to be brought before superior court for trial in case in which judgment of conviction in question was entered, and due notice had not been given to warden under statute requiring due notice to the warden of orders affecting prisoner's status, trial court did not abuse its discretion in denying defendant's request for a stay of execution pending appeal of judgment entered on second murder charge. West's Ann.Pen.Code, §§ 1243, 2620.

Warner, Sutton & Warner, Barbara
Warner, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., William B. McKesson, Dist. Atty. of Los Angeles County, Jere J. Sullivan, Deputy District Atty., Los Angeles, for respondent.

PER CURIAM.

Petitioner was convicted of murder in the Superior Court of Los Angeles County and sentenced to state prison for the term of his natural life. He gave due notice of appeal to this court from such conviction. A request for stay of execution pending appeal was denied by the trial judge and this is an application to this court to order such a stay (Penal Code, section 1243). On July 3, 1958 we issued an order staying execution of the judgment herein until the further order of this court, and set the matter of continuing such stay for hearing on July 8th.

It appears that at the time the instant prosecution was instituted, petitioner was confined in the State Prison at Folsom pursuant to a judgment pronounced against him on another and different charge of murder.

In accordance with an order of the Superior Court of Los Angeles County pursuant to Section 2620 of the Penal Code, petitioner was delivered into the custody of the Sheriff of Los Angeles County, to be brought before the aforesaid court for trial in the case at bar.

We are satisfied that the instant application must be denied. In *re Bost*, 214 Cal. 150, 153, 4 P.2d 534, is authority for the statement that when petitioner was delivered to the warden of Folsom Penitentiary under sentence for a previous and different murder charge, he was permanently removed from the jurisdiction of the superior court, except in certain contingencies, one of which, under Penal Code, section 2620, in his production for trial of himself before the superior court in which such an action is pending. The last-named section further provides that "when his presence is no longer required" he shall be returned to the prison from which he was taken. The same section further provides that "When a prisoner is removed from a State prison under this section he shall remain in the constructive custody of the warden thereof and any order affecting his status in any manner whatever, other than that provided for in said order, may only be made after due notice to the warden."

[1,2] Petitioner urges that the "status" referred to in Penal Code, section 2620 "* * * relates to change of custody, such as release on probation". With this we cannot agree. We interpret the words "when his presence is no longer required" as meaning that when the purpose stated in the superior court order is accomplished, the duty of the sheriff is to return the prisoner to the warden unless "due notice" is given as provided in Penal Code, section 2620, to the warden. It is conceded no such notice was given herein.

For the foregoing reasons, we are satisfied that the trial judge did not abuse his discretion when he denied petitioner's request for a stay of execution.

The order of this court entered July 3, 1958 is vacated, and the petition for a stay of execution is denied.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



162 Cal.App.2d 164

Edgar T. STONER, Plaintiff and Appellant,
v.

Alexander BISNO, Henry Bisno and Henry Kawin, Defendants and Respondents.

Henry MEZORI, Plaintiff and Appellant.
v.

Alexander BISNO, Henry Bisno and Henry Kawin, Defendants and Respondents.

Civ. 22544, 22614.

District Court of Appeal, Second District,
Division 1, California.

July 16, 1958.

Rehearing Denied Aug. 8, 1958.

Hearing Denied Sept. 10, 1958.

Consolidated actions to declare void certain transactions in which plaintiffs had attempted to obtain interests in hotel and gambling casino. The Superior Court of Los Angeles County, Emil Gumpert, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Fourn, J., held that there was substantial evidence to support finding that transactions in question were loans and evidence supported findings that there were no sales, no offers to sell, and no transfers of securities within proscription of Corporate Securities Law.

Judgment affirmed.

1. Common Law ⇐9

It is substance and not the form of a transaction which should be the criterion used in determining its character.

2. Appeal and Error ⇨1010(1)

Even though a finding by trial court that some transactions with respect to obtaining interests in hotel and gambling casino were within the proscription of Corporate Securities Law would have been supported by substantial evidence, District Court of Appeal could not disturb the trial court's contrary determination, if there was substantial evidence to support it.

3. Licenses ⇨39.24

In action to declare void certain transactions in which plaintiffs attempted to obtain interests in hotel and gambling casino on theory that there had been no compliance with requirements of Corporate Securities Law, there was substantial evidence to support finding that transactions in question were loans and evidence supported findings that there were no sales, no offers to sell, and no transfers of securities within proscription of Corporate Securities Law. West's Ann.Corp.Code, §§ 25008 and (a-d), 25009, 25009(a-c), 26100, 26103, 26104(a, g).

Wm. H. Neblett, Los Angeles, for appellants.

Sol D. Seldin, Los Angeles, for respondents Bisno.

Buchalter, Nemer, Coyle & Cooper, Los Angeles, for respondent Kawin.

FOURT, Justice.

These are appeals from judgments determining that money loaned in anticipation that the funds would be used in the acquisition of certain interests in the Moulin Rouge Hotel, an interracial hostelry and gambling casino at Las Vegas, Nevada, were not securities within the meaning of the California Corporate Securities Law requiring a permit from the Corporation Commissioner authorizing the transaction as a sale. The causes of action in both amended complaints are the same, and the cases were consolidated for trial, and by court order on stipulation of the parties, the two appeals have been consolidated for hearing.

The master plan for building the Moulin Rouge Hotel was to raise \$1,200,000 for

the sale of 100 units of \$12,000 each. In late 1954 and early 1955 when the hotel was about ninety per cent completed, additional money was needed and Henry Kawin, a certified public accountant with offices adjoining those of Alexander Bisno, conferred with him relative to a plan for selling an additional ten units for \$120,000. Kawin subsequently did turn over \$113,500 (including all sums involved herein) to Alexander Bisno for use in the construction of the Moulin Rouge Hotel.

The facts with respect to the Mezori case are substantially as follows: Jerome Steier is Kawin's brother-in-law and the bookkeeper for plaintiff Henry Mezori. Steier made an appointment for Kawin to meet Mezori, his sister Emeline Dawson and Sol Rose at Mezori's offices. Mrs. Dawson delivered her check in the amount of \$12,000 to Kawin, which check was made payable to Henry Kawin, Trustee. She also executed a typewritten form letter directing Kawin to loan the funds to the organization which was about to build the proposed hotel under a co-operative Joint Deed of Trust to a collective unit of which she was to comprise a part, which unit was to participate in the net profits of the operations of the proposed hotel. The letter also contained the following provision: "It is understood, of course, that if I do not personally approve the final organizational papers, I shall have the privilege of withdrawing my money, but of course I will forfeit any interest that my money would otherwise have entitled me to."

Kawin endorsed the check "For investment in the Moulin Rouge Hotel of Las Vegas, Henry Kawin, Trustee" and deposited it in his trust account.

Substantially the same procedure was later followed as to Sol Rose, whose check was for \$6,000, and as to Henry Mezori, whose check was for \$12,000. When these funds had all been received by Kawin he drew a trustee check for \$30,000 payable to Moulin Rouge Trust Account, and delivered same to Alexander Bisno. The funds were later deposited into the Moulin

Rouge Trust Account at the First National Bank of Nevada at Las Vegas, and apparently were used and spent on the Moulin Rouge Hotel.

Subsequently Emeline Dawson and Sol Rose assigned their rights to Mezori.

In the Stoner case, Charles Keefer, who is Kawin's uncle, brought Edgar T. Stoner and his assignor Norman E. Smith to Kawin's home. Stoner gave Kawin two checks totaling \$6,000 and Smith gave Kawin a check for \$2,000. Each of them also executed a typewritten form letter directing Kawin to loan the funds to Bisno & Bisno for 30 days with the understanding that when the gambling license for the Moulin Rouge had been issued, the party would then make application with the Nevada Tax Commission to become a licensee of Moulin Rouge, and upon approval, the funds would be applied to acquire an interest in the Moulin Rouge, which interest would be held in the name of Henry Kawin, Trustee. These funds were deposited in Kawin's trust account and Kawin drew one check payable to the order of Bisno & Bisno in the amount of \$6,000 and another in the amount of \$4,000 (of which \$2,000 represented Smith's payment), and on each of which was written in the upper left hand corner of the check, "Endorsement of this check acknowledges receipt in full of the following item. Loan with option to acquire an interest in Moulin Rouge." It was stipulated that thereafter the funds were put into the Moulin Rouge Hotel at Las Vegas, Nevada.

Mezori and Stoner sued Alexander Bisno, Henry Bisno and Henry Kawin for damages in the sums paid to Kawin, plus interest alleging that the transactions were sales of securities consisting of participating interests in the Moulin Rouge Hotel, and that they were void in that there had not been compliance with the requirements of the Corporate Securities Law of the State of California or with the regulations of the Federal Securities and Exchange Commission. On motion of plaintiff made during the trial, the cause of action in each case

relating to violations of the Federal Securities Act was dismissed with prejudice.

Separate findings of fact were made with respect to each sum advanced to Kawin by the respective parties in each of the cases. Some of the more significant findings relating to transactions with Mezori are set forth hereinafter:

"II. That each and all of the allegations set forth in Paragraph II of the alleged First Cause of Action of Plaintiff's First Amended Complaint are untrue, except as follows:

"1. That it is true that no application was made to the Corporation Commissioner of California for a permit, nor was a permit granted by said Corporation Commissioner, authorizing the issuance and sale, within the State of California, of certificates representing percentages of interest in the Moulin Rouge Hotel of Las Vegas, Nevada.

* * * * *

"V. That each and all of the allegations set forth in Paragraph V of the alleged First Cause of Action of Plaintiff's First Amended Complaint are untrue, except as follows:

"1. That it is true that on or about February 8, 1955, Plaintiff loaned to Defendant, Alexander Bisno, the sum of Twelve Thousand Dollars (\$12,000.00);

"2. That it is true that Plaintiff made demand upon Defendant, Alexander Bisno, for repayment to him of his loan to said Defendant, Alexander Bisno, in the sum of Twelve Thousand Dollars (\$12,000.00);

"3. That to represent the said loan, the said defendant, Alexander Bisno, made, executed and delivered in a bona fide way in the ordinary course of legitimate business his Promissory Note unto Henry Kawin as Trustee for Plaintiff, Henry Mezori, dated February 14, 1955, in the amount of Twelve Thousand Dollars (\$12,000.00), payable ten (10) days after demand, with interest at ten percent (10%) per annum from February 14, 1955.

"VI. That each and all of the allegations set forth in Paragraph VI of the alleged First Cause of Action of Plaintiff's First

Amended Complaint are untrue, except as follows:

* * * * *

"2. That the Plaintiff has stipulated in open court by and through his counsel, Wm. H. Neblett and Harry W. Dudley, that he prays for a Judgment herein based upon only a violation of the Corporate Securities Law of the State of California and did not nor does he pray or seek a Judgment based upon the said loan of Henry Mezeri or the said Promissory Note referred to in Paragraph V of these Findings, and Plaintiff further stipulated that he waives any Judgment on said loan or said Promissory Note to which he might otherwise be entitled.

* * * * *

"XXIX. That no security, nor interest in a security, as defined in the Corporate Securities Law (Sec. 25008 of the Corporations Code of the State of California) was issued or sold, or offered for sale, as defined by the Corporate Securities Law (Sec. 25009 and Sec. 26100 of the Corporations Code of the State of California), unto Plaintiff, or his Assignors, or either or any of them, by Defendants, or the Moulin Rouge Hotel of Las Vegas, Nevada, or either or any of them.

"XXX. That there was no sale, nor offer to sell, nor transfer of any partnership interest, from Defendants, or either or any of them, unto Plaintiff, or his assignors, or either or any of them."

Appellants contend that the findings are not supported by the evidence and are contradictory to the evidence; that the findings upon which the conclusions of law are based and upon which the judgment rests are outside the issues raised by the pleadings; and that the facts show the defendants Alexander Bisno, Henry Bisno and Henry Kawin conspired to sell and, in California, did sell to the public, including plaintiffs, securities in the Moulin Rouge Hotel of Las Vegas, Nevada, without a permit from the Corporation Commissioner of California authorizing the sales.

Appellant argues "It does not matter whether Kawin extracted the \$30,000 from the plaintiff and his assignors through the

device of a loan, trust arrangement or what. The result is the same. The \$30,000 found its way into the Moulin Rouge Hotel as an investment therein for which plaintiff and his assignors were to receive a participating interest * * *. It was a clear violation of the Corporate Securities Law for Kawin to take \$30,000 from the plaintiff and his assignors pursuant to a prearranged plan between him and his co-defendants."

The sections of the Corporate Securities Law which it is claimed were violated by the transactions in question are as follows:

Corporations Code, Sec. 26100: "Every security of its own issue sold or issued by any company without a permit of the commissioner then in effect authorizing the issuance or sale of the security is void. Every security of its own issue sold or issued by a company with the authorization of the commissioner but which has been sold or issued in nonconformity with any provision in the permit authorizing the issuance or sale of the security is void."

Corporations Code, Sec. 26103: "Every company which directly or indirectly offers for sale, or negotiates for the sale of, or sells, or issues, or causes to be issued any security contrary to the provisions of this division, or of the Constitution of this State, or in nonconformity with a permit of the commissioner authorizing it so to do, or which applies the proceeds from the sale of any security, or any part of such proceeds, to any purpose other than a purpose specified in the permit, or to any purpose specified in the permit in excess of any amount limited in the permit to be used for that purpose is guilty of a public offense punishable by a fine not exceeding ten thousand dollars (\$10,000)."

Corporations Code, Sec. 26104: "Every officer, agent, or employee of any company and every other person, who does any of the following acts is guilty of a public offense punishable by imprisonment in a state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars (\$5,000), or by both such fine and imprisonment:

"(a) Knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division, or of the Constitution of this State.

* * * * *

"(g) With one or more other person, conspires to violate any permit or order issued by the commissioner or any provision of this division."

Securities and sales thereof are defined in Corporations Code, sections 25008 and 25009 as follows:

Corporations Code § 25008: "'Security' includes all of the following:

"(a) Any stock, including treasury stock; any certificate of interest or participation; any certificate of interest in a profit-sharing agreement; any certificate of interest in an oil, gas, or mining title or lease; any transferable share, investment contract, or beneficial interest in title to property, profits, or earnings.

"(b) Any bond; any debenture; any collateral trust certificate; any note; any evidence of indebtedness, whether interest-bearing or not.

"(c) Any guarantee of a security.

"(d) Any certificate of deposit for a security."

Corporations Code, Sec. 25009: "(a) 'Sale' or 'sell' includes every disposition, or attempt to dispose, of a security or interest in a security for value.

"'Sale' or 'sell' includes all of the following, whether done directly or by an agent, circular letter, advertisement, or otherwise: An offer to sell; an attempt to sell; a solicitation of a sale; an option of sale; a contract of sale; a taking of a subscription; an exchange; any change in the rights, preferences, privileges, or restrictions on outstanding securities.

"(b) Any security given or delivered with, or as a bonus on account of, any

purchase of securities or any other thing is conclusively presumed to constitute a part of the subject of the purchase and to have been sold for value.

"(c) A privilege pertaining to a security giving the holder the privilege to convert that security into another security of the same company is not a sale of the other security within the meaning of this section.

"The issue or transfer of a right pertaining to a security and entitling the holder of that right to subscribe to another security of the same company shall not be deemed a sale of such other security within the meaning of this section; but the sale of the other security upon the exercise of the right is subject to the provisions of this division."

[1,2] In the present cases, the trial court upon conflicting evidence found the transactions not to be within the act. In a criminal prosecution for violation of the Corporate Securities Law, the state is not bound by the written provisions of the civil contracts between the parties. It is likewise true that "[t]he understanding or misunderstanding of the parties as to the nature of the transaction is not determinative of its legal effect." *People v. Sidwell*, 27 Cal.2d 121, 126, 162 P.2d 913, 915. The cases are legion that the substance and not the form of the transaction should be the criterion used in determining its character. In these cases, we think a finding by the trial court that the transactions were within the proscription of the Corporate Securities Law would have been amply supported by substantial evidence. However, this does not permit us to disturb the trial court's contrary determination if there was substantial evidence to support it. See *People v. Sidwell*, supra, 27 Cal.2d at pages 128 and 129, 162 P.2d at pages 916 and 917 and cases cited thereat.

As is stated in *People v. Rankin*, 160 Cal.App.2d 93, 325 P.2d 10, 15, in quoting with approval from *People v. Thomas*, 103 Cal.App.2d 669, 672, 229 P.2d 836: "The trier of fact may believe and

accept a portion of the testimony of a witness and disbelieve the remainder. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment. (Citations.) A judgment cannot be set aside on appeal unless it clearly appears that on no hypothesis whatever is there sufficient substantial evidence to sustain it. (Citation.)”

[3] The basic and fundamental issue presented by this appeal is: Was there substantial evidence to support the findings of the trial court that the transactions in question were loans, and the findings of fact that there were no sales, nor offers to sell, nor transfers of securities within the proscription of the Corporate Securities Law?

It is well stated in *People v. Syde*, 37 Cal.2d 765, 768, 235 P.2d 601, 602, that “[t]he Corporate Securities Law does not contain an all-inclusive formula by which to test the facts in every case. And the courts have refrained from attempting to formulate such a test. Whether a particular instrument is to be considered a security within the meaning of the statute is a question to be determined in each case. In arriving at a determination the courts have been mindful that the general purpose of the law is to protect the public against the imposition of unsubstantial, unlawful and fraudulent stock and investment schemes and securities based thereon.”

A somewhat analogous factual situation was before the court in *Nicholl v. Ipsen*, 130 Cal.App.2d 452, 278 P.2d 927, and in ruling that the transaction there involved was not a security within the meaning of the Corporate Securities Law, the court commented at pages 457 and 458 of 130 Cal.App.2d, at page 931 of 278 P.2d that “the purpose of the Corporate Securities Law was to protect the public, as well as to safeguard individual purchasers and subscribers or creditors, and that an ordinary note, whether secured or unsecured, not offered to the public or sold to an

underwriter for resale, is not ‘security’ requiring a permit. In the instant case it appears that the business first contemplated it was a joint adventure or partnership, and plaintiffs were to engage in such joint adventure or partnership with defendants. In fact, nearly all planning and business arrangements were done by plaintiff after the agreements were signed and plaintiffs were to have control over the expenditures of any money by said partnership. * * * It might be well believed that these advances were made and that this note was issued under the original memorandum agreement. Under it, the respective interests of the parties in the ‘tentative oral partnership’ were agreed upon and therein indicated. * * * Therein it was also agreed that thereafter they would immediately incorporate. * * * They agreed, however, that pending the incorporation, they would advance portions of it, by way of a loan to defendants, to be represented by the promissory notes indicated. The only time this investment was not to be considered a loan would be if the shares of stock were issued and were transferrable, in which case it was to be considered that the loan was paid.”

We view the present situation as clearly distinguishable from the swindle technique described by Mr. Justice Herndone in his concurring and dissenting opinion in *People v. Rankin*, supra, 160 Cal.App.2d at page 103, 325 P.2d at page 16, in which he states, “[q]uite typically, six of the seven victims * * * were elderly women.”

In marked contrast is the testimony of Henry Mezeri on cross-examination, as follows:

“Q. What is your business, sir? A. I am in the automotive parts business.

“Q. For what period of time have you been in business in Los Angeles? A. Since 1934.

“Q. You are president of your company? A. Yes, sir.

“Q. Back in February of 1955 you first were advised about the Moulin

Rouge by your sister, weren't you, Mrs. Dawson? A. Yes, sir.

"Q. And she told you that she had some information on the Moulin Rouge and it looked like a good deal, didn't she; isn't that right? A. Yes, sir.

"Q. And at that time, in the month of February, being, I assume, a successful business man, you were always looking for deals where you might realize a profit, weren't you? A. Periodically I looked for a deal for a profit.

"Q. That is right. You had driven by and you had seen the Moulin Rouge under construction in October of 1954, hadn't you? A. I had, not knowing what it was.

* * * * *

"Q. She first told you about the Moulin Rouge on the telephone, didn't she? Wasn't it a telephone conversation? A. Yes, sir.

"Q. That is right, isn't it? A. Yes, sir.

"Q. And it sounded pretty good to you, didn't it? It sounded to you like something from which you could make a dollar; isn't that right? A. It didn't sound pretty good to me. I stated to her over the telephone that it appears to me that it bears investigation and I would like to have her set up an appointment.

"Q. So, pursuant to your request, as you know, Mrs. Dawson set up a request with Mr. Henry Kawin; isn't that right? A. I don't think so.

"Q. With whom did she set it up? A. I think she told Mr. Steier to set up an appointment with Mr. Kawin.

* * * * *

"Q. Mr. Mezori, when your sister talked to you on the telephone and she first told you about the Moulin Rouge, one of the things she told you was that some of the information which was imparted to you was that she had gotten that information from your em-

ployee, Mr. Steier; isn't that right? A. No, sir, not some of the information, the information.

"Q. The information. In other words, she got the whole story from Jerome Steier? A. She got a story that a deal was available."

In our opinion, the factual situation approaches that before the court in *Wells v. Comstock*, 46 Cal.2d 528, at page 531, 297 P.2d 961, at page 963, where the court stated: "Both parties advance arguments based upon the general purpose of the Corporate Securities Act to protect the public against fraudulent or unlawful stock schemes. Where, as here, both parties with full knowledge have joined in the illegal scheme, there can be no problem of applying the above quoted sections of the Corporate Securities Act to protect one from the other. (Citations.)"

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



162 Cal.App.2d 1

Louis G. PEPPER, Sherman R. Smith and Edward B. Page, Petitioners and Respondents,

v.

The BOARD OF DIRECTORS OF The BOULINAS PUBLIC UTILITY DISTRICT, a Public Corporation, and James Bourne, Warren McKinney and Samuel H. Mostovoy, Constituting the Members of said Board of Directors, Respondents and Appellants.

Civ. 17885.

District Court of Appeal, First District,
Division 2, California.

July 7, 1958.

Hearing Denied Sept. 3, 1958.

Mandamus proceeding to compel board of directors of public utilities district to

place petitioners' names on ballots as candidates for director of public utilities district. The Superior Court, County of Marin, N. Charles Brusatori, J., entered judgment for petitioners and board appealed. The District Court of Appeal, Dooling, J., held that nominating petitions, which were in the form and filed with directors of district within the time prescribed by public utilities code were proper and petitions did not have to be in the form or filed within time as provided by election code with respect to general election laws.

Judgment affirmed.

1. Statutes ⇨201

Where necessary to give a statute any reasonable meaning or where it manifestly appears that legislature has erroneously used one word for another, courts may substitute intended word for one erroneously used, however, need for such substitution should be patent and pressing and such action should not be taken by courts where language of statute, given its ordinary and obvious meaning, will accomplish full purpose of legislation. West's Ann.Code Civ. Proc. § 1858.

2. Statutes ⇨181(1), 190, 205

In construing statutes, intention of legislature will be determined so far as possible from language of statutes, read as a whole and if words of enactment given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty courts will look no further to ascertain statute's meaning. West's Ann. Code Civ.Proc. § 1858.

3. Elections ⇨120

Where amendment to public utilities code, with respect to nominating petitions for candidates for office of director of public utilities district, applied only to elections at which there was a "board of directors" with whom the nominating petitions could be filed and amendment was not applicable to first election at which "board of directors" were elected, fact that prior to amendment statute applied to first election of di-

rectors did not compel construction that amended statute applied to first election. West's Ann.Public Util. Code, § 15966; West's Ann.Code Civ.Proc. § 1858.

4. Statutes ⇨211

Under public utilities code providing that the division, part, chapter, article, and section headings do not in any matter affect scope, meaning, or intent of provisions of code, headings could not be considered in construing code and the several sections had to be given construction which their language demanded without regard to headings under which they appeared. West's Ann.Public Util.Code, §§ 6, 15966, 16152.

5. Elections ⇨126(1)

In statute authorizing electors in public utilities district to file with board of directors of public utilities district a petition requesting that names of certain persons be placed on ballot as candidates for office of director at large and authorizing electors of a territorial unit to file with board of directors a similar petition, the words "board of directors" did not mean "board of supervisors" since, according to plain meaning of statutory language, statute could not refer to nominations at first election of directors after formation of a public utilities district but statute did apply to all subsequent elections. West's Ann.Public Util. Code, §§ 15966, 16152; West's Ann.Code Civ.Proc. § 1858.

See publication Words and Phrases, for other judicial constructions and definitions of "Board of Directors".

6. Elections ⇨126(1)

Nominating petitions for candidates for office of director of public utilities district which were in the form and filed with directors of district within the time prescribed by Public Utilities Code were proper and petitions did not have to be in the form or filed within time provided by Election Code with respect to general election laws. West's Ann.Public Util.Code, § 15966, 15971, 16152, 16171-16174; West's Ann.Elections Code, §§ 2600, 2601, 2605(c, f), 2632.

Hadsell, Murman & Bishop, San Francisco, for appellants.

Crimmins, Kent, Draper & Bradley, Lawrence Draper, Jr., Sam J. Whiting, Jr., Thomas J. Barfield, Walter E. Hettman, San Francisco, for respondents.

DOOLING, Justice.

The petitioners in the court below sought a writ of mandate to compel the respondents below to place petitioners' names on the ballot as candidates for director of Bolinas Public Utilities District. This appeal is from a judgment granting a peremptory writ of mandate as prayed.

The nominating petitions of these candidates were in the form and filed with the directors of the district within the time provided in section 15966, Public Utilities Code, but they were not in the form (Elections Code, § 2601) nor filed within the time (Elections Code, § 2600) provided by the general election laws.

The Public Utility District Act was codified and added to the Public Utilities Code in 1953. Stats.1953, ch. 72, p. 751. Later at the same session section 15966 was amended to its present form. Stats.1953, ch. 1196, p. 2711, § 2. Section 15966 as so amended reads:

"(a) Not less than 30 days prior to the election, any five or more electors in the district may file with the board of directors a petition requesting that the names of certain persons specified in the petition be placed upon the ballot as candidates for the office of director at large.

"(b) Not less than 30 days prior to the election, any five or more electors of a territorial unit may file with the board of directors a petition requesting that the name of a designated person specified in the petition be placed upon the ballot as candidate for the office of director from the territorial unit."

In its present form, according to the plain meaning of its language, section 15966 cannot refer to nominations of directors at the first election of directors after the formation of a public utility dis-

trict, because until after such first election of directors there is no "board of directors" with whom such nominating petitions may be filed, as expressly directed by that section. Giving the words of the section their plain meaning the section equally does apply to the nomination of directors at all subsequent elections, at which times there is a "board of directors" with whom the nominating petitions may be filed as therein provided. This is the construction put upon the section by the trial court.

It is appellants' contention that despite the clear language of section 15966 as it now reads, that the nominating petitions therein provided for shall be filed with "the board of directors," and despite the fact that there is no "board of directors" with whom such petitions can be filed before the first election of directors, section 15966 nevertheless applies only to the first election of directors and does not, as the trial court held in this case, apply to subsequent elections. To make the section conform to the meaning which they ascribe to it appellants ask us to read "board of directors" to mean "board of supervisors." We can find no justification for thus reading the section to mean something which its own language makes it perfectly plain that it does not mean.

Appellants argue, however, that the construction for which they contend must be given to section 15966 in order to have any provision in the statute for the nomination of directors at the first election. We find no such difficulty in the statute. Section 16152 Public Utilities Code provides:

"The provisions of law relating to * * * the manner of nominating county officers, as far as applicable, govern all district elections, except when otherwise provided in this division." This is a catch-all provision and makes the law regarding the nomination of county officers apply to *all* elections for which no other provision is made in Division 7 Public Utilities Code. If section 15966 as it now reads is construed according to the plain meaning of its words to apply to all subsequent elections of directors after the first election section 16152

fills in the gap and makes the law relating to nominations of county officers applicable to the first election of directors for which no other provision is now made in the statute.

[1,2] While it is true, as stated by appellants, that where necessary to give a statute any reasonable meaning or where it manifestly appears that the Legislature has erroneously used one word for another, the courts may substitute the intended word for the one erroneously used (23 Cal.Jur., Statutes, § 116, pp. 738-739), the need for such substitution should be patent and pressing and such action should not be taken by the courts where the language of the statute given its ordinary and obvious meaning will accomplish the full purpose of the legislation. The Legislature itself has admonished us that: "In the construction of a statute * * * the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted * * *". Code Civ. Proc. § 1858. Following this rule the "intention of the legislature will be determined so far as possible from the language of its statutes, read as a whole, and if the words of an enactment, given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning." (23 Cal.Jur., Statutes, § 109, pp. 730-731.) "It is the function of the courts to construe and apply the law as it is enacted and not to add thereto nor detract therefrom" (Pacific Coast Joint Stock Land Bank of San Francisco v. Roberts, 16 Cal. 2d 800, 805, 108 P.2d 439, 442; In re Miller, 31 Cal.2d 191, 199, 187 P.2d 722; Kirkwood v. Bank of America, 43 Cal.2d 333, 341, 273 P.2d 532) and "the better and more modern rule of construction is to construe a legislative enactment in accordance with the ordinary meaning of the language used and to assume that the legislature knew what it was saying and meant what it said." Pac. Gas & Electric Co. v. Shasta Dam, etc., Dist., 135 Cal.App.2d 463, 468, 287 P.2d 841, 844.

[3] Appellants argue from the history of the act that because section 15966 before its amendment applied to the first election of directors it must still be construed, despite its radical change in language, to apply to the first election. We are not called upon to construe the section as it read before its amendment, but as it reads now, and since the very purpose of an amendment is to change the meaning or application of the statutory provision amended we fail to see the force of this argument. As it now reads section 15966 applies, and can apply, only to elections at which there is a "board of directors" with whom the nominating petitions therein provided for can be filed.

[4] Appellants attempt to invoke the rule that the various headings of the statute may be looked to in construing sections 15966 and 16152, but they disregard Public Utilities Code section 6 which reads: "Division, part, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code." In the face of such a provision the headings may not be considered in construing the code and the several sections must be given the construction which their language demands without regard to the headings under which they may appear. In re Halcomb, 21 Cal.2d 126, 130, 130 P.2d 384; Klassen v. City of San Carlos, 149 Cal.App. 2d 225, 228, 308 P.2d 413; People v. Trout, 137 Cal.App.2d 794, 291 P.2d 83; Cavalli v. Luckett, 40 Cal.App.2d 250, 255-256, 104 P.2d 708.

[5,6] Our reading of section 15966 according to the plain meaning of its words finds support, if any be needed, in the history of its amendment to its present form.

After the Public Utilities District Act was codified by the Legislature in 1953 and at the same session a bill was introduced to add Article 6.5 to this act. Article 6.5 as originally introduced added sections 16171 to 16174 to the Public Utilities Code. This amendment introduced an entirely new idea, providing in substance that if only one person should be nominated for each office of director the election might be dispensed

with and the nominees be appointed by the board of supervisors to the positions of director without the holding of an election.

After its introduction this bill was amended in the assembly to add thereto section 2 which amended section 15966 to its present form. This statute as so amended was adopted as Chapter 1196. Stats.1953, p. 2710.

Prior to this amendment the general election laws governed the nomination of directors at all district elections. Public Utilities Code, § 15966 as it read before its last amendment, Stats.1953, p. 759; §§ 15971, 16152. The Elections Code section 2605(c) requires a minimum of 20 sponsors to sign such petitions or where there are less than 150 registered voters in the district at least 10 sponsors. El.Code, 2605(f). The nominations must be in the form provided by Elections Code, section 2601 and must be filed not less than 60 days prior to the election. El.Code, § 2600.

Section 15966 as last amended substitutes a simple petition for the form required by Elections Code, section 2601; extends the time within which such petitions may be filed to 30 days before the election; and reduces the number of electors who must sign such petition to five.

The purpose of this last amendment of section 15966 appears obvious on the face of the statute. The Legislature was providing for the appointment of directors where only one person was nominated for each office and was thus taking away from the voters the right of franchise in those cases. If the voters were to be deprived of the right to vote for the persons of their choice where only one person was nominated for each office, what more natural safeguard of their right of franchise could be devised than to provide a simpler system of nomination, make nominations easier by reducing the number of sponsors required, and enlarge the time within which such nominating petitions might be filed? This is precisely what the Legislature did by adding section 2 to Statutes 1953, Chapter 1196 which amended Public Utilities Code, section 15966 to its present form.

The weakness of the argument that "board of directors" in this section really means "board of supervisors" is apparent from another point of view. Before its last amendment section 15966 made the general election laws applicable to nominating petitions. Under the general election laws nominating petitions are not filed with the board of supervisors but with the *county clerk*. El.Code, § 2632. We are asked by appellants to believe that the Legislature amended section 15966 to change the place of filing from the county clerk to the *board of supervisors* and to accomplish this purpose described the board of supervisors in the amendment as "the board of directors." Even the severest critic of the legislative process would hesitate to ascribe such ineptness with words to the Legislature.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J.,
concur.



162 Cal.App.2d 222

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Baltazar R. FLORES, Defendant and
Appellant.

Cr. 1359.

District Court of Appeal, Fourth District,
California.

July 17, 1958.

Hearing Denied Sept. 10, 1958.

Defendant was convicted of possession of narcotics found by officers in matchbox under bathtub in house of defendant and his sister. The Superior Court of Imperial County, L. J. Mouser, J., entered judgment of conviction and an order denying a new trial, and the defendant appealed. The District Court of Appeal, Griffin, J., held that surrounding facts and circumstances clearly permitted the fair and reasonable

inference by the jury that the defendant had knowledge of the presence of the matchbox containing the narcotics.

Judgment and order affirmed.

1. **Polsons** Ⓒ9

Conviction for possession of narcotics requires proof of knowledge of presence of the narcotics as embraced within concept of physical control with intent to exercise such control, but knowledge may be inferred from all surrounding facts and circumstances. West's Ann.Health & Safety Code, § 11500.

2. **Polsons** Ⓒ9

In prosecution for possession of narcotics found by officers under bathtub in house belonging to defendant and his sister, surrounding facts and circumstances clearly permitted fair and reasonable inference by jury that defendant had knowledge of presence of narcotics. West's Ann.Health & Safety Code, § 11500.

3. **Criminal Law** Ⓒ438

In prosecution for possession of narcotics found by officers in matchbox under bathtub and behind casing, admission of photograph indicating that matchbox was found near bathtub and not behind casing was not error, where placement of matchbox was sufficiently explained to jury. West's Ann.Health & Safety Code, § 11500.

Al Matthews, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Joe J. Yasaki, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice:

Defendant-appellant was convicted by a jury of violating section 11500 of the Health and Safety Code (possession of narcotics) on July 4, 1957. He admitted a prior conviction of said section in Riverside County. A motion for new trial was denied and he was sentenced to San Quentin prison.

Defendant lived in a 9-room house belonging to him and his sister, at 943 H

Street in Brawley. On that day nine officers, armed with a search warrant, surrounded the home and on a call, all entered at different doors. As the captain entered the living room he saw the defendant run from there through the doorway to the dining room and kitchen and toward the bathroom. Another officer met defendant there and he was placed under arrest. The search warrant was shown to him and a search of the house followed. In the bathroom, under the tub and behind a 2x4 casing was found a penny match box. A photograph of it was taken while in that general position. It contained four pieces of paper folded to form packets. One proved to be a marijuana cigarette and the rest heroin. It was then shown to defendant and he was asked if he knew how it got there and what it contained. Defendant replied he did not know unless the police had placed it there. The paper used to form the bindles in the match box was apparently torn from a writing pad found in a dresser drawer in the bedroom which defendant and his wife customarily occupied. Defendant's wife, sister and three children were in the home at the time of the search. Defendant and the two women were arrested. Defendant then told the officers: "I am the one you want; don't take my wife and children; let them alone." (Defendant, at the time of trial, denied this conversation.) He said that was all that was in the house and the car was "clean". Defendant claimed the writing pad found by the officers was purchased by him in January, 1957, and he used it to keep track of his restaurant business transactions, and his wife and sister used it to keep a grocery list and to write letters. He claimed that he, his wife and family and his sister did not move into these premises until February, 1957, and before that time it was occupied by defendant's brother-in-law, Reyes, who testified that sometime between April and May 24th, 1957, he purchased one marijuana cigarette and about one spoonful of heroin from a street peddler whose name he did not know; that he cut some paper from the writing pad and wrapped the heroin in it, placed it with the

marijuana in the match box, under the bathtub; that he took part of it with him when he left but he did not tell defendant about leaving the remainder under the tub; and that he served 100 days in jail in Fresno as a user.

Defendant's wife testified she swept the bathroom floor daily and did not notice the presence of the match box and that she and her husband customarily slept in the bedroom where the writing paper tablet was found. The defendant, his wife and the sister testified they had no knowledge concerning the match box or its contents. The two women were subsequently released after their arrest.

The officers testified that lint and other dirt was found under the bathtub and there was no evidence that it had been swept for some time, and that the match box was not dusty.

[1] The main claim on this appeal is that the evidence was insufficient to show knowledge of possession of the match box and its contents on the part of the defendant. It is true that a conviction for possession of narcotics requires proof of knowledge of the presence of the object as embraced within the concept of "physical control with the intent to exercise such control". *People v. Gory*, 28 Cal.2d 450, 455, 170 P.2d 433, 436. Knowledge, however, may be inferred from all the surrounding facts and circumstances. *People v. Torres*, 98 Cal.App.2d 189, 219 P.2d 480; *People v. Gentry*, 118 Cal.App.2d 501, 503, 257 P.2d 1012.

[2] In the present case the surrounding facts and circumstances clearly permitted the fair and reasonable inference that the defendant had knowledge of the presence of the match box containing the narcotics under the bathtub. Apparently the jury disbelieved Reyes's testimony, or believed that defendant and Reyes had joint control and knowledge of its possession. *People v. Romero*, 161 Cal.App.2d 404, 327 P.2d 205.

[3] Some complaint is made about the admission of the photograph in evidence as indicating that the match box was found

near the bathtub and not behind some 2x4 casing under it. We see no merit to this claim since its placement was sufficiently explained to the jury.

Judgment and order denying a new trial affirmed.

MUSSELL, Acting P. J., and McCABE, J. pro tem., concur.



162 Cal.App.2d 325

Alexandrine VERDIER, Plaintiff, Cross-Defendant and Respondent,

v.

Paul VERDIER, Defendant, Cross-Complainant and Appellant.

No. 17723.

District Court of Appeal, First District,
Division 1, California.

July 25, 1958.

Hearing Denied Sept. 17, 1958.

Action by wife for separate maintenance, division of community property and for cancellation, on ground of fraud, of separation and support agreement purporting to amend earlier separation and support agreement. The Superior Court, City and County of San Francisco, W. T. Sweigert, J., entered order directing husband to pay for attorneys' services rendered to wife on her appeal from a judgment against her and to pay to wife her costs of maintaining and perfecting such appeal. The husband appealed. The District Court of Appeal, Fred B. Wood, J., held that wife was entitled to an award for her counsel fees and costs, notwithstanding that her motion for such fees and costs was not made until near the end of the appeal period, where appeal was taken in good faith and attorneys' services were extremely necessary and valuable.

Order affirmed.

Husband and Wife Ⓒ295

Wife suing for separate maintenance, division of community property and for cancellation, on ground of fraud, of separation and support agreement purporting to amend earlier separation and support agreement was entitled to award of fees for attorneys' services rendered on her appeal from a judgment against her and to an award for her costs in maintaining and perfecting appeal, notwithstanding that wife's motion was not made until near end of appeal period, where appeal was taken in good faith and attorneys' services were extremely necessary and valuable. West's Ann.Civ.Code, §§ 137, 137.2, 137.3, 137.5.

Alvin D. McNeil, Tom B. Markley, Morgan J. Doyle, A. F. Breslauer, San Francisco, for appellant.

John D. Martin, Oakland, Heller, Ehrman, White & McAuliffe, F. Whitney Tenney, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant Paul Verdier appeals from an order directing him to pay plaintiff Alexandrine's attorneys \$5,000 "on account of services rendered * * * as attorneys for plaintiff * * * on appeal" and to pay to plaintiff \$500 "on account of her expenses and costs of maintaining and perfecting said appeal."

Plaintiff's motion therefor was made and submitted during the pendency of the appeal and about 38 days before the reviewing court filed its decision on appeal, reported in 133 Cal.App.2d 325, 284 P.2d 94. After the filing of the remittitur proceedings were had in the trial court which culminated in new findings, conclusions and judgment. Meanwhile, on stipulation of the parties, the initial submission of plaintiff's motion was deemed set aside pending oral arguments and was later resubmitted. The order under appeal was made subsequent to entry of the new judgment, nunc pro tunc as of the date of the filing of the reviewing court's decision.

Appellant claims the order erroneous because, he asserts, (1) upon the first appeal the Supreme Court held attorney fees and costs could not be awarded in an action upon a contract; (2) upon the second appeal the district court of appeal held that plaintiff has a cause of action upon a contract but not a cause of action under section 137 of the Civil Code; (3) the court had no power to make this order nunc pro tunc; and (4) the last judgment exhausted the trial court's power to award costs. Our examination of the record convinces us that these claims are not well founded.

The factual and legal basis for our conclusion is expressed in a well considered opinion written and filed by Honorable William T. Sweigert, the judge who heard the motion and made the order:

"This is a motion made in the Domestic Relations Department by plaintiff wife for support, counsel fees and costs pending her appeal from a judgment rendered against her on October 16, 1952. From the affidavits and oral testimony upon this motion the Court finds that plaintiff is, and has been for about thirty-eight years, the wife of defendant; that she is destitute and dependent upon the charity of friends; that defendant has an income of about \$40,000 per year; that she is in need of support and counsel fees pending appeal and that they should be awarded unless for some reason the Court is precluded from making such an award.

"The complaint in this action, which was filed in 1948, prayed for separate maintenance, counsel fees and costs, a division of community property and also for cancellation, upon the ground of fraud, of a certain separation and support agreement of 1946, purporting to amend an earlier separation and support agreement of 1937 by reducing support payments from \$500 to \$400 a month.

"At the outset of the case, plaintiff moved for support, fees and costs *pendente lite*. Her motion was denied, but upon appeal (Verdier v. Verdier, 36 Cal.2d 241, 223 P.2d 214) this order was reversed and her

motion was remanded for further proceedings. On that appeal the Supreme Court held that the trial court had erred in taking the position that *pendente lite* relief could not be awarded plaintiff unless she attacked the validity of the 1937 agreement; that her allegation of defendant's nonperformance of the 1937 agreement had the effect of putting her in a position to seek separate maintenance as a wife under Civil Code Section 137; that if in fact plaintiff attempted to seek inconsistent relief, i. e., on a contract and as a wife under C.C. Sec. 137, the trial court could require her to make an election. Upon further proceedings, and under an order of Judge van der Zee, dated May 18, 1951, the court awarded her *pendente lite* support in the sum of \$1,000 a month and fees in the sum of \$2,500, but defendant appealed from that order. While that appeal was pending, the parties entered into a written stipulation, dated March 4, 1952, to the effect that the appeal would be held in abeyance pending the trial of the action; and, further, that upon the trial the court could try both issues, i. e., issues *re* relief under the contract and relief as a wife under C.C. Sec. 137; and that the court could afford her relief under either theory; that, in the event the court found in her favor on both theories, then, after the decision, plaintiff could elect between her remedies; that if plaintiff then elected under C.C. Sec. 137, the Judge van der Zee *pendente lite* support and fee order of May 18, 1951 could be included in the judgment; that upon the making and entry of final judgment in the action, all interlocutory orders could be deemed vacated and appeals therefrom dismissed as moot, without prejudice to either party to said appeals in the event of an appeal from the final judgment in the Superior Court. Upon the trial, however, the court found and ruled against plaintiff upon both theories, and further found that plaintiff, herself, had violated the agreement by molesting defendant and thereby had become liable to him for \$500 damages, and had also lost all her rights to support under the contracts, and, further,

the court refunded to defendant a substantial accumulation of contractual support payments which defendant had deposited in court. Thereupon plaintiff procured new counsel—the present counsel who represent her on this motion—and appealed from the judgment. Upon appeal, the District Court of Appeal (Verdier v. Verdier, 133 Cal.App. 2d 325, 284 P.2d 94, hearing in Supreme Court denied), although affirming the judgment in other respects, reversed the judgment in so far as it deprived plaintiff of her contractual rights, and in so far as it had refunded the support deposits to defendant; and, further, ordered costs on appeal to plaintiff wife in the interests of justice. The present motion for support, counsel fees and costs was made pending this last-mentioned appeal.

"After considering the record on this motion the record in the entire case, including the aforementioned stipulation of the parties, the general law, and the law established on appeal for this particular case, the Court has come to the following conclusions:

"According to the letter and policy of our law, a wife is entitled to *pendente lite* support, fees and costs (C.C. Secs. 137, 137.2, 137.3, 137.5) and, wherever it appears that there has been a ceremonial marriage followed by the assumption of marital relations, the wife is entitled by that fact alone to such *pendente lite* relief, even though there is an issue concerning, e. g. the validity of the marriage itself or the validity of an apparent intervening divorce (Dietrich v. Dietrich, 41 Cal.2d 497, 261 P.2d 269; Gromeeko v. Gromeeko, 110 Cal.App. 2d 117, 242 P.2d 4; Kopasz v. Kopasz, 34 Cal.2d 423, 210 P.2d 846; Baldwin v. Baldwin, 28 Cal.2d 406, 170 P.2d 670; Fisher v. Superior Court, 110 Cal.App. 565, 294 P. 445) or an issue concerning the validity of an apparent property agreement which has released or limited the husband's duty of support. Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715; Vishner v. Vishner, 125 Cal.App.2d 667, 271 P.2d 68; Spreckels v. Spreckels, 111 Cal.App.2d 529, 244 P.2d

917; Steinmetz v. Steinmetz, 67 Cal.App. 195, 227 P. 713.

"Under the law of the pending case the same principle concerning *pendente lite* relief is applicable where, although the validity of an outstanding separation and support agreement of 1937 is not attacked, there is an issue concerning the wilful non-performance of such an agreement (Verdier v. Verdier [36 Cal.2d 241, 223 P.2d 214], supra). On that appeal the court also held that plaintiff wife had not elected to look to the contract; that if in fact she attempted to seek inconsistent remedies, the trial court could require her to elect. This undoubtedly means upon a final judgment in the action. It does not mean that she would have to elect in advance in order to obtain *pendente lite* relief. To so hold would run counter to the whole purpose and policy of the above-cited cases holding that the wife is entitled to such *pendente lite* relief even though there is an issue in the case which, if determined against her, would end her rights. In any event, however, the written stipulation of the parties in the pending case expressly waived any election by plaintiff wife until *after a decision in her favor on both* causes of action—a contingency which never occurred.

"Whether applications for *pendente lite* relief prior to the judgment in the trial court have been granted or denied would be neither material nor binding in this matter. After judgment in the trial court, support and fees pending appeal therefrom

must be sought and separately considered upon a new and separate motion. Wilson v. Superior Court, 31 Cal.2d 458, 189 P.2d 266; McCaleb v. McCaleb, 177 Cal. 147, 169 P.2d 1023. Further, on this motion, whether the judgment of the trial court would or would not be reversible on any particular issue would be immaterial. The issue of wilful nonperformance of the 1937 contract was still in the case until finally resolved on the appeal. Good faith in the appeal would be sufficient. Gay v. Gay, 146 Cal. 237, 79 P. 885. Such good faith has since been demonstrated by the fact that, although plaintiff did not succeed in finally establishing her rights as a wife under C.C. Sec. 137, she did succeed in reviving her contractual rights which had accumulated in the amount of about \$30,000 and which run in the future at the rate of \$400 per month.¹

"For the foregoing reasons the Court concludes that at the time of this motion, plaintiff wife not only established her need for, but was legally entitled to, support and fees pending the appeal, subject to the sound discretion of the court.

"However, the Court believes that, as far as support pending the appeal is concerned, its discretion should be exercised against any such award. First, nearly three years had already elapsed from the taking of the appeal to this motion for support, and, second, since the making of the motion her contractual right to support by the defendant during the past and in the future has

1. Especially significant, we think, is the fact that in her affidavit filed in support of her motion for support, costs and attorney fees pending the appeal, plaintiff among other things stated: "Affiant further deposes that she has fully and fairly stated her case on this appeal together with all the facts and circumstances connected therewith to her attorneys herein, and said counsel have carefully read and considered all of the transcripts, exhibits, evidence, motions and orders, and all of the files, records and proceedings in this action, and all of the opinions, findings of facts, conclusions of law, and the decrees entered herein, and the judgment from which this appeal is taken, and after such statement, and such reading and consideration, affiant has been advised by

her said counsel, and she verily believes that prejudicial and reversible error occurred upon the trial in said Superior Court, and exists in the said judgment appeal from, and that valid grounds of appeal exist in her favor upon the merits."

This statement was not controverted or questioned, in whole or in part, by the affidavit which was filed on behalf of defendant in opposition to the motion.

Accordingly, plaintiff's honest belief in her appeal and her good faith in taking her appeal, upon all issues, stood admitted by the defendant, with essentially the same effect as the concession which the husband made upon the hearing of a similar motion in Weil v. Weil, 37 Cal.2d 770, 790, 236 P.2d 159.

been finally determined. To order support now for the period of the appeal would serve no purpose.

"However, as to counsel fees and costs, the situation is entirely different. Neither plaintiff nor counsel have any contractual or other right to such relief save and except through this motion. Although the motion was not made until near the end of the appeal period, the Court has the right to award fees for services rendered on the appeal prior to the making of the motion (C.C. Sec. 137.3). These services have proved to have been extremely necessary and valuable.

"Accordingly, it is ordered that plaintiff's motion be denied in respect to support, but granted in respect to counsel fees, expenses and costs as follows: To F. Whitney Tenney and John J. Martin the sum of \$5,000 attorney fees for services rendered and to be rendered pending appeal, and to plaintiff the sum of \$500 on account of expenses and costs on appeal.²

"Further ordered that this order be entered *nunc pro tunc* as of May 31st, 1955. (See *Fox v. Hale*, 108 Cal. 478, 480 [41 P. 328]; also *Leavitt v. Gibson*, 3 Cal.2d 90, 102-105 [43 P.2d 1091]; *Osmont v. All Persons, etc.*, 165 Cal. 587, 591 [133 P. 480]; *Mather v. Mather*, 22 Cal.2d 713, 719 [140 P.2d 808]; 3 *Witkin California Procedure* 1892; 28 *Cal.Jur.2d* 692.)"

The order is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, SCHAUER and McCOMB, JJ., dissenting.

2. The fact that defendant obtained effective relief upon a cross-complaint which he filed does not require a determination of the amount of fees and costs in respect to the appeal from that portion of the judgment which pertained solely to plaintiff's rights, if any, under sections 137-137.5 of the Civil Code.

If performance of the separate maintenance agreement had been urged as a defense to the action, pendente lite relief would have been available. (*Locke Paddon v. Locke Paddon*, 194 Cal. 73, 227 P. 715; *Steinmetz v. Steinmetz*, 67 Cal.App. 195, 227 P. 713; *Spreckels v. Spreckels*, 111 Cal.App.2d 529, 244 P.2d 917; *Vishner v. Vishner*, 125 Cal.App.2d

Jim ALLEN, Plaintiff and Appellant,
v.

AMERICAN FEDERATION OF LABOR
et al., Defendants,

Los Angeles County District Council of Carpenters, Robert O'Hare, Earl E. Thomas, Roy Fankboner (Sued herein as Roy Frankboner), Arthur McGaffin, Gilbert Nixon, Alex Bodin, Joe L. Ezell, Joe Pena, Sol H. Agronovitz, Garvin McGeehee, Carnie L. Renfrow, Dale H. Keys, and Local Union 1976 of The United Brotherhood of Carpenters and Joiners of America, Respondents.*

Civ. 22634.

District Court of Appeal, Second District,
Division 1, California.

July 15, 1958.

Rehearing Denied Aug. 8, 1958.

Hearing Granted Sept. 10, 1958.

Proceeding for a writ of mandate to compel a labor union to restore plaintiff to membership and damages for alleged wrongful expulsion. Judgment for the defendants in the Superior Court of Los Angeles County, Bayard Rhone, J., and the plaintiff appeals. The District Court of Appeal, Fourn, J., held that dismissing the suit on the ground that Labor Relations Board had exclusive jurisdiction was error.

Judgment reversed and cause remanded.

I. Labor Relations §510

In proceeding to compel a labor union to restore plaintiff to membership and to

667, 669, 271 P.2d 68. That defendant included a demand for affirmative relief does not change the situation and allocation is not required in view of the interdependence of the issues raised by the parties.

Defendant questions the allowance of costs upon the additional ground that the reviewing court had already allowed plaintiff her costs of appeal in the principal case [133 Cal.App.2d 325, 337, 284 P.2d 94], thus exhausting the power of the courts on that subject. Those costs are too obviously different from the type of costs here involved to require discussion. This point is without merit.

* Opinion vacated 337 P.2d 457.

recover damages for wrongful expulsion where plaintiff had been expelled from the union for allegedly giving comfort and support to Communistic front organizations in violation of the union bylaws, dismissing the suit on the ground that the National Labor Relations Board had exclusive jurisdiction was error. Executive Order No. 9835, 5 U.S.C.A. § 631 note; Labor Management Relations Act, 1947, § 1 et seq., 29 U.S.C.A. § 141 et seq.

2. Courts ⇐97(5)

Determination of the United States Supreme Court involving a construction of the National Labor Relations Act is binding on state courts.

Herbert W. Simmons, Jr., and Abraham Gorenfeld, Los Angeles, for appellant.

Arthur Garrett, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal from a judgment discharging an alternative writ of mandate and denying a peremptory writ of mandate, and costs in favor of the defendants.

In plaintiff's complaint he sought a writ of mandate to compel the defendants to restore him to membership in Local 1976 of the United Brotherhood of Carpenters of America, a labor union; he also sought damages allegedly resulting from the claimed wrongful expulsion. In a second count he asserted a claim for damages from certain defendants who had filed and prosecuted the charges which resulted in his expulsion, and damages from certain defendants who constituted the trial board which recommended his expulsion.

The facts are substantially as follows: The plaintiff belonged to Local No. 1976 of the Carpenters' Union. The constitution, bylaws and ritual of the United Brotherhood of Carpenters and Joiners of America, of which the local union was a part, provided in effect that a member, at the time of joining, should take certain obligations which in part read as follows:

"And I further affirm and declare that I am not now affiliated with and never will join or give aid, comfort or support to any Revolutionary Organization or to any organization that tries to disrupt or cause dissension in any Local Union, District Council, State or Provincial Council or the International Body of the United Brotherhood of Carpenters and Joiners of America."

Prior to the taking of such obligation, the appellant was put on notice by the president that the Union does not recognize the Communist Party as a political organization.

Pursuant to the bylaws, charges were filed by members of the Union, in writing, against the plaintiff, as follows:

"We, the undersigned, hereby prefer charges against Brother James T. Allen, member of Carpenters' Local #1976, whose address is 629 E. 85th Street, Los Angeles, California for violation of his obligation which he took when he became a member of the United Brotherhood of Carpenters and Joiners of America, which reads in part:

"I further affirm and declare that I am not now and never will join or give aid, comfort or support to any revolutionary organization or any organization which tries to disrupt or cause dissension in any Local Union, District Council, State or Provincial Council or the International Body of the United Brotherhood of Carpenters and Joiners of America."

"We specifically charge that Brother James T. Allen has over a period of years given aid, comfort and support to Communistic-Front organizations, in violation of the obligation quoted above."

A copy of the charge was served upon the plaintiff within the time prescribed by the rules of the Union and a hearing was held thereon. At the hearing there was introduced into evidence certain items from the Daily People's World newspaper. In one issue of such newspaper the plaintiff was listed as a union leader and one of the signers of a statement released by the

Civil Rights Congress, asking an end to contempt proceedings against the "L. A. Ten," and reading in part as follows:

"The jailing of Communist and progressive leaders for refusing to answer questions concerning themselves or their organizations, reminds us of trade union leaders who have been jailed for refusing to turn over membership lists in court, and thus expose their members to reprisals by employers."

"The statement said 'we demand the rights of Communists, along with those of all Americans, be fully respected.

"Signers and their organizations, which are listed for identification only, include: * * * James T. Allen, vice president Local 634 AFL Carpenters; * * *"

In another issue of the same newspaper it was set forth in substance that certain reactionary elements in the National Association for the Advancement of Colored People had demanded removal of communists and other progressives, and read in part as follows:

"Others more subtly have accomplished the same end by demanding removal of known Communists and progressives from the nominating committee of the NAACP and from nomination in recent elections. As a result, barred from office were * * * and James T. Allen, vice president of AFL Carpenters Local 634."

In another issue of the same newspaper the plaintiff was described as "a leader in the labor movement," and as one of the founders of the Negro Labor Council. An item from another newspaper set forth that the Attorney General of the United States had stated that the last named organization was to be put on the list of organizations designated by the Justice Department as subversive.

Other items from the Daily People's World were introduced at the hearing, some of which set forth in substance that an officer of the Civil Rights Congress, who had been found guilty of contempt of Congress for refusing to divulge the names of members of his group or contributors to

it, would speak at a reception for him and at a mass meeting and that the plaintiff was one of the sponsors of the reception. It was related in the item that the speaker had stated that the organization was once listed among communist-front organizations by the United States Attorney General.

There was also introduced into the hearing a copy of the Fourth Report of Un-American Activities in California, in which the Civil Rights Congress is declared to be a subversive organization and under communist control. There was also introduced a form of document used by the Housing Authority of the City of Los Angeles which listed the Civil Rights Congress and its affiliated organizations as being among the organizations designated by the Attorney General of the United States as within Executive Order No. 9835, 5 U.S.C.A. § 631 note.

The plaintiff prior to bringing the action with which this appeal is concerned, namely on April 29, 1955, had filed an action in the municipal court in Los Angeles county. The municipal court case was then transferred to the superior court in Los Angeles county, where it received the number 662-828. Between the time of the filing of that case and its transfer to the superior court, the present case was instituted and given number 654-969. The essential allegations of the two complaints are substantially the same.

On July 8, 1955, the plaintiff filed a charge against his employer with the National Labor Relations Board, setting forth in the charge that on or about January 25, 1955, the employer, at the request of the Los Angeles District Council of the United Brotherhood of Carpenters and Joiners of America, had discharged him, and that the employer had interfered in the exercise of his rights. On the same date the plaintiff filed a charge with the National Labor Relations Board against the above named labor organization and charged the union with unfair labor practices.

At the hearing in the superior court the plaintiff was asked the question: "Have

you ever been a member of the Communist Party?" He first answered, "I wouldn't like to answer that question." Later in the hearing he stated in substance that he refused to answer the question because he believed that the answer might tend to incriminate him. Finally, in an attempted explanation, he testified among other things:

"The reason that I give is, that if I answer this question 'no,' then I understand that later on somebody could come along and accuse me of lying here, which legally is considered perjury."

The evidence in court established that the plaintiff was a business agent and an officer of the local union, and that as such agent he would have had to file certain affidavits, including the non-communist affidavit required by the Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq. The plaintiff testified that he could not remember whether he had ever signed such an affidavit.

At the hearing before the trial committee of the Union the plaintiff declined to become a witness.

Appellant now contends that the trial court erred as follows:

(1) In finding that the evidence against the plaintiff was competent to support his expulsion from the union; (2) in finding that there was substantial evidence to support plaintiff's expulsion; (3) in finding that there was a sufficient specification of the charges; (4) in finding that plaintiff failed to exhaust his union remedies; (5) in finding that exclusive jurisdiction was vested in the National Labor Relations Board; (6) in finding that plaintiff was barred by reason of other actions pending; (7) in finding that plaintiff had suffered no damages by reason of his expulsion; and (8) in admitting and considering evidence of refusal to testify as to Communist membership on the issue of credibility and damages.

[1] Subsequent to the oral argument by counsel before this court, the United States Supreme Court on May 28, 1958, delivered

its opinion in *International Association of Machinists v. Gonzales*, 78 S.Ct. 923, 2 L. Ed.2d 1018. Concerning the contention made by appellant that the trial court erred in holding that the National Labor Relations Board had exclusive jurisdiction, it was stated therein as follows: "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The provision to § 8(b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.' 61 Stat. 141, 29 U.S.C. § 158(b) (1), 29 U.S.C.A. § 158(b) (1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United Const. Workers, Affiliated with United Mine Workers of America v. Laburnum Const. Corp.*, 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025.

"Although petitioners do not claim that the state court lacked jurisdiction to order respondent's reinstatement, they do contend that it was without power to fill out this remedy by an award of damages for loss of wages and suffering resulting from the breach of contract. No radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touch-

ing the regulation of labor. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although if the unions' conduct constituted an unfair labor practice the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered. See

International Union, United Automobile, Aircraft & Agr. Implement Workers of America (UAW-CIO) v. Russell, 356 U. S. 634, 78 S.Ct. 932" [2 L.Ed. 1030]. 78 S.Ct. at page 925, 2 L.Ed.2d at pages 1021-1022.

[2] In view of the foregoing determination, which is binding upon this court, the judgment is reversed and the cause remanded for a determination of all issues upon their merits.

WHITE, P. J., and LILLIE, J., concur

162 Cal.App.2d 409

Leona LEGG, Plaintiff and Appellant,
v.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, a Corporation, and United Benefit Life Insurance Company, a Corporation, and William Worthing, Maurice Siegel, E. S. Hall, Defendants and Respondents.

Civ. 23007.

District Court of Appeal, Second District,
Division 2, California.

July 29, 1958.

Rehearing Denied Aug. 18, 1958.

Hearing Denied Sept. 24, 1958.

Action by insured under a health and accident policy, against insurer and others. The Superior Court, Los Angeles County, Kenneth N. Chantry, J., entered judgment of dismissal pursuant to an order sustaining defendants' demurrer without leave to amend, and plaintiff appealed from such judgment and order. The District Court of Appeal, Ashburn, J., held that record failed to establish that trial judge abused his discretion in striking insured's amended complaint for failure to state a cause of action.

Judgment affirmed, attempted appeal from nonappealable matters dismissed.

1. Appeal and Error ⇨948

Upon appeal from judgment of dismissal following striking of a plaintiff's complaint, burden was upon plaintiff to establish an abuse of discretion.

2. Conspiracy ⇨18

Where count in a complaint charging conspiracy between various defendants did not factually aver any wrong committed pursuant to alleged conspiracy, it failed to state a cause of action.

3. Pleading ⇨356(1)

In action under a health and accident policy, record failed to establish that trial

judge abused his discretion in striking insured's amended complaint for failure to state a cause of action.

Leona Legg, in pro. per.

J. Edward Haley, Los Angeles, for respondents.

ASHBURN, Justice.

Plaintiff-appellant appears in propria persona upon appeal from a judgment of dismissal entered pursuant to an order sustaining without leave to amend defendants' demurrer to her third amended complaint. Appellant has managed to make the appeal a difficult one for the court because her briefs, like the complaint, consist of sentences almost devoid of syntax, composed of words without definitive meaning, used in an effort to express confused cross-currents of thought.¹

The complaint is in three counts, each of which is baffling.

First Count. Conversion of an insurance policy (Lifetime Income Protection Contract of Insurance No. NS-349684-44, Policy Form 104 NS) issued to her by defendant Mutual Benefit Health and Accident Association on November 7, 1944. The policy was executed in duplicate and the original kept by the Company with duplicate delivered to plaintiff. She was injured on February 6, 1948, and permanently disabled. The company paid her \$100 for one month's benefit and on January 7, 1954 advised her that it had "converted" her contract "into a different kind of contract for its own use." On this basis plaintiff alleges that defendant "seized and converted" the contract and "stole and disposed of said property," to plaintiff's damage in the amount of \$60,000 "ensueing in indemnity accruelements." The charge of conversion seems to be a play

1. The following passage is a fair example: "That appellant alleges upon information and belief and as to those matters thereof that she believes it to be true that the court in his abuse of reference, cited and relied upon the authority of the case of Taliaferro v. Prettnier, supra [135 Cal.App.2d 157, 286 P.2d 977], and under

its rulings in items (a) (b) (c) (d) (e) and (f) as aforesaid, inured as applicables to the position of the appellant in comparison to this respondent's position as a Donner-politically with pre-arranged judgement as recompense to the extent of the concern of financial interests."

upon words. The complaint contains a copy of the policy which appellant's brief says was attached in the process of amendment. Nowhere does it appear that the duplicate policy ever left plaintiff's hands. In the second count plaintiff says that defendant on said January 7, 1954, advised her that no part of her premiums had been "processed" to this policy 104 NS. In the third count it appears that plaintiff had two policies. Hence it *seems* that the alleged conversion consisted of a claim that premiums on policy 104 NS had not been paid and for some reason and in some manner the policy had been "converted" into a different form.

The demurrer is not in the record before us, but appellant's brief says it was general and special. Certainly a specification of uncertainty in the allegation of wrongful conversion would lie. Both sides agree that the trial judge, in making the ruling under review, relied upon *Taliaferro v. Prettner*, 135 Cal.App.2d 157, 286 P.2d 977. The minute order cites it. That case deals with a failure to amend in good faith after leave granted. At page 157 of 135 Cal.App.2d, at page 977 of 286 P.2d the court said: "Did the court abuse its discretion in striking from the files an amended complaint which made no appreciable effort to meet the objections which the court had sustained to the original complaint?" At page 160 of 135 Cal.App.2d, at page 979 of 286 P.2d: "The courts are, and should be, liberal in allowing pleadings to be amended, but when, as here, the court reasonably concludes that the plaintiff has made no real effort to comply with the permission once given him to amend his complaint, the amended complaint becomes nothing but a sham. The court is not required to give him another opportunity." At page 161 of 135 Cal.App.2d, at page 979 of 286 P.2d: "Under the circumstances of this case, the fact that plaintiff is a layman and appeared in propria persona, would not compel the trial court to give him another chance to amend.

"The court had jurisdiction to strike plaintiff's amended complaint on the ground that it was frivolous and a sham. The order was clearly not an abuse of discretion. The complaint having been stricken, the judgment of dismissal was, of course, proper."

[1] The previous complaints are not in the record and hence we have no way of judging the soundness of the discretion exercised in the present instance. Of course, the burden rests upon appellant to establish an abuse of discretion.

Respondent relies upon previous judgments (*Legg v. United Benefit*, 136 Cal. App.2d 894, 289 P.2d 553 and *Legg v. Mutual Benefit*, 136 Cal.App.2d 887, 289 P.2d 550, 290 P.2d 87), and the dismissal of an appeal from judgment rendered in defendants' favor after re-trial of *Legg v. Mutual Benefit*, supra. The complaint contains no reference to any such former suits (the demurrer is not in the transcript) but appellant's reply brief helps respondent in this respect (see *Willson v. Security-First Nat. Bank of Los Angeles*, 21 Cal.2d 705, 713, 134 P.2d 800). It says at page 17, "plaintiff was at liberty to sue defendants for damages resulting from the original injuries to collect disability benefits (see *Legg v. Mutual Benefit*, 136 Cal.App.2d 887 [289 P.2d 550, 290 P.2d 87]) and was at liberty to sue the same defendant and associated conspirators for damage resulting from subsequent injuries, in the second action Civil No 671657", the number of the present action upon the Superior Court records. The same brief also says, at page 22, with respect to *Legg v. Mutual Benefit*: "This action was brought to collect disability benefits, a trial was had thereon and commenced on January 7th, 1954 the date on which plaintiff had learned for the first time through testimony of defendants on the trial of this action that the defendants in this case No 671657 had fraudulently [sic] conspired to—and did convert plaintiff's policy contract and in unison therewith fraudulently conspired to

—and did wrongfully appropriate [sic] plaintiff's premium accruals in cash to their own use for unjust enrichment at plaintiff's expense." It is further said, at page 23, with respect to the new trial therein: "A trial was had thereon and again testimony was given that the contract was converted to the effect that the contract no longer existed (reference to Reporter's Transcript, the testimony of Maurice Siegel, Willim Worthing, 1954 Court of Arthur Crumm, Judge) a judgment was rendered adverse to the plaintiff from which an appeal was pending. * * * nevertheless the District Court dismissed this appeal based on the grounds of conjecture favorable to defendant. Civil No 22266 2nd Dist." Thus it appears that appellant has been defeated in a suit upon the policy and in this indirect manner a plea of res judicata has been made good upon demurrer. Cf. Pike v. Archibald, 118 Cal.App.2d 114, 116, 257 P.2d 480.

The second cause of action asserts breach of trust. The charge seems to be that plaintiff paid premiums in advance but defendant did not apply them to the policy in question. The charge that the moneys were received in trust is a bald conclusion, not supported by the underlying facts. The worst that appears is a breach of contract. That question was necessarily involved in the above mentioned action on the policy.

[2,3] The third count charges conspiracy between the various defendants, repeats most of the charges of the first and second counts as overt acts done pursuant to the conspiracy, and adds new allegations which probably give a clue to the refusal of defendant to pay more than \$100 after plaintiff's injury. It is averred that after the injury plaintiff was advised that policy 104 NS was payable only if no other income protection was available to her, that California state disability insurance was available for a specified period and payments under 104 NS would be withheld so long as plaintiff was eligible for state payments. This

count does not state a cause of action because it does not factually aver any wrong committed pursuant to the alleged conspiracy. 11 Cal.Jur.2d § 47, p. 272.

The notice of appeal specifies as the subjects of appeal the judgment, the "Order of the above entitled court made and entered on the decision of the complaint and from the Striking of the Complaint from the Files and from the whole of said Order. and from the validity of the decision and legal process of the court rendered in the above entitled cause."

The judgment is affirmed; the attempted appeal from the other non-appealable matters is dismissed.

FOX, P. J., and HERNDON, J., concur.



162 Cal.App.2d 320

Audrey N. ROTH, Plaintiff and Respondent,
v.

GUARDIAN THRIFT AND LOAN, a corporation, et al., Defendants,

Guardian Thrift and Loan, a corporation;
and Leon Lyon, Defendants and
Appellants.

No. 17702.

District Court of Appeal, First District,
Division 1, California.

July 25, 1958.

Action to recover amount of check, endorsed and delivered by payee to plaintiff. The Superior Court, City and County of San Francisco, John B. Molinari, J., granted summary judgment against drawer of check and personal guarantor of payee's endorsement, and they appealed. The District Court of Appeal, Fred B. Wood, J., held that triable issue of fact as to whether plaintiff had expressly agreed to accept check in payment of debt then owed her by

payee-endorser precluded summary judgment against drawer and guarantor of payee's endorsement.

Judgment reversed and cause remanded for trial.

1. Judgment ⇐181(26)

In action to recover amount of check endorsed and delivered by payee to plaintiff, triable issue of fact as to whether plaintiff had expressly agreed to accept check in payment of a debt then owed her by payee-endorser and hence was a holder in due course, in whose hands check would not be subject to defense that it had been obtained by payee on basis of forged documents, precluded summary judgment against drawer and personal guarantor of payee's endorsement. West's Ann.Civ.Code, §§ 3133, 3140.

2. Payment ⇐17, 18

Taking a note, either of debtor or of third person, for a pre-existing debt does not constitute payment of such debt, unless it is expressly agreed to take note as payment thereof.

3. Bills and Notes ⇐497(3)

In order to recover from drawer amount of check endorsed and delivered by payee to plaintiff, if payee's title to check was defective, plaintiff has the burden of proving that he took check for value. West's Ann.Civ.Code, §§ 3133, 3140.

4. Bills and Notes ⇐497(3)

In action to recover from drawer amount of check endorsed and delivered by payee to plaintiff for a pre-existing debt, if payee's title to check was defective, plaintiff has the burden of proving that he took check upon express agreement that it constituted payment of such debt, and such agreement will not be presumed but must be proved by party relying upon it. West's Ann.Civ.Code, §§ 3133, 3140.

* Plaintiff had purchased an automobile from Leonard's, Inc. (paying \$4,750 for it), and had returned it to Leonard's for correction of a defect discovered in it.

Some time elapsed without redelivery of the car and she was demanding its

5. Judgment ⇐178

Issue finding and not issue determination is the pivot upon which summary judgment law turns.

6. Judgment ⇐186

Whether there is a triable issue of fact precluding summary judgment is to be determined from the affidavits which have been filed.

7. Judgment ⇐185(2)

Any doubt as to whether summary judgment should be granted should be resolved against party seeking such judgment.

Bacigalupi, Elkus & Salinger, San Francisco, for appellants.

Lange & Rockwell, C. Dan Lange, Clyde R. Rockwell, San Francisco, for respondent.

FRED B. WOOD, Justice.

From Leonard's Inc. plaintiff received, duly endorsed, a check for \$4,000, drawn by Guardian Thrift and Loan, a corporation, in favor of Leonard's Inc. as payee.* Upon presentation to the drawee bank it was discovered that payment had been stopped. Plaintiff then brought this action for \$4,000, costs of suit and general relief against Guardian Thrift and Loan, Leonard's Inc., Robert C. Leonard, president of Leonard's Inc., and Leon Lyon, who had personally guaranteed Leonard's Inc.'s endorsement.

After the filing of an answer by Leon Lyon and Guardian Thrift and Loan plaintiff moved for and was granted a summary judgment against them. The question upon this appeal is whether or not there is any triable issue of fact. Our examination of the record convinces us that there is, and that the judgment should be reversed.

[1] The answer alleges that Leonard's obtained the check on the basis of forged

return or refund of the purchase price money, whereupon Leonard's Inc., endorsed and delivered the Guardian Company's \$4,000 check and paid her \$750 in cash.

documents, a defense which would be good against plaintiff unless she is a holder in due course, and presents the issue whether or not she took the check under such circumstances as would make her a holder in due course. See Civ.Code, § 3133. This issue turns upon the question whether or not plaintiff upon receiving this check *expressly agreed to accept it in payment* of a debt then owed her by the payee-endorser.

[2] The applicable rule of law we find well expressed in *Bramante v. Krug*, 143 Cal.App.2d 771 at 773, 300 P.2d 71, 72, (hearing by Supreme Court denied):

“The rule appears to be established by authority that the taking of a note, either of the debtor or of a third person, for a prior existing debt is no payment, *unless it be expressly agreed to take the note as payment*, and that, upon failure to pay such note, the creditor may ignore it and sue upon the original debt. *Merchants Nat. Bank v. Bentel*, 166 Cal. 473, 477, 137 P. 25. So here, by way of direct application of the rule above stated, it must be held that taking from plaintiff's debtor a check of a third person to plaintiff's debtor does not operate as payment of the debt to plaintiff *unless plaintiff agreed to take the check as payment*. Manifestly, this was not done in the present case. The original debt of the Pacific Motors Corporation to plaintiff remained unaffected by the transfer of the check, and was thus to remain until actual payment of the check. Under such circumstances the indorsee of the check has not become a purchaser for value. * * * The consideration for the transfer of the check by the payee to plaintiff was purely conditional. It amounted to nothing more than an agreement at a future date to credit the amount [sic] of the payee with the payment of \$3,000; said date being concurrent with and dependent upon the collection of the Goodman check.’ [*Pacific Acceptance Corp. v. Goodman*, 72 Cal.App. 143, 147, 236 P. 964.] (Emphasis added.)” See also *Bank of Italy v. Welbilt Auto Body Co.*, 101 Cal.App. 526, 281 P. 1060, and similar cases cited on page 774 of 143 Cal.App.2d, on page 73 of 300 P.2d.

[3, 4] Whether the title of Leonard's, Inc., to the check was defective is in issue. If and when this is established plaintiff has the burden of proving that she took the check for value. Civ.Code, § 3140; *Pacific Acceptance Corp. v. Goodman*, 72 Cal.App. 143, 146, 236 P. 964; *Bramante v. Krug*, supra, 143 Cal.App.2d 771, 722, 300 P.2d 71. This, of course, means that plaintiff has the burden of proving that she took the check upon an express agreement that it constituted payment of Leonard's antecedent debt to her, a principle long ago expressed in *Welch v. Allington*, 23 Cal. 322, at page 323, when the court said “[t]he law will not presume such an agreement, and it must be proved by the party relying upon it.”

Here, there is no evidence that plaintiff accepted the check as payment of the debt owing to her by Leonard's, Inc.; i.e., unless the following statement in plaintiff's affidavit is proof thereof: “* * * said Robert C. Leonard gave your affiant the Guardian Thrift and Loan Company check, * * * endorsing the same with the words ‘Leonard, Inc., by Robert C. Leonard’ and delivered said check to your affiant as a partial refund of said purchase price. That the balance of the money owed to your affiant pursuant to said demand for repayment being the sum of \$750 was paid to your affiant in cash on or about the 20th day of April, 1955.”

It might be possible to infer an express agreement by plaintiff from this statement that Leonard's, Inc., delivered the check to plaintiff “as a partial refund” of moneys owing from Leonard's to plaintiff. However, plaintiff's saying that Leonard's thus delivered the check is not quite the same as if she had also said that she expressly agreed to and did receive and accept the check in payment (to the extent of the amount of the check) of the debt which Leonard's then owed plaintiff.

This element of doubt deepens when we consider an affidavit by defendant's counsel setting forth testimony given by plaintiff upon deposition, narrating what was said and done upon the occasion of the delivery

of this check to her by Leonard's. She testified that Mr. Leonard "gave me that check for \$4,000 and endorsed it over to me." He had the check at the time and endorsed it over to her. A Mr. Hoyt who was present asked Leonard "if he had a check to pay for the automobile and he said yes. * * * To pay for the Cadillac that I was supposed to pick up." These and other words of similar import do not speak clearly of an express agreement to accept the check in payment and discharge of Leonard's debt to plaintiff.

[5-7] In addition, affidavits produced by defendant token subsequent conduct of plaintiff tending to indicate that she accepted the check conditionally and not in payment of Leonard's debt to her: (a) She said to the assignee for the benefit of Robert Leonard's creditors that she had a \$4,000 claim against Leonard, describing the transaction out of which the transfer of the check grew; and (b) she brought suit against an insurance company, predicated upon loss of the automobile by theft. Plaintiff argues that such putatively inconsistent acts and utterances of the plaintiff can be explained and should not be viewed as truly inconsistent with what really happened, at the time it happened, as narrated in plaintiff's affidavit. Such an argument, particularly in the light of the uncertain and inconclusive nature of the statements made by plaintiff in her affidavit and upon deposition, serves to emphasize the "triableness" character of the basic issue presented by the defendant by its pleadings and by its affidavits. "In a proceeding under section 437c, Code of Civil Procedure, issue finding rather than issue determination is the pivot upon which the summary judgment law turns. *Poochigian v. Layne*, 120 Cal.App. 2d 757, 760, 261 P.2d 738; see also *Eagle Oil & Ref. Co. v. Prentice*, 19 Cal.2d 553, 555-556, 122 P.2d 264. Whether an issue of fact exists is to be determined from the affidavits which have been filed. *Cone v. Union Oil Co.*, 129 Cal.App.2d 558, 562, 277 P.2d 464; *Low v. Woodward Oil Co., Ltd.*, 133 Cal.App.2d 116, 118, 121, 283 P.2d 720; *McComsey v. Leaf*, 36 Cal.App.2d 132,

97 P.2d 242. *If any doubt exists whether summary judgment should be granted, it should be resolved against the moving party.* *Travelers Indemnity Co. v. McIntosh*, 112 Cal.App.2d 177, 245 P.2d 1065." *Whaley v. Fowler*, 152 Cal.App.2d 379, 381, 313 P.2d 97, 98, emphasis added.

Let it be understood that we have discussed the pleadings and the facts only as they appear in the record before us and solely from the standpoint of their bearing upon a summary judgment proceeding. Nothing said herein is intended to limit either party in the framing of issues or the presentation of evidence upon the trial of the case if a trial be had.

The judgment is reversed and the cause remanded for trial.

PETERS, P. J., and BRAY, J., concur.



162 Cal.App.2d 44

**REALTY CORPORATION OF AMERICA,
Inc., a California corporation,
Plaintiff and Appellant,**
v.

**Roy W. BURTON, Special Administrator of
the Estate of L. W. Coffee, Deceased, and
L. W. Coffee, Inc., a California Corporation,
Defendants and Respondents.**

Civ. 22810.

District Court of Appeal, Second District,
Division 1, California.

July 9, 1958.

Suit to recover real estate commissions allegedly due from defendants. From adverse judgment of the Superior Court of Los Angeles County, Clarence M. Hanson, J., relator appealed. The District Court of Appeal, White, P. J., held that prior written agreement regarding real estate broker's commission and providing for commissions

of 55% of owner's list price was modifiable by subsequent oral agreement to effect that if lots were sold at price exceeding list price broker would be entitled to 55% of surplus, where consideration for modification was broker's promise to increase advertising expenditures and oral modification was followed in subsequent written commission reports.

Reversed and remanded for new trial.

1. Brokers Ⓒ71

Prior written real estate broker's commission contract providing for commissions of 55% of owner's list price was modifiable by subsequent oral agreement to effect that if lots were sold at price exceeding list price then broker would be entitled to 55% of surplus, when consideration for oral modification was broker's promise to increase expenditures in promotion of sales and oral agreement was subsequently followed in written commission report. West's Ann. Civ.Code, § 1698.

2. Contracts Ⓒ241

A written agreement may be supplemented by parties provided that such supplement is predicated upon an adequate consideration.

3. Contracts Ⓒ6

An "executed oral agreement" is one, the terms of which have been fully performed.

See publication Words and Phrases, for other judicial constructions and definitions of "Executed Oral Agreement".

4. Frauds, Statute of Ⓒ139(1)

Fully executed parol contract cannot be affected by statute of frauds and cannot be assailed by either party or by third persons on ground that it is not in writing.

5. Frauds, Statute of Ⓒ119(2)

Statute of frauds has been enacted for purpose of preventing fraud and may not be made instrument of shielding, protecting or aiding party who relies on it in perpetration of a fraud or in consummation of a fraudulent scheme.

Wolver & Wolver, by Eugene L. Wolver, Los Angeles, for appellant.

Avery M. Blount, Pasadena, for respondents.

WHITE, Presiding Justice.

Plaintiff instituted this action to recover certain real estate commissions allegedly due from defendants. Plaintiff's first amended complaint contains six causes of action, in the first of which it was alleged that plaintiff is a licensed real estate broker and on or about October 17, 1952, entered into a written agreement with defendants under the terms of which plaintiff was authorized and empowered to sell for and on behalf of defendants certain real property. That said agreement set forth a "list price" at which each lot, piece or parcel of real property could or should be sold by plaintiff and provided that the compensation of plaintiff would be 55% of said list price, and that defendants should receive 45% of said list price.

It is then alleged that the aforesaid agreement was on or about November 1, 1952, supplemented by an *oral agreement* to the effect that if any property be sold at a price in excess of the list price, plaintiff should receive 55% of the actual sale price, the defendants 45% of the list price, and the balance, if any, thereafter remaining, would be distributed 55% to plaintiff, 45% to defendants. That this oral agreement was evidenced by a written memorandum dated November 20, 1952, and that commencing on said 20th day of November, 1952 and subsequent thereto, the defendants computed, made and rendered to plaintiff written commission reports prepared by the defendants, wherein all sales made by plaintiff in excess of the said list price were indicated by the defendants and payments made by the defendants to the plaintiff in accordance with said oral agreement. That upon the last several commission reports made by the defendants to the plaintiff, commissions have been indicated as payable to the plaintiff, but that the same have not been paid, and the same are due, owing and payable.

The Second Cause of Action is predicated upon the same factual basis as the First Cause of Action, but pertains to "trade in" lots, which were to be computed on the same principle except that the cost of the "trade in" lot would be in lieu of the list price, upon which there was owing from the defendants to the plaintiff, the sum of \$33.25.

The Third Cause of Action is a common count for monies due for the same sum as that set forth in the First Cause of Action.

The Fourth Cause of Action is a common count for an open book account in the same sum as that set forth in the First Cause of Action.

The Fifth Cause of Action is a common count for an account stated in the same sum of money as that set forth in the First Cause of Action.

The Sixth Cause of Action seeks declaratory relief as to the sums of money to which plaintiff is entitled, by reason of the written agreement, the oral agreement, the written memorandum thereof and the subsequent conduct of the parties in the interpretation of their agreements and contractual rights.

By their answer to the first cause of action defendants presented a general denial of all the allegations thereof except to historical facts as to the written contractual relationships between the parties. The answer to the second cause of action also set forth a general denial subject to the aforesaid exception. As to the third, fourth, fifth and sixth causes of action the answer was the same as that made to the second cause of action.

As a second defense, the answer alleged that a certain written agreement allegedly entered into on or about August 7, 1953, wherein "Plaintiff was authorized and empowered to sell for and on behalf of defendants, certain real property in said agreement described", is illegal and void " * * in that said agreement does not contain a definite and specified date of final and complete termination."

For a third defense, the answer alleged that two certain letters written by defendant L. W. Coffee to plaintiff, and attached

to and incorporated in the complaint as Exhibits "A" and "B", were made without any consideration therefor whatsoever.

For a fourth defense and by way of counterclaim defendants sought to recover on a common count, the sum of \$8,592.23 for monies had and received. However, this was subsequently withdrawn by defendants.

During the trial defendants were permitted to file an amendment to their answer to the first amended complaint, wherein they set forth for a First Separate and Distinct Defense, the historical background of the contract involved and its assignment to the present litigants; that such contract had been the subject of a prior lawsuit, wherein an appeal was taken from the judgment therein, and that said judgment appealed from was an adjudication of the rights herein alleged in the first cause of action of the first amended complaint.

For a Second Separate and Distinct Defense, it was alleged that such defense was the same as pleaded in certain paragraphs of defendant's first separate and distinct defense of said first amended complaint.

For a Third Separate and Distinct Defense it was alleged that plaintiff's sixth cause of action "was fully tried and determined and Judgment rendered in favor of these defendants and against the plaintiffs herein".

For a Fourth Separate and Distinct Defense it was alleged that the six causes of action of the first amended complaint do not state facts sufficient to constitute a cause of action.

For a Fifth Separate and Distinct Defense, that by reason of said prior action, the contract of October 17, 1952, is void and without force and effect.

For a Sixth Separate and Distinct Defense, that the first five causes of action of the first amended complaint are barred by the statute of frauds.

When the cause was called for trial, the judge announced that he had examined the pleadings and the exhibits. He then summarized the provisions of the original con-

tract of October 17, 1952, with regard to the compensation or commissions to be paid to plaintiff, and thereupon stated:

"Now, those provisions are all very clear and explicit and consequently require no evidence in the interpretation of that contract.

"The position of the Plaintiff is that there was an oral contract entered into subsequent to the entry into this written contract and that by the terms of that oral contract there was a change made with respect to what the Plaintiff was to receive. The oral contract being squarely contrary to the provisions of the written contract may not be shown in evidence.

"The letter written by the Defendant to the Plaintiff stating that he was enclosing a statement or a report of commissions and that thereafter his reports would be along that same line does not by its terms indicate that that letter was to constitute a change of any of the terms of the written contract.

"I am of the opinion that the entire case will have to turn upon the provisions of the written contract. * * *

The trial judge then stated that insofar as defendant's motion to abate the instant action was concerned, he had concluded there was no abatement thereof by reason of the prior action set forth in defendants' First Separate and Distinct Defense contained in their amendment to their answer to the First Amended Complaint.

The court then stated: "I am calling to counsel's attention my views with respect to the parol evidence rule and the thought that there is no sufficient amendment in the writing of that original contract of October, 1952, upon which the Plaintiffs can stand * * *." The original contract of October 17, 1952, was received in evidence by stipulation.

Plaintiff's counsel then stated: "It is apparent your Honor will hold that certain of the oral testimony upon which the plaintiff's case is based is inadmissible * * *. Therefore, with the permission of the Court

I should like to make an offer of proof * * *." Upon the announcement by plaintiff's counsel that all witnesses referred to in the offer of proof were personally present in the court and ready to testify it was stipulated that the necessity of calling such witnesses be dispensed with. Thereupon plaintiff's counsel made his offers of proof which may be summarized as follows: That at the time the original contract of October 17, 1952, was entered into under the terms of such contract and for the practical purpose of sale, it was necessary that a schedule be made of the owners' list price, namely, the price at which the respondent had theretofore been selling or listing each individual lot, since the "release price" to be paid to the owner, was to be computed at 60% of such "Owners' List Price".

That Mr. Carpenter, the sales manager for appellant offered to compute such schedules, but the defendant, L. W. Coffee, refused to permit the same and stated he would compute such schedules himself. At said time and prior theretofore, it had been indicated that the plaintiff's predecessor, as the real estate broker, would not be able to operate upon the 40% of the "Owners' List Price" remaining after the deduction of the release price of 60% thereof, and that such real estate broker must have a commission of 55%, which would require that the new list price be increased sufficiently that it would total the 55% commission and the aforesaid "release price".

That, on the initial weekend of sales, some five or six sales were made. Mr. Carpenter checked the same as against the said schedule (hereinafter designated "Coffee Schedule") annexed to the contract, and ascertained that both as to such sales and as to spot checking of the "Coffee Schedule", a few of the prices were mathematically inaccurate; a few of the prices were high, but most of the same were low; that is, if the land be sold at the amount set forth in said "Coffee Schedule" as the list price, such price would be insufficient to pay a full "release price" or a full 55% commission. Mr. Carpenter phoned defendant Coffee and informed him of this

situation and offered to make a new schedule which would be mathematically accurate, so that the broker could obtain a full 55% commission, and the seller could obtain a full "release price". Mr. Coffee agreed to the making of such schedule, and the same (hereinafter designated "Carpenter Schedule") was thereafter prepared under Mr. Carpenter's supervision. The same was completed in late October or early November, 1952. Carpenter took the same to Coffee's office in Los Angeles and there he and Mr. Coffee spot checked the "Coffee Schedule" as to ten or fifteen sales prices, which they found to be inaccurate, their actions therein being observed by Miss Fearington, Mr. Coffee's office manager. Mr. Carpenter thereupon produced the "Carpenter Schedule", and he and Mr. Coffee spot checked it as to twenty to twenty-five sales prices, which they found to be accurate. This also was observed by Miss Fearington. Mr. Coffee thereupon instructed Miss Fearington to use the "Carpenter (new) schedule". After Mr. Carpenter left, Mr. Coffee further instructed Miss Fearington to abandon the "Coffee (old) Schedule", and thereafter use the "Carpenter (new) Schedule".

While Mr. Carpenter was in the office with Mr. Coffee, the former called the latter's attention to the fact that for a period of many years, Mr. Coffee had not been too successful in selling the lots involved, at the prior "Owners' List Price". That this was the basic reason why plaintiff's predecessor had initially been contracted to act as real estate broker. Mr. Carpenter was then convinced, after his first week's experience, not only could the land be sold for the owners' list price, as contained in the modified "Carpenter Schedule", "but we can sell this land for a much larger sum. However, if we do that we will have to expend additional sums, and we contemplate spending in excess of \$100,000.00. We will have to spend a lot more energy in talking to our salesmen who will make less sales but larger sales, but I know it can be done." Mr. Carpenter thereupon explained to Mr. Coffee that all office ex-

penditures as well as salesmen's commissions and overrides, were predicated upon the actual sales price. Mr. Carpenter then stated the terms under which the sales campaign would be conducted at expenditures in excess of \$100,000, namely that the real estate broker would receive a 55% commission on the actual sales price, "that is the amount the purchaser pays," which sum, together with the release price, would be deducted from the sales price and the balance or surplus, if any, would be allocated 55% to the broker and 45% to the respondents. Upon said novations being stated, Mr. Coffee said "that is agreeable", and Mr. Carpenter requested Mr. Coffee to confirm this understanding by letter. Mr. Coffee stated he would do so concurrently with the first schedule of computation of commissions due, and suggested that the form thereof be worked out. Mr. Coffee suggested that the same be jointly done by Mr. Carpenter and himself, and thereupon, by such joint effort, the subsequently used form of commissions report was drawn up. Such form was specifically originated in accordance with the existing agreement between the parties as to the computation of broker's fees, the release price, and the allocation of the surplus thereof, 55% to the broker and 45% to the "Owner". Miss Fearington participated in the preparation of such rough draft. The draft thereof was printed and such printed form was thereafter utilized for all commission reports prepared by the defendants.

That such printing was completed during the first week of November, 1952. About the same time, Mr. Coffee stated to Mr. Carpenter that he was the agent for a Mr. Wardman, who had encumbrances upon Desert Hot Springs property and who owned a number of lots in Palm Desert, an area between Palm Springs and Indio on State Highway 112; that Mr. Wardman would be agreeable to the sale of such lots upon the same arrangement then existing between plaintiff's predecessor and the defendant, L. W. Coffee.

Mr. Carpenter requested Mr. Coffee to prepare a contract with similar terms. Mr.

Coffee answered that he would do so and would have the same approved by Mr. Wardman. On November 17, 1952, Mr. Coffee conferred in his office with Mr. Wardman, Mr. Carpenter staying in Mr. Coffee's waiting room for three-quarters to one hour, during such conference. When Mr. Carpenter was admitted into the presence of Mr. Wardman and Mr. Coffee, Mr. Wardman, who wanted a contract for his lots in Palm Desert, the same as Mr. Coffee had informed Mr. Wardman was the terms under which the lots in Desert Hot Springs were being sold, inquired of Mr. Carpenter if the contract prepared by Mr. Coffee and then offered to him was the same as Mr. Coffee then had with the plaintiff, as the original thereof would be modified by Mr. Coffee's letter. The specific terms thereof were enumerated by Mr. Wardman, namely, that the commission would be 55% of the actual sales price; that there would be in addition thereto, a release price being equal to 60% of the former owners' list price, and that the balance or surplus, if any, to be allocated 55% to the broker and 45% to the owner. The fact that the contract offered to Mr. Wardman, in regard to the lots in Palm Desert, was the same as the contract between the parties, upon the lots in Desert Hot Springs, to be thereafter verified by letter, was concurred in by both Mr. Carpenter and Mr. Coffee. This contract was executed two days thereafter, namely, on November 19, 1952. A copy thereof was marked as Exhibit 4 for identification. Set forth therein, in paragraphs Fifth and Sixth, is a summary of the method of computing the broker's commission and release price. An epitome thereof is that the commission is computed upon the actual sales price, the release price is equal to 60% of the former "Owners' List Price", and that any surplus remaining thereafter would be allocated 55% to the broker and 45% to the owner. Shortly thereafter, Mr. Coffee, as the agent for Mr. Wardman, indicated that the commission reports would be made to the broker by him, as Mr. Wardman's agent,

upon the form of commission reports theretofore evolved through the joint efforts of Mr. Carpenter, Mr. Coffee and Miss Fearrington, for use in sales in Desert Hot Springs. Subsequently, Miss Fearrington came to the office of Mr. Wardman and indicated the computation of broker's commission as aforesaid. During the same period, Mr. Coffee explained to Mr. Cook, a public accountant employed by Mr. Wardman, the computation of commissions by the aforesaid method.

About November 10, 1952, the first commission check was received by plaintiff's predecessor, from Mr. Coffee's office. A commission report indicating an amount due in conformity with said check dated November 10, 1952, was received with Mr. Coffee's letter of November 20, 1952. Such letter reads as follows:

"The attached Commission Report dated November 10th, 1952, for which remittance was made to you on November 10th shows the Release Price, Sales Price, Total Commission, Shortage subtracted from the 55% commission, also shows surplus over and above the release price and 55% commission, and the division of Agent of 55%; to Owner 45%.

"All following reports will be shown in this manner.

"The surplus, if any, shall not be paid until the Agent's total commission and the Owner's release price have been paid." (Emphasis added.)

That the commission report was drawn in conformity with the novated method of computation as summarized in said letter. The letter of November 20, 1952, was dictated by Mr. Coffee to Miss Fearrington. Thereafter semi-monthly commission reports were sent, all computed upon the same method. Such subsequent semi-monthly commission reports were offered as part of the offers of proof. In addition thereto, mathematical computations were prepared by the plaintiff, which indicated that each and all of such commission reports were prepared by the defendants and

computed by them as indicating that the plaintiff, as real estate broker, was entitled to a commission of 55% of the actual sales price; that said sum, together with the "release price" was deducted from the actual sales price, and that the balance or surplus, if any, was allocated 55% to plaintiff and 45% to defendants. All of the sales indicated in said exhibit for identification were made prior to May 15, 1954. Likewise, such exhibits indicate that where a deficit existed, the same were chargeable to the broker.

That by reason of the claimed novation, as aforesaid, and the letter of November 20, 1952, plaintiff expended or caused to be expended, \$100,000 on an extensive sales campaign. This was at least \$50,000 larger than any originally anticipated campaign. That such expenditures were necessary in order to get the increased sales price for the individual lots. That the same was done with the knowledge of Mr. Coffee who informed Mr. Wardman of the fact that his letter novating the agreement, was resulting in the spending of a "large sum" by the appellant for an advertising campaign.

That although not involving substantial monies, the arrangements as to "trade in" lots, are indicative of the agreement between the parties. Between November 20, 1952, and February 4, 1953, there were two or more conversations between Mr. Carpenter and Mr. Coffee concerning lots received by way of "trade in". It was agreed between these parties that such lots should be handled in the same manner as the other lots sold in Desert Hot Springs, except in lieu of the release price, the cost of the lots would be considered. Mr. Coffee was to acknowledge this arrangement by letter. As the result thereof and in compliance with his commitment, Mr. Coffee wrote the letter of February 4, 1953. That it shows the same basic plan of computation of commissions and allocation of surplus, providing in the pertinent part thereof, "* * * Sell the property, deduct 55% from the sales price, add the costs of acquiring the same and

the balance is to be divided 55% to Realty Co. of America, 45% to L. W. Coffee, provided always that the surplus over and above the original 55% is sufficient to pay for the cost of receiving and disposing of same."

It was stipulated that said letter was typed by Ann Ingraham, an employee of the defendants.

That although the numerous semi-monthly commission reports were usually accompanied by checks, the last report and computations were not. These consisted of \$5,109.52, representing unpaid commissions of 55% of the sales price and three statements for 55% of the surplus in excess of commissions and release price in the respective sums of \$116.41, \$238.25 and \$206.71. Such amounts aggregate the sum of \$5,670.89, upon which plaintiff brought all but the second cause of action of its first amended complaint.

That said statements contained in Exhibit 8 for identification, were not accompanied by any check and the amounts sued for are unpaid, it being stipulated that said commission report of July 25, 1955, and the surplus reports which constitute Exhibit 8 for identification, were mailed by the defendants on or about the date that the same bear, to the plaintiff, and that no remittance was made thereon. That the sum of \$5,109.52 shown upon the commission report of July 25, 1955, represented unpaid commissions on the initial 55% of the sales price and did not involve any surplus above commissions and release price. The other amounts are the sums due on June 25, 1955, July 10, 1955, and July 25, 1955, being the 55% of the surplus after the deduction of commissions and release price.

Defendants' objection to the foregoing offer of proof on the ground "that it tends to vary or change the terms of a written document by parol evidence" was sustained.

The court signed written Findings of Fact wherein it found that the original agreement of October 17, 1952, was entered into. That said agreement provided that the plaintiff be compensated by 55% of list

price. That there had not been any oral novation thereof, giving to plaintiff a commission of 55% of the actual sales price, and a like percentage of the surplus after deducting the original commission and the release price, payable to the defendants. That the letter of November 20, 1952, had been delivered by the defendants to plaintiff. That with said letter there was transmitted to plaintiff the initial commission report, but that it is not true that said commission report attempted to novate the terms of said agreement. That defendants prepared and sent to plaintiff semi-monthly commission reports, the last of which was received on or about June 29, 1955. That there was no valid oral or written novation or amendment to the agreement of October 17, 1952. That there was no commission, monies or compensation due thereunder. That there was no oral amendment to the agreement as to the "trade in" lots. That the letter of February 4, 1953, was delivered by the defendants to plaintiff, that said letter is not a written memorandum of any agreement in regard to "trade in" lots, and that no monies are due by reason of "trade ins". That an actual controversy exists between the plaintiff and defendants as to the commissions to which plaintiff was entitled under the contract of October 17, 1952, and that plaintiff contends it was entitled to compensation under the novated and amended agreement. That the exhibits annexed to the first amended complaint were made without consideration.

Judgment was entered in favor of defendants for their costs and for declaratory relief in their favor, to the effect that there had been no agreement which changed, modified or novated the written agreement of October 17, 1952. From such judgment, plaintiff prosecutes this appeal.

[1] We are satisfied that the contention of appellants that the evidence contained in the foregoing offer of proof was properly admissible for the purpose of proving a collateral agreement, or supplemental agreement or a novation to the original written agreement of October 17, 1952, must be sustained. Though it be conceded that

the terms of the original contract of October 17, 1952, entered into with appellant's assignor covered or pertained to sales in excess of the list price, nevertheless, it seems manifest that a supplemental written agreement was entered into as evidenced by the letters of November 20, 1952, specifically referring to surplus above the list price, and the letter of February 4, 1953, pertaining to "trade in" lots. The first of these letters addressed to appellant by respondent Coffee states in part,

"The attached Commission Report dated November 10th, 1952, for which remittance was made to you on November 10th, shows the Release price, Sales Price, Total Commission, Shortage subtracted from the 55% commission, also shows surplus over and above eht (sic) release price and 55% commission, and the division to Agent of 55%; to Owner 45%.

"All following reports will be shown in this manner."

The second letter, also written by respondent Coffee to appellant, reads as follows:

"In reference to the trades where you took in lots in Desert Hot Springs and/or Apple Valley and Rocket Town, which are already in my name, will go through as outlined in our original agreement:

"Sell the property, deduct 55% from the sales price, add the costs of acquiring the same and the balance is to be divided 55% to Realty Co. of America, 45% to L. W. Coffee, provided always that the surplus over and above the original 55% is sufficient to pay for the cost of receiving and disposing of same.

"Please take notice that from today on, so long as you pay the release price of any lots in any of my Tracts in Desert Hot Springs, you can make any trade that you so choose and whatever you take in is yours and you can do as you please with the same."

It seems clear to us that each of these letters indicates a consistent new method of compensation to the real estate broker to be computed by deducting 55% of the sales price, adding thereto, either the release price or the costs of acquiring the "trade in" lot and the balance or surplus, if any, is to be allocated 55% to the broker and 45% to the owner. In each of the letters it is indicated that the surplus is not to be allocated until each of the parties has received the full amount to which they are entitled, prior to the obtaining of such surplus.

[2] An agreement may be supplemented by the parties provided that such supplement is predicated upon an adequate consideration (12 Cal.Jur.2d 233, Contracts, Sec. 37). The offers of proof herein indicate that the consideration consisted of the additional and increased sales campaign in the promotion of which additional monies were expended by appellant for advertising, the primary purpose of which was to make possible the sale of the lots involved at substantially higher prices than that originally intended and set forth in the list price. That this was accomplished and all parties benefitted thereby is indicated by the surplus set forth in the commission reports offered in evidence for identification, coupled with the finding of the court that appellant had, prior to the filing of the complaint herein, sold all of the property made available for sale by respondents pursuant to the original agreement of October 17, 1952.

[3] Aside from the foregoing documentary evidence of a supplemental agreement, there is present in the offers of proof an intention on the part of the parties to novate the original agreement of October 17, 1952. This they had a right to do under the provisions of Section 1698 of the Civil Code which provides that "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise". An executed oral agreement is one the terms of which have been fully performed. Civil Code, Section 1698 has

been applied to numerous forms of transactions particularly in those transactions concerning the sale, transfer or leasing of real property, wherein the statute of frauds is generally pertinent. For instance, it has been held that where there was performance of and effect given to an executed oral change of the selling price specified in a written agreement for the sale of land by a broker, a commission may be collected (*Moore v. Borgfeldt*, 96 Cal.App. 306, 311, 273 P. 1114). See, also, *Bard v. Kent*, 37 Cal.App.2d 160, 163, 99 P.2d 308.

Oral agreements to accept less rental than the amount specified in written leases for terms longer than one year have been held valid under Civil Code, Section 1698, when they have been executed by payment and acceptance of the reduced rent (*Sinnige v. Oswald*, 170 Cal. 55, 57, 148 P. 203; *Anderson v. Adler*, 42 Cal.App. 776, 779, 184 P. 42). A similar conclusion was reached by the court in *In re Estate of McDougald*, 146 Cal. 196, 199, 79 P. 878, with regard to an executed oral agreement by a mortgagee to accept a lower rate of interest than that specified in the mortgage note. And, in *Conway v. Moore*, 70 Cal.App.2d 166, 171, 160 P.2d 865, an executed oral modification of the method of payment specified in a written contract for the purchase and sale of land was held effective as against a contention that it involved a violation of the statute of frauds.

We are persuaded that the offers of proof made by appellant contain sufficient evidence from which the court could have found that there existed a written collateral agreement or a supplemental novated oral agreement fully executed and that it was error to reject and refuse to consider the same.

[4, 5] As to the statute of frauds, it has often been held that a fully executed parol contract cannot be affected by such statute, and cannot be assailed by either party or by third persons, on the ground that it is not in writing (*Bates v. Babcock*, 95 Cal. 479, 488, 30 P. 605, 16 L.R.A. 745; *Dean v. Davis*, 73 Cal.App.2d 166, 168, 166 P.2d 15;

Kreling v. Walsh, 77 Cal.App.2d 821, 832, 176 P.2d 965; McComsey v. Leaf, 36 Cal. App.2d 132, 142, 97 P.2d 242; Freitas v. Freitas, 31 Cal.App. 16, 19, 159 P. 611, 613). As was said in Wilson v. Bailey, 8 Cal.2d 416, 422, 423, 65 P.2d 770, 772, quoting from Seymour v. Oelrichs, 156 Cal. 782, 794, 106 P. 88, and Carpy v. Dowdell, 115 Cal. 677, 687, 47 P. 695, respectively:

"The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing of fraud, cannot be disputed. It is based upon the principle "thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme." "

" * * * "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." * * * " See, also, Wade v. Markwell & Co., 118 Cal.App.2d 410, 421, 258 P.2d 497, 37 A.L.R.2d 1363; Pruitt v. Fontana, 143 Cal.App.2d 675, 687, 300 P.2d 371.

Furthermore, in the case at bar, if respondents are not estopped from asserting the statute of frauds against appellant, the foregoing two letters written by the former on November 20, 1952, and February 4, 1953, furnish sufficient compliance with the statute of frauds (Hellings v. Wright, 29 Cal.App. 649, 656, 156 P. 365; Arnold v. La Belle Oil Co., 47 Cal.App. 290, 295, 190 P. 815; McCartney v. Clover Valley Land & Stock Co., 10 Cir., 232 F. 697).

While the action of the court in the case at bar was rather unique, in that it made its rulings and excluded the evidence prior to any motion therefor on the part of respondent, we shall assume that the question on appeal is the correctness of the judgment of the trial court on the basis of appellant's pleadings and offers of proof. When both the pleadings and offers of proof are considered in the instant case, we are satisfied that appellant was entitled to a trial upon the merits, and that since no evidence was received except the original agreement of October 17, 1952, it is manifest that many of the findings are without evidentiary support.

The judgment is reversed and the cause remanded for a new trial.

FOURT and LILLIE, JJ., concur.



162 Cal.App.2d 357

William S. YEOMANS, Jr., Plaintiff and Respondent,

v.

Elmer LYSFJORD and Walter R. Waldron, Defendants and Appellants.

Civ. 22723.

District Court of Appeal, Second District,
Division 2, California.

July 28, 1958.

Suit for an accounting. From a judgment of the Superior Court, Los Angeles County, and from an order denying motion for new trial, Parks Stillwell, J., the defendants appealed. The District Court of Appeal, Fox, P. J., held inter alia that in suit by former partner against other partners for accounting plaintiff, in effort to set aside waiver and assignment which plaintiff had executed, was entitled to in-

introduce evidence tending to establish fraud or unfair advantage on part of former partners, notwithstanding plaintiff had not pleaded fraud or unfair advantage, but that the trial court erred in calculations upon accounting.

Appeal from order dismissed, and judgment reversed with directions.

1. Appeal and Error ⚡110

Order denying motion for new trial is not appealable, and hence appeal therefrom must be dismissed.

2. Pleading ⚡291(2)

Plaintiff's failure to file affidavit in denying execution of instrument included in defendant's answer admits genuineness and due execution of the instrument, but does not estop plaintiff from showing mistake, undue influence, fraud, estoppel, or any other defense that would be open if instrument were the basis of an action.

3. Partnership ⚡120

In suit by former partner against other partners for accounting, plaintiff, in effort to set aside waiver and assignment which plaintiff had executed, was entitled to introduce evidence tending to establish fraud or unfair advantage on part of former partners, notwithstanding plaintiff had not pleaded fraud or unfair advantage.

4. Partnership ⚡70

Partners are trustees for each other, and in all proceedings connected with conduct of the partnership every partner is bound to act in the highest good faith to his copartner, and may not obtain any advantage over him in partnership affairs by slightest misrepresentation, concealment, threat, or adverse pressure of any kind. West's Ann.Corp.Code, § 15021.

5. Partnership ⚡122

In suit by former partner against other partners for accounting of money received by other partners in settlement of antitrust action wherein defendants claimed that plaintiff had waived and assigned his share in such settlement, but wherein in addition to plaintiff's testimony that he

was to share in settlement of antitrust suit there was also testimony of other witnesses concerning statements made by defendants to effect plaintiff was entitled to one third of the settlement it was for trial judge to resolve such conflict in the testimony.

6. Appeal and Error ⚡1011(1)

In suit by former partner against other partners for accounting, wherein there was substantial evidence to support court's resolution of conflicting testimony in favor of plaintiff, such action was binding upon the appellate court.

7. Partnership ⚡112

In suit for accounting by former partner against other partners, where while agreement called for plaintiff to execute notes in amounts of \$2,500 in favor of each of other two partners notes in evidence were each in amount of \$2,758.51, and there was no suggestion that such notes were invalid or ineffective and there was no finding that any payment had been made on such notes, court should have deducted face value of such notes, amounting to \$5,517.02, from plaintiff's share in partnership.

8. Interest ⚡49

In suit by former partner against other partners for accounting, wherein charging plaintiff's notes to other partners against plaintiff's share in partnership as of date of dissolution had the effect of cancelling such notes, since debts represented by such notes no longer existed it was error to charge interest on them thereafter.

9. Partnership ⚡333

In suit by former partner against other partners for accounting, if the plaintiff had in fact converted an automobile belonging to partnership plaintiff should have been charged with value of automobile at time of conversion, and if there was no conversion, it was improper to charge plaintiff rental as of date of dissolution when no rental had as yet accrued and such rental could not be taken into account in determining value of plaintiff's share on date of dissolution.

10. Partnership Ⓒ306

Where upon dissolution of partnership a partner elected to receive his pro rata share of profits, court erred in awarding him one third of those profits where he did not own a one-third interest in the partnership assets upon its dissolution, but trial court should have awarded plaintiff a share in net profits after dissolution based upon ratio that plaintiff's interest in partnership at time of dissolution bore to the total net worth of the partnership at that time, without any deduction for salaries to the remaining members. West's Ann.Corp.Code, §§ 15018(f), 15042.

11. Partnership Ⓒ306

Where the business of a partnership is continued after dissolution with employment of assets of retiring partner, the latter is entitled to a pro rata share of the profits, based upon value of his interest in the partnership ascertained as of date of dissolution.

12. Partnership Ⓒ300

Any recovery or loss growing out of antitrust suit by partnership should not be included in assets of the partnership for purpose of accounting as of date of dissolution where it was no more than a speculative item of indeterminate value at that time and matter was not disposed of until almost three years after dissolution.

Gordon Stater, Los Angeles, for appellants.

William M. Poindexter, Los Angeles, for respondent.

FOX, Presiding Justice.

[1] This is a suit by one former partner against the other two for an accounting. The defendants, being aggrieved by an adverse judgment, have appealed. They have also appealed from the order denying their motion for a new trial. Since there is no appeal from such an order, the purported appeal therefrom must be dismissed. *Echols v. Fabyunkey*, 137 Cal.App.2d 477, 478, 290 P.2d 260.

In January, 1952, plaintiff and defendants entered into a written partnership agreement for the purpose of conducting an acoustical tile contracting business under the fictitious name of the Aabeta Company. The defendants were each to contribute \$5,000 cash and plaintiff his promissory note for \$5,000. All three partners were to devote their full time to the business. The acoustical tile was a necessary material for carrying on the contemplated business. When the business first started the partnership had arrangements with a supplier for a supply of the material but this arrangement was soon cancelled by the supplier. This unexpected cancellation put the partnership business in a difficult position. Investigation of the situation led Lysfjord and Waldron to file an antitrust action for treble damages in July of 1952 against various defendants, the principal of which was the Flintkote Company. Yeomans was not made a party to the action.

On June 30, 1953, Yeomans executed an instrument by which he purported to waive any interest he might have in the antitrust suit and assign such interest to Lysfjord and Waldron. Plaintiff testified, however, that they assured him he would be entitled to one third of any recovery. On that same day the parties entered into a new partnership agreement which was to begin July 1, 1953. Just prior to this time negotiations for settlement were in progress between counsel for Lysfjord and Waldron and certain minor defendants in the antitrust suit. As a result, a settlement for \$20,000 was accepted on June 26. This represented a net to the plaintiffs, Lysfjord and Waldron, of \$12,000. This money was paid on July 31, 1953. The antitrust suit continued against the Flintkote Company. Counsel for Lysfjord and Waldron had never met Yeomans before the meeting in his office on June 30, 1953, to execute the assignment and the new partnership agreement. In fact, counsel did not know Yeomans was a partner with Lysfjord and Waldron when he filed the antitrust suit. At the time Yeomans signed the waiver and assignment of any interest

in the antitrust suit he did not know that any settlement was in contemplation.

The partnership was dissolved by mutual consent on March 31, 1955. At that time Yeomans, without the permission of the other partners, took with him the 1952 Cadillac that belonged to the partnership. He kept the car for a year and then returned it. Yeomans secured employment elsewhere and did not further participate in the operations of the company. Lysfjord and Waldron, however, continued to operate the business.

One of the items that Yeomans sought to have included in the accounting was the \$12,000 that Lysfjord and Waldron had received in partial settlement of the antitrust suit. As a defense to this claim, Lysfjord and Waldron pleaded in their answer the waiver and assignment that Yeomans had previously executed.

The trial court in effect set aside Yeomans' waiver and assignment on the ground that Lysfjord and Waldron had taken unfair advantage of him in violation of their fiduciary duty as partners. The court then included the \$12,000 among the partnership assets. The trial court determined the net worth of the partnership on the date of dissolution to be \$30,148.33, and, accordingly, that Yeomans was entitled to one third. The court then deducted from plaintiff's interest certain items of indebtedness. This left Yeomans an interest of \$1,110.66 at the time of dissolution.

The court also found that the net profits realized by the business during the 18 months following the dissolution of the partnership were \$22,558.08. The court then awarded plaintiff one third of this amount, namely \$7,519.36. Accordingly, judgment was entered in favor of the plaintiff for \$8,630.02 (\$1,110.66 plus \$7,519.36).

[2, 3] Defendants contend that plaintiff was not entitled to introduce evidence in an effort to set aside the waiver and assignment which he had executed since he had not pleaded fraud or unfair advantage. This contention is not well founded. The law on this subject is clearly stated in

Walsh v. Jacobson, 3 Cal.App.2d 477, 39 P.2d 455. At page 480 of 3 Cal.App.2d, at page 456 of 39 P.2d the court states: "It is well established by decisions of our appellate courts that where an answer filed in an action sets up a written instrument as an affirmative defense to the suit, and the plaintiff fails to file an affidavit denying the execution of such instrument as provided for in section 448 of the Code of Civil Procedure, the plaintiff is estopped from attacking the instrument only upon the grounds of its 'genuineness and due execution.' The plaintiff may, without filing any replication, which under our practice is not required because all new matter set up in the answer is deemed denied, controvert the instrument by evidence of mistake, undue influence, fraud, estoppel, and any other defense that would be open if such instrument were the basis of an action. [Citations.]" To the same effect, see *Watson v. Poore*, 18 Cal.2d 302, 316, 115 P.2d 478.

It is therefore clear that plaintiff was entitled to introduce evidence tending to establish fraud or unfair advantage on the part of his partners.

[4, 5] In this connection, defendants also contend that the court erred in setting aside the instrument in question. In effect, this is simply an attack on the sufficiency of the evidence to sustain the court's finding on this issue. "Partners are trustees for each other, and in all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner, and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind. [Citation.]" *Llewelyn v. Levi*, 157 Cal. 31, 37, 106 P. 219, 221. See, also, *Corp.Code*, § 15021; *Richards v. Fraser*, 122 Cal. 456, 460, 55 P. 246. In addition to plaintiff's testimony that he was to share in any settlement of the antitrust suit there was also testimony of three other witnesses concerning statements made by either Lysfjord or Waldron to the effect that the plaintiff was entitled to \$4,000 (i. e., one third) out of the settlement. While Lysfjord and

Waldron contradicted this testimony, it was for the trial judge to resolve such conflict. The court's resolution in favor of the plaintiff is binding upon this court since there is substantial evidence to support it.

[6] We come now to an examination of the accounting which the court conducted. The court's calculations are set forth in the footnote.¹ Examination of these items discloses numerous errors. One of the items which the court charged against plaintiff's share in the partnership was his "notes due defendants" in the sum of \$5,000. This, undoubtedly, refers to the promissory notes which Yeomans gave to Lysfjord and Waldron upon the execution of the second partnership agreement. While that agreement calls for Yeomans to execute notes in the amount of \$2,500 in favor of both Lysfjord and Waldron, the notes in evidence are each in the amount of \$2,758.51. There is no suggestion that these notes were invalid or ineffective for any reason and the court did not purport to set them aside. And there is no finding that any payment had been made on these notes. It is therefore apparent that the court should have deducted the face value of these notes (\$5,517.02) from plaintiff's share in the partnership. Thus, the trial court charged against plaintiff's share \$517.02 less than it should have on this item.

[7] Another item which the court deducted from plaintiff's share of the partnership consisted of 7 per cent interest on the above notes from March 31, 1955 (the date of dissolution) to September 30, 1956. Charging the above notes against plaintiff's share in the partnership as of the date of dissolution had the effect of cancelling them. Since the debts represented by these notes no longer existed, it was patent error to charge interest on them thereafter. While this latter error is in favor of plaintiff, and he has not appealed, it is, nevertheless, an item that should be taken into account on a retrial.

[8] The next error involves the Cadillac which plaintiff took with him upon the dissolution and for the use of which he was only charged rental. Although the evidence tends to establish that plaintiff converted the car to his own use, the court nevertheless failed to make any express finding on that issue. The only reference in the findings to the car is the item charging plaintiff \$125 per month rental for a period of one year. It is thus uncertain whether the trial court found that there was no conversion or simply overlooked the question. But upon either hypothesis the accounting with respect to the automobile is erroneous. If there was in fact a conversion, the plaintiff should have been

Net worth—3/31/55

1

This figure is composed of the following items.

		\$30,148.33
Net worth reflected by Ex. G.	\$ 14,832.85	
1/3 of "Utility" item	815.48	
Good Will	1,800.00	
Dodge Truck	700.00	
Antitrust suit settlement	12,000.00	

\$30,148.33

Plaintiff's share of Net Worth

\$10,049.44

—from which must be deducted the following items:

2/3 of materials shipped to plaintiff	180.34
Cadillac rental (1 yr. at \$125 per mo.	1,500.00
Excess of plaintiff's drawing	1,733.44
Notes due defendants	5,000.00
Interest on notes (7% 3/31/55-9/30/56)	525.00

8,938.78

Due plaintiff on dissolution

\$ 1,110.66

charged with the value of the car as of the time of the conversion. On the other hand, if there was no conversion, it was improper to charge plaintiff rental as of the date of dissolution when no rental had as yet accrued. In this connection it must be borne in mind that the court was seeking to ascertain the value of the plaintiff's interest in the partnership as of the date of dissolution. The rental for the car accrued during the year following dissolution. Thus, it could not be taken into account in determining the value of plaintiff's share on the date of dissolution. It would have to be deducted as it accrued thereafter.

From the foregoing it is apparent that the court erroneously determined plaintiff's interest in the partnership on the date of dissolution. It is therefore necessary for a new accounting to be had in order to properly determine what interest, if any, plaintiff had in the partnership on the date of its dissolution.

[9, 10] The court also erred in awarding plaintiff one third of the net profits (\$22,-558.08) from the business after the dissolution of the partnership. Under Corporations Code, Section 15042 the plaintiff was entitled to make an election as to whether he would receive interest on the value of his share in the dissolved partnership or, in lieu of interest, "the profits attributable to the use of his right in the property of the dissolved partnership. * * *" He elected to receive his pro rata share of the profits. The court obviously erred in awarding him one third of those profits for he did not own a one-third interest in the partnership assets upon its dissolution. The rule applicable in such circumstances was stated by this court in *Vangel v. Vangel*, 116 Cal.App.2d 615, 628, 254 P.2d 919, 927: "[W]here the business of a partnership is continued after dissolution with the employment of the assets of the retiring partner, the latter is entitled to a pro rata share of the profits, based upon the value

of his interest in the partnership ascertained as of the date of dissolution. [Citations.]" See, also, *Nuland v. Pruyn*, 99 Cal. App.2d 603, 613-614, 222 P.2d 261.

[11] Applying these principles to the facts in the instant case, the trial court should have awarded plaintiff a share in the net profits after dissolution based upon the ratio that plaintiff's interest, if any, in the partnership at the time of dissolution bore to the total net worth of the partnership at that time. For purposes of retrial it should also be noted that under section 15018(f) the defendants are not entitled to salaries for their services in carrying on the partnership business. In other words, plaintiff's pro rata share is based on the net profits after dissolution without any deduction for salaries to the remaining partners.

[12] It should be noted that upon a retrial another matter should be considered by the court. After setting aside plaintiff's waiver and assignment the court concluded that plaintiff owned "an undivided one-third interest" in the antitrust suit. On oral argument we were advised that that litigation has been concluded. Any recovery or loss growing out of such litigation (apart from the \$12,000 discussed above) must be considered in arriving at the final result herein, although such item should not be included in the assets of the partnership as of the date of dissolution since it was no more than a speculative item of indeterminable value at that time and the matter was not disposed of until almost three years after the dissolution.

The purported appeal from the order denying defendants' motion for a new trial is dismissed. The judgment is reversed with directions to take a new accounting consistent with the views expressed herein and to enter judgment accordingly.

ASHBURN and HERNDON, JJ., concur.

162 Cal.App.2d 198

Roxy PRATHER, Plaintiff and Appellant,
v.

George VASQUEZ and Eleanor Vasquez,
Defendants and Respondents.

Frank R. HALTERMAN, Plaintiff and
Appellant,
v.

George VASQUEZ and Eleanor Vasquez,
Defendants and Respondents.

Civ. 22702.

District Court of Appeal, Second District,
Division 3, California.

July 17, 1958.

Hearing Denied Sept. 10, 1958.

Actions, consolidated for trial, against vendors by purchaser for vendors' failure to convey the realty involved and by broker for commission allegedly due. The Superior Court, Los Angeles, Wilbur C. Curtis, J., granted vendors' motions for a nonsuit in each case, and purchaser and broker appealed from the ensuing judgments of nonsuit. The District Court of Appeal, Shinn, P. J., held that, where vendors' offer to sell certain acreage was wholly gratuitous, right to purchase terminated upon vendors' cancellation of escrow, and that, where purchaser obtained by broker was unwilling to enter into a binding contract to purchase and cause to be prepared an escrow agreement which was lacking in mutuality, broker was not entitled to a commission.

Judgments affirmed.

1. Escrows Ⓒ1

Where escrow instructions specifically provided that purchaser was not to be liable in damages on account of his failure to go through with the transaction for the purchase of realty and that he could not be compelled to do so, compliance with escrow terms was left wholly to purchaser's discretion, and, therefore, escrow instructions did not constitute a binding agreement.

2. Contracts Ⓒ10(5)

For contract for purchase of realty to be binding on either party, its obligations must be mutual and reciprocal.

3. Contracts Ⓒ10(1)

Where, under terms of an agreement, performance is optional with one party, and the option is not exercised, agreement lacks mutuality of obligation and cannot be enforced against other party.

4. Contracts Ⓒ10(1)

Vendor and Purchaser Ⓒ145

Escrow agreement which was not binding on purchaser, was not binding on vendors, and, therefore, vendors' cancellation of the escrow did not constitute a breach of an enforceable agreement to convey the property to purchaser.

5. Vendor and Purchaser Ⓒ18

An option to buy constitutes a proposal by which owner of property invests another with the exclusive right to purchase the property at a stipulated price within a limited or reasonable time without imposing any obligation on the party to whom the option is given.

6. Vendor and Purchaser Ⓒ18(4)

Where no consideration is given for an option, it may be revoked by optionor at any time prior to its acceptance, but if consideration has been given, the option may not be terminated without optionee's consent during the time specified in the option.

7. Evidence Ⓒ419(11)

True consideration or lack of consideration for a contract may always be shown.

8. Escrows Ⓒ5

Where escrow instructions contained ambiguous language for which purchaser was responsible, trial and reviewing courts would be required to adopt the interpretation most favorable to the vendors, namely, that purchaser was to pay costs of escrow in event he canceled the escrow, rather than if either purchaser or vendors canceled the escrow. West's Ann.Civ.Code, § 1654.

9. Vendor and Purchaser Ⓒ18(1)

Purchaser's promise to pay escrow charges in event he decided not to buy the realty involved could not be regarded as consideration for vendors' promise not to withdraw the offer to sell until a certain date.

10. Contracts Ⓒ50

Consideration for a promise must be an act or a return promise which is bargained for and given in exchange for the promise.

11. Vendor and Purchaser Ⓒ18(1)

Where escrow instructions did not contain either purchaser's promise to obtain approval of subdivision plan or to do anything in interest of vendors or vendors' promise to keep offer open in return for purchaser's endeavors, purchaser's detriment in endeavoring to obtain approval of a rezoning and a subdivision did not constitute consideration for vendors' promise to keep the offer to sell the land involved open until a certain date.

12. Vendor and Purchaser Ⓒ16(1)

Where vendors' offer to sell certain acreage was wholly gratuitous, it could be revoked at will by vendors before it was accepted by purchaser, and, therefore, the right to purchase terminated upon vendors' cancellation of the escrow.

13. Brokers Ⓒ58

Licensed real estate broker, who obtained purchaser who was unwilling to enter into a binding contract to purchase vendors' acreage and who caused preparation of escrow instructions which rendered the escrow agreement entirely lacking in mutuality, was not entitled to a commission, following failure to consummate the transaction, on ground that she had procured a purchaser who was ready, willing and able to purchase on terms set by vendors.

14. Brokers Ⓒ63(1)

If there is mutuality of agreement between vendor and purchaser, and vendor refuses to comply with the agreement, broker's right to a commission is not there-

by defeated, even though it was to have been paid only out of proceeds of sale.

Ralph C. Curren, Los Angeles, and Charles T. Lester, Altadena, for appellants.

Kenny, Morris & Ibanez and Richard A. Ibanez, Los Angeles, for respondents.

SHINN, Presiding Justice.

George and Eleanor Vasquez (respondents) owned approximately 58 acres of agricultural land in La Puente. In July 1954, they orally employed Roxy Prather, a licensed real estate broker, to obtain a purchaser. Mrs. Prather obtained Frank R. Halterman, and the parties signed escrow instructions on July 15, 1954.

The escrow instructions contemplated a sale of the property to Halterman or his nominee for \$232,000, on the basis of \$4,000 an acre, the exact acreage to be determined by Halterman's engineers and approved by the parties. The escrow was to close December 1, 1954. Halterman was to deposit \$67,280 and a trust deed securing his promissory note for \$164,720, payable January 5, 1955; respondents were to deposit a deed and 57 shares of water stock and to furnish a title policy. The parties were each to pay one-half of the escrow fees and the cost of drafting and recording the deeds. Mrs. Prather was to receive a \$12,000 commission, payable from the funds accruing to respondents at the close of the escrow.

The instructions contained the following special provisions, which were prepared by the escrow officer at Halterman's request. "Subject Only to * * *. Covenants, conditions, restrictions and public utility easements of record * * * *subject to my approval.*" "It is understood and agreed that: * * * (3) *In the event of cancellation the buyer is to pay all charges.*" "This escrow may be terminated by the seller at any time after 139 days from the date hereof, provided, the buyer does not deposit the funds agreed upon in

this escrow, or the date of such deposit may be extended by the seller from time to time. *Termination of the escrow by the seller as herein provided shall be the seller's only remedy for buyer's failure to carry out the terms and conditions hereof and seller shall not be entitled to damages or specific performance as against the buyer, anythings [sic] in these instructions contained to the contrary notwithstanding.*" (Emphasis added.)

On September 18, 1954, respondents gave written notice of cancellation of the escrow instructions. Halterman refused to agree to a cancellation and rejected a subsequent offer by respondents to sell him the property for \$4,200 an acre. October 25, 1954, respondents brought an action against Halterman for declaratory relief, in which it was contended that the escrow instructions were unenforceable and had been repudiated by the sellers; respondents caused the action to be dismissed after December 1st. Halterman did not deposit the \$67,280 or the trust deed in the escrow. The acreage was later sold by respondents to one Garrick for \$4,800 an acre.

Halterman sued the Vasquezes for substantial damages for their failure to convey the property. In a separate action, Mrs. Prather sued for her \$12,000 commission. The actions were consolidated for trial. Trial was to a jury. At the close of the evidence for the plaintiffs, respondents made motions for a nonsuit in each case; both motions were granted by the court. The present appeals are from the ensuing judgments of nonsuit; the appeals are presented on a single record and a single set of briefs.

The amended complaint in each suit stated several causes of action. In his first cause of action, Halterman alleged the execution of a written contract for the purchase and sale of the acreage, which respondents breached by cancelling the escrow. Mrs. Prather's first cause of action was likewise predicated on the existence of a written contract, which contained a promise by respondents to pay her a commission. The alleged contracts consisted

of the escrow instructions, copies of which were attached as exhibits. General demurrers to these counts were sustained by the court without leave to amend upon the ground that the escrow instructions did not constitute an enforceable contract of sale. In his second cause of action, Halterman alleged that the parties signed escrow instructions, that respondents cancelled the escrow in bad faith and refused to convey the property unless he agreed to pay an additional \$200 an acre, and that he was excused from depositing the cash and trust deed in escrow because the escrow instructions had been repudiated by Mr. and Mrs. Vasquez. Mrs. Prather alleged, in her second cause of action, that she obtained a purchaser ready, willing and able to buy the property on the terms set by respondents, that the parties signed escrow instructions, and that respondents wilfully frustrated a purchase by Halterman. Mrs. Prather also alleged a third cause of action in the form of a common count for services rendered to respondents as a real estate broker. The answers of respondents denied the allegation that Mrs. Prather had obtained a buyer ready, willing and able to purchase the acreage, and alleged that the Vasquezes were under no obligation to deposit a deed to the property until Halterman deposited the down payment and trust deed, which he did not do. Respondents also alleged a number of affirmative defenses upon which no evidence was introduced at the trial.

Halterman was the chief witness for the plaintiffs. He testified that he was engaged in subdividing the area surrounding respondents' acreage and that he had previously purchased several properties in the neighborhood. He stated that at all times between July 15 and December 1, 1954, he was ready, willing and able to buy the acreage; a financial statement, indicating that in October 1954 he had assets in excess of \$150,000, was introduced in evidence by stipulation.

The witness stated that after the escrow instructions were prepared, he gave copies to Mr. and Mrs. Vasquez and read the in-

structions aloud while respondents read their copies. He explained to Mr. and Mrs. Vasquez the provisions which we quoted earlier. He told them that if their land could not be subdivided he did not wish to buy it and that he wished to be protected from suit in case the acreage was not suitable for subdivision. With respect to his promise to "pay all charges" in the event of a cancellation, he testified that he told the escrow officer that "I wanted the clause in there to limit my liability in purchasing this land, in other words I'd guarantee all the escrow costs if it didn't go through but beyond that I wasn't liable." In response to a question by the court, Halterman stated that the clause meant that he would pay the escrow costs if, after making an investigation, he found that the acreage was unsuitable for subdivision and he did not go through with the transaction for that reason.

Halterman also testified that he began negotiating with the county authorities for a re-zoning and subdivision of the property after July 15th. On September 17th, the day preceding cancellation of the escrow, he went to see Vasquez to ask for an easement across the acreage for sewage purposes, and Vasquez referred him to his attorney, a Mr. Egly. Halterman told Egly that he intended to go through with the transaction and Egly replied "There's ways of breaking contracts." Halterman returned to the farm and told Vasquez that "my counsel had advised me that I had a valid contract with him, and that I was going to pay his money as I agreed upon that contract, and I expected him to live up to his end of the contract, too." Halterman continued his efforts to obtain approval of a subdivision plan after cancellation of the escrow, but he did not deposit the \$67,280 because "there wasn't any use to put up any money." In support of his allegations of damage, Halterman stated his opinion that the property was reasonably worth \$4,750 an acre on September 18, 1954. A bill from the escrow company for \$50 charges in connection with the escrow was introduced as an exhibit; Halterman ad-

mitted that he did not pay the bill. Vasquez paid the charges.

In deciding the motions for nonsuit, the court ruled, as to Halterman, "that the agreement of Mr. Halterman to pay escrow charges in the event that he did not go through with the escrow does not furnish any consideration either for an agreement to sell by the Vasquezes or an agreement on their part * * * to keep an offer open, that is, an offer to sell open until December 1st. * * * There was in my opinion a unilateral promise only on the part of the Vasquezes, and being without consideration it could be withdrawn at any time before acceptance. In the Court's opinion it was withdrawn before any attempt was made to accept it." The court ruled, as to Mrs. Prather, that "there was no unqualified agreement for the payment of any commission to her other than out of a special fund, namely, the proceeds of this sale, which was not a sale, * * * and she having no listing and no contract for the payment of a commission, she could earn one only by procuring not only a purchaser ready, willing and able to buy but also one bound by an enforceable contract to purchase, which this was not."

The first point to be considered is the contention of appellants that the escrow instructions created a binding contract for the purchase and sale of the acreage, as alleged in the first causes of action of each complaint, and that the court erred in sustaining, without leave to amend, respondents' demurrers to those causes of action.

[1-3] In our opinion, the demurrers were properly sustained. There is no basis for a contention that the escrow instructions constituted a binding agreement. It is settled that a contract for the purchase and sale of real property is not binding on either party unless its obligations are mutual and reciprocal; where, under the terms of an agreement, performance is optional with one of the parties, and the option is not exercised, the agreement lacks mutuality of obligation and it cannot be enforced against the other. *Shortell v. Evans-Ferguson Corp.*, 98 Cal.App. 650, 660-661, 277 P.

519, and cases cited; *Seymour v. Shaeffer*, 82 Cal.App.2d 823, 825, 187 P.2d 95; 25 Cal.Jur. 506.

[4] It is obvious from a reading of the escrow instructions that Halterman was under no obligation to deposit the cash payment and trust deed and to complete a purchase of the property. The instructions specifically provided that he was not to be liable in damages on account of his failure to go through with the transaction and that he could not be compelled to do so. Compliance with the terms of the escrow was left wholly to his discretion. Since the agreement was not binding on the purchaser, it was not binding on the sellers, and it cannot be contended that their cancellation of the escrow constituted a breach of an enforceable agreement to convey the property to Halterman.

The next point to be considered is the contention of Halterman that respondents granted him an option to purchase the property on the terms set forth in the escrow instructions, that he gave a consideration for the option, and that respondents had no right to revoke it prior to December 1, 1954, the closing date of the escrow. The argument is without merit.

[5,6] An option to buy is a proposal by which the owner of property invests another with the exclusive right to purchase it at a stipulated price within a limited or reasonable time without imposing any obligation upon the party to whom it is given. (25 Cal.Jur. 506, 507.) Where no consideration has been given for an option, it may be revoked by the optionor at any time prior to its acceptance. *Canty v. Brown*, 11 Cal.App. 487, 105 P. 428; *Raymer v. Hobbs*, 26 Cal.App. 298, 146 P. 906. But an option given for a consideration may not be terminated without the consent of the optionee during the time specified therein. (12 Cal.Jur.2d 206.)

[7] We are of the opinion that no consideration was given by Halterman for a promise by respondents to keep an offer to sell the acreage open until December 1, 1954. Halterman argues that the written

instrument is presumptive evidence of consideration and that his promise to "pay all charges" in the event of a cancellation of the escrow was a sufficient consideration for an option. We are not persuaded by his arguments. The true consideration or lack of consideration for a contract may always be shown. (12 Cal.Jur.2d 240.)

[8,9] It is clear that the charges referred to were the normal charges incurred in the escrow. But the question arises whether this provision of the instructions was to apply to a cancellation of the escrow by the sellers as well as to a cancellation by the purchaser. In this respect the escrow instructions were ambiguous, and since Halterman directed and was responsible for the language of the instructions, the trial court was required, as we are, to adopt the interpretation most favorable to respondents, namely, that Halterman was to pay the costs of the escrow in the event he cancelled the escrow. Civ.Code § 1654. Halterman was the one who reserved the privilege of withdrawing from the transaction. There was good reason for his agreeing that if he did so the sellers would have incurred no expense. There would have been no reason for him to save the sellers from expense in case they refused to sell their property and it is clear that he did not agree to do so. This interpretation of the agreement finds support in Halterman's testimony that he intended to pay the charges if he did not go through with the transaction, and the fact that he did not pay the \$50 charged by the escrow company is further evidence of his understanding that he was not to pay the escrow fees in the event of a cancellation by Mr. and Mrs. Vasquez. Halterman's promise to pay the escrow charges in the event he decided not to buy the property cannot be regarded as consideration for a promise by respondents not to withdraw their offer to sell him the land.

[10,11] We do not doubt that Halterman suffered detriment in endeavoring to obtain the authorities' approval of a rezoning and a subdivision. But the consideration for a promise must be an act or a return promise, bargained for and given in

exchange for the promise. *Bard v. Kent*, 19 Cal.2d 449, 452, 122 P.2d 8, 139 A.L.R. 1032, and cases cited. Halterman's efforts would have constituted consideration for an option had respondents agreed to accept them as such. However, the escrow instructions did not contain a promise by Halterman to obtain approval of a subdivision plan or to do anything in the interests of respondents, and it is clear that respondents did not agree to keep the offer open in return for his endeavors.

[12] Since the offer to sell the acreage was wholly gratuitous, it could be revoked at will by Mr. and Mrs. Vasquez before it was accepted by the purchaser. Admittedly Halterman did not deposit the cash and the trust deed in escrow, and he made no offer to do so. He did not obtain approval of a subdivision plan until November 12th. His statement to Vasquez on September 17th that he intended eventually to pay the money was wholly insufficient to constitute an exercise of the option. His right to purchase the property terminated upon cancellation of the escrow by respondents.

[13] We have next to consider the contention of Mrs. Prather that she procured a buyer who was ready, willing and able to purchase the property on the terms set by Mr. and Mrs. Vasquez, and that she earned a broker's commission notwithstanding the fact that the transaction was never consummated. The argument cannot be maintained.

[14] Mrs. Prather did not have a special contract with respondents for the payment of a commission and compensation was to be paid to her only from the funds accruing to Mr. and Mrs. Vasquez at the close of the escrow. In urging that she was entitled to a commission, Mrs. Prather relies upon *Collins v. Vickter Manor, Inc.*, 47 Cal.2d 875, 306 P.2d 783 and *Coulter v. Howard*, 203 Cal. 17, 262 P. 751. In *Collins* it was

held that where a broker had procured a buyer who was ready, able and willing to purchase on the terms fixed by his principal and the buyer and seller executed an agreement in the form of a deposit receipt which provided that the seller would pay the broker a commission, the right of the broker to receive a commission could not be defeated by the owner's arbitrary refusal to sell the property. The Supreme Court held in *Coulter* that the same rule is applicable even where the broker's commission is payable out of the funds available to his principal at the close of the escrow. Neither case is in point. The buyer obtained by Mrs. Prather was manifestly unwilling to enter into a binding contract to purchase respondents' acreage and he caused to be prepared escrow instructions which rendered the escrow agreement entirely lacking in mutuality. If there had been mutuality of agreement and the sellers had refused to comply, Mrs. Prather's right to a commission would not thereby have been defeated, even though it was to be paid only out of the proceeds of the sale. But since respondents were not obligated to sell the land to Halterman except upon acceptance of their offer before it was withdrawn it cannot be said that they were guilty of an arbitrary refusal to consummate a sale.

We find no substance in appellants' final contention that the motions for nonsuit did not contain a sufficient statement of the grounds of the motions. With particular reference to the motion in Halterman's case three separate grounds were stated and fully argued. These were also applicable to and were urged, with one additional ground, in the Prather case. This was sufficient. *Eason v. Kelly Pipe Co.*, 16 Cal. App.2d 88, 95, 60 P.2d 488.

The judgments are affirmed.

WOOD, J., and NOURSE, J. pro tem., concur.

162 Cal.App.2d 262

Herman WURM, Plaintiff and Respondent,
v.

Lester METZ, Marjorie Metz, his wife, Leonard Glenn Baker and Iva D. Baker, his wife, individually and as co-partners doing business under the firm name and style of Baker and Metz, Defendants,

Leonard Glenn Baker and Iva D. Baker,
Appellants.

Civ. 9334.

District Court of Appeal, Third District,
California.

July 21, 1958.

Rehearing Denied Aug. 15, 1958.

Hearing Denied Sept. 17, 1958.

Actions against lessors who were husband and wife and were allegedly partners of lessee, for money lent and for goods sold and delivered to lessee for use in partnership business. The Superior Court, Yuba County, E. T. Manwell, J., rendered judgment for plaintiff, and lessors appealed. The District Court of Appeal, Warne, J. pro tem., held that where husband furnished land, equipment and money to start chicken business, husband had authority to write checks on account of himself and lessee who operated business, husband worked on premises and entered into contracts for business, cash buyer's license was granted to farm and indicated that husband and lessee were owners thereof, and both parties received about the same amount from business which was operating at a loss, husband was partner in business and was liable for money lent and goods sold to lessee for use of partnership, but that wife was not member of partnership and was not liable for debts of partnership.

Judgment against wife reversed and judgment against husband modified, and as modified, affirmed.

1. Partnership ⚡32

Where lessor furnished land, equipment and money to start chicken business, lessor had authority to write checks on account of himself and lessee who operated business, lessor worked on premises and entered into contracts for business, cash

buyer's license was granted to farm and indicated that both parties were owners thereof, and both parties received about same amount from business which was operating at a loss, lessor was partner in business and was liable for money lent and goods sold to lessee for use of partnership.

2. Partnership ⚡241

Fact that wife owned with her husband the real property on which business was located and she gave notice as one of existing partners of dissolution of partnership between husband and wife and another couple, was insufficient to make wife member of partnership which continued after notice of dissolution was given and wife was not liable for debts of partnership.

3. Partnership ⚡146(1)

Fact that notes were signed by one partner individually was a circumstance to be considered in determining intention of parties, but would not relieve partnership of liability if such partner had authority to bind firm and notes were executed with such intent and were so accepted and credit were extended therefor.

4. Partnership ⚡146(1)

Nature of partnership business consisting of buying, processing and selling poultry fairly and reasonably implied the borrowing of money to accommodate its necessities and fact that notes signed by one partner in connection with loans were signed by him individually did not relieve partnership of liability.

5. Abatement and Revival ⚡80

Where no plea in abatement was entered, defendants waived right to assert defense that plaintiff's action on note was premature.

Corkin & Corkin, Clewe, Blade & McDonald, Oroville, for appellants.

Erling S. Norby, Marysville, John T. Kenward, Yuba City, for respondent.

WARNE, Justice pro tem.

This is an appeal by Leonard Glenn Baker and Iva D. Baker, his wife, from a

judgment against them in the amount of \$12,191.15. Lester Metz and Marjorie Metz, his wife, codefendants, have not appealed.

The complaint alleged and incorporated by reference in each count, "that at all times herein mentioned the defendants were partners doing business under the firm name of Baker and Metz in the County of Yuba, State of California, and as such engaged in the business of raising, buying, producing and selling poultry." In seven counts the complaint alleges indebtedness of said defendants in certain amounts for money loaned and for goods sold and delivered by plaintiff or his assignors to the defendant, Lester Metz, for the use of said partnership and business, or for goods sold and delivered to the defendants.

The answer of the defendants Metz admitted that they were doing business as Baker and Metz for the production and marketing of poultry, admitted the indebtedness alleged in counts 2 and 7, and that plaintiff loaned money to Lester Metz as alleged in count 1 and denied the alleged accounts stated; denied Lester Metz and Marjorie Metz, and Leonard Glenn Baker and Iva D. Baker were partners at any time alleged in the complaint and denied that the money loaned or the goods sold and delivered were for the use of the alleged partnership and the business. In answer the defendants Baker denied that either of the partners were doing business under the name of Baker and Metz or that they were in any way associated with Lester Metz and Marjorie Metz other than that they were the parents of said Marjorie Metz, and the owner of the real property, and improvements thereon, which was leased to the defendants Metz. The evidence shows that in January, 1952, Mr. Baker and Mr. Metz orally agreed that each would receive 50 per cent of the profits from the buying, processing and selling of poultry under the name of Baker and Metz, Mr. Baker in return for furnishing the land, improvements, equipment and \$4,000, represented by 5,000 chickens on hand, and Mr. Metz for his labor. They agreed

that Metz was to keep books. Said agreement was never changed and was in effect when the business was terminated in 1955. From January, 1952, until cessation of the business in February, 1955, the business operated under the firm name of Baker and Metz. A commercial bank account for the business was carried under the name of Baker and Metz. Mr. Baker at all times had authority to write checks on said account. When the agreement was originally made they agreed also that each would receive \$40 a week from the account of Baker and Metz and each did so during 1952. In 1952 they agreed to increase said amount to \$60 a week and from 1953 until discontinuance of the operations each received \$60 from the account of Baker and Metz. Frequently, Mr. Baker went to the place of business in Hallwood. He purchased chickens in Sonoma and Petaluma for the business. He wrote checks for the purchase of poultry and occasionally for the rent due him. When the business was terminated it was indebted in the amount of \$15,000 or \$16,000. From 1952 through 1954 Mr. Baker and Mr. Metz each received about \$8,320 or a total of over \$16,000 from the account of Baker and Metz.

Pursuant to an application for a cash buyer's license to handle poultry for the Baker and Metz Poultry Farm, a partnership consisting of "Glenn Baker" and Lester Metz, a cash buyer's license was granted for one year from January 29, 1952, by the Bureau of Market Enforcement, Department of Agriculture, State of California. A cash buyer's license was granted for one year from January 29, 1953, and again for one year from January 29, 1954, to the Baker and Metz Poultry Farm. These licenses all indicated that Mr. Metz and Mr. Baker were the owners of the business. The license for 1954 was posted upon the premises of the business as required by law. Mr. Baker testified that he had seen the posted license but paid no attention to it.

Defendants introduced a purported lease dated January 1, 1952, executed by the Bakers as lessors and the Metzses as lessees, whereby the Bakers leased to the Metzses

for five years said real property and certain personal property consisting of equipment for the purpose of the acquisition, production and marketing of poultry by the Metzses at this location. The lessees agreed to use the name of Baker and Metz in the poultry business; to pay as rental one-half of the net profits of the business; to keep a complete set of books open to the lessors' inspection and to deliver to the lessors a semi-annual financial statement beginning March 1, 1953, and make a division of profits from the business. Defendants also introduced a notice of going business under a fictitious name and of a dissolution of partnership dated October 31, 1952, recorded November 8th and filed November 18, 1952, and an affidavit of publication of said notice filed January 7, 1953. The notice stated that the copartnership under the name of Baker and Metz, Poultry Producers, existing between Leonard Glenn Baker and Iva D. Baker and Lester Metz and Marjorie Metz was, on September 30, 1952, dissolved, said Bakers having retired from the business, and that the Metzses would continue doing business under the name of Baker and Metz for the production and marketing of poultry at the location involved.

Appellants Baker contend first that the finding that at all times mentioned in the complaint the defendants were partners doing business under the name of Baker and Metz is not supported by the evidence in this case.

In *Singleton v. Fuller*, 118 Cal.App.2d 733, 740-741, 259 P.2d 687, 691, where the Supreme Court denied a hearing, that court said:

"In determining whether a relationship such as that of partners has been created, the courts are guided not only by the spoken or written words of the contracting parties, but also by their acts. [Citation.] The fact that no complete control of any part of a partnership venture is vested in each partner does not negative the existence of a partnership since, by agreement, one partner may be given the duty of man-

agement of the enterprise or any part thereof."

In *San Joaquin Light & Power Corp. v. Costaloupes*, 96 Cal.App. 322, 334, 274 P. 84, 89, the court said:

"* * * The courts will not countenance contrivances for giving persons the whole of the advantage of a partnership without subjecting them to the liabilities, and an agreement which attempts to carry out a joint venture for the mutual profit of the adventurers and evade their responsibility for losses may be enforced and construed as creating a partnership."

As indicated by the trial court in its memorandum opinion in this case, the defendants-appellants Baker appear to have been contriving to receive the benefits of a partnership without being subject to its liabilities.

In *Asamen v. Thompson*, 55 Cal.App.2d 661, 668-669, 131 P.2d 841, 846, the court stated:

"* * * A partnership once shown to exist is presumed to continue until the contrary is shown, and the burden of proof is upon him who asserts its termination."

[1] There is ample evidence to support the finding that Mr. Baker was a partner in the business. Pursuant to an application for a cash buyer's license to handle poultry for the Baker and Metz Poultry Farm, a partnership consisting of Glenn Baker and Lester Metz, a cash buyer's license was granted for one year from January 29, 1952. Defendants introduced a notice of dissolution of partnership that "the copartnership heretofore existing under the firm name and style of Baker & Metz, poultry producers, * * * between Leonard Glenn Baker and Iva D. Baker, husband and wife, * * * and Lester Metz and Marjorie Metz, his wife, * * * was on the last day of September, 1952, dissolved by mutual consent of the parties thereto * * *" However, in the application for the cash buyer's license and in the notice of dissolution defendants were claiming an

existing partnership. No evidence was introduced other than the notice to show that the parties took any steps or had any intent to terminate the existing partnership by the winding up of partnership affairs. Instead, defendants introduced said lease and testified to the effect that defendants operated the poultry business under only one agreement, made on January 1, 1952, whereby the Bakers were lessors and the Metzses were lessees. It would appear that the parties continued the business without any termination or liquidation of partnership affairs and that the partnership continued.

The fact that both Mr. Baker and Mr. Metz each received about \$8,320 from 1952 through 1954 from the business which was operating at a loss shows a community of interest and participation in non-existent profits. Baker never requested a financial statement and did not inspect the books until a week before Mr. Metz left temporarily. At that time he discovered that the business was in bad condition but a week later he received \$60 from the business.

Additional evidence supporting the finding that Mr. Baker was a partner in the business is that when the business was started in January, 1952, he furnished the land, equipment and money; he had authority to write checks on the account of Baker and Metz, and wrote checks for the purchase of poultry and to himself; and he worked on the premises of the business and purchased chickens and entered into other contracts therefor. Further significant evidence is that a cash buyer's license was granted for the years 1952 through 1954 to the Baker and Metz Poultry Farm, indicating Lester Metz and Leonard Glenn Baker as the owners thereof. The license was posted on the premises of the business.

[2] The only evidence connecting Mrs. Baker with the partnership is her ownership with her husband of the real property on which the business was located and her notice as one of the existing partners of dissolution of the partnership as of September 30, 1952. Therefore, it appears that

the finding that she was a partner is not supported by the evidence.

Appellants contend next that the first four causes of action were for money loaned by plaintiff or his assignors to defendant Lester Metz individually. In connection with the first cause of action plaintiff testified that when he made the loans Lester Metz stated that the business of Baker and Metz needed capital because Mr. Baker was having difficulty in selling his property in Indiana; that it was his (plaintiff's) understanding that the firm of Baker and Metz was composed of Mr. Baker and Mr. Metz; that he loaned the money to the business for the purchase of chickens. Lester Metz testified that several times in 1953 he borrowed money from the plaintiff and told him it was to buy and process chickens.

In connection with the second cause of action plaintiff testified that Lester Metz told him he needed funds to buy supplies for current needs because cold storage holdings had not been sold during the holiday season. He had no knowledge of the purported dissolution of the partnership of Baker and Metz.

In connection with the third cause of action Lester Metz testified that he told plaintiff's assignor that he needed the money for operational expenses in the business. Plaintiff's assignor testified that Lester Metz said he wanted to put the money into the poultry business of Baker and Metz.

In connection with the fourth cause of action plaintiff's assignor testified that he loaned the money for the use of the partnership to keep the plant going and he had no knowledge of the purported dissolution of the partnership.

The sums alleged and admitted by defendants Metz in the first and third causes of action were evidenced by notes signed by Lester Metz and in the second and fourth by checks of Baker and Metz, signed by Lester Metz, and returned by the drawee bank to plaintiff or his assignor because of insufficient funds.

In *Stauffer v. Ti Hang Lung & Co.*, 29 Cal.App.2d 121, 124-125, 84 P.2d 209, 211, the court said:

"* * * [P]romissory notes executed by a general partner in the *ordinary course of business* are binding on the other partners, even though they have had no knowledge of the execution thereof."

[3, 4] The fact that the notes were signed by Metz individually, while a circumstance to be considered in determining the intention of the parties, does not relieve the partnership of liability if such partner had authority to bind the firm and the notes were executed with such intent and were so accepted and credit extended therefor. *First Nat. Bank of Dixon v. Spangler*, 49 Cal.App. 133, 192 P. 874. Here the nature of the partnership business, consisting of buying, processing and selling poultry fairly and reasonably implies the borrowing of money to accommodate its necessities. *Jacobson v. Lamb*, 91 Cal.App. 405, 267 P. 114.

[5] Appellants also contend that the first cause of action was prematurely brought. While this cause of action seeks to recover on an alleged stated account, in fact it is actually to recover on a promissory note dated July 1, 1954, due two years thereafter. This action was filed in June, 1955, and tried in March, 1956. The judgment was rendered on March 18, 1957. While plaintiff's action on the note was premature, no plea in abatement was entered. The Supreme Court said in *Seches v. Bard*, 215 Cal. 79, 81, 8 P.2d 835, 836:

"The rule has long been settled that the defense that an action is premature is in the nature of a dilatory plea not favored in the law, and that such defense must be seasonably urged in the trial court or it is waived." See, also, *Kelley v. Upshaw*, 39 Cal.2d 179, 186, 246 P.2d 23.

In this case the defendants waived the right to assert the defense of prematurity.

At the trial plaintiffs stipulated that the defendants were entitled to a credit of

\$624.40 on the sum of \$5,750 alleged in the first cause of action, and since plaintiff testified that \$750 of said amount of \$5,750 was money borrowed by Lester Metz in 1949, at a time prior to the formation of the partnership, defendants are entitled to an additional credit for said sum.

The judgment against Iva D. Baker is reversed. The judgment against Leonard Glenn Baker is modified by decreasing the same in the sum of \$1,374.40, and as so modified the judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



162 Cal.App.2d 416

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Fay STANLEY et al., Defendants,
George Cordon, Defendant and Appellant.
Cr. 1379.

District Court of Appeal, Fourth District,
California.

July 29, 1958.

Rehearing Denied Aug. 22, 1958.

Prosecution for conspiracy to commit offense of bookmaking. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment of conviction, and an order granting probation and defendant appealed. The District Court of Appeal, Griffin, J., held that where it appeared that defendant's activities were carried on mainly through the telephone exchange in connection with his house and his property, condition of three year probation that defendant not have a telephone in his home or upon any property under his control, was not unreasonable.

Judgment and order affirmed.

1. Conspiracy *§*23

Gist of a criminal conspiracy is a corrupt agreement of two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of the objects of the conspiracy. West's Ann.Pen.Code, §§ 182-184.

2. Conspiracy *§*47

The existence of agreement upon which a charge of criminal conspiracy is based may be established by circumstantial evidence and may be inferred from acts and conduct of defendants in mutually carrying out a common purpose in violation of statute. West's Ann.Pen.Code, §§ 182-184.

3. Criminal Law *§*351(1)

Deception and falsehood as to facts under consideration in a criminal prosecution are evidence of a consciousness of guilt.

4. Conspiracy *§*48

Evidence was sufficient to present a question for the jury as to defendant's guilt of conspiring to commit offense of bookmaking. West's Ann.Pen.Code, §§ 182 subd. 1, 337a.

5. Criminal Law *§*982

Where it appeared that defendant's bookmaking activities were carried on mainly through the telephone exchange in connection with his house and his property, condition of three-year probation imposed following defendant's conviction for conspiracy to commit offense of bookmaking, that defendant not have a telephone in his home or upon any property under his control, was not unreasonable. West's Ann.Pen.Code, § 1203.1.

John C. Thompson, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., and James Don Keller, Dist. Atty., San Diego, for respondent.

GRIFFIN, Justice.

Defendant-appellant Cordon was charged in count one of an indictment, along

with defendants Stanley and Phillips, with the crime of conspiracy to commit the offense of bookmaking (violation of sections 182, subdivision 1, and 337a of the Penal Code.) Five separate overt acts are charged. As to count one the jury returned a verdict of guilty. Appellant's sentence was suspended and he was granted probation for three years. As a part of the conditions of probation, he was to serve six months in the detention facilities of San Diego County and pay a fine of \$1,000, not associate with any known bookmakers, not cross the international border into Mexico, and *not have a telephone in his home or upon any property under his control*, except his wife may have such telephone while he is in custody.

Appellant, on appeal, claims: (1) that the evidence is insufficient to establish a conspiracy as alleged; (2) error in the admission of certain evidence and in denying his motion for a directed verdict and for a new trial; and (3) imposition of unreasonable conditions pertaining to the telephone service as above italicized.

One Schrader, District Attorney Investigator, testified that between July 1, 1957, and October 21, 1957, he placed numerous bets on horse races with defendant Stanley at her place of business (a souvenir shop located at 1023 Fourth Avenue) in San Diego; that on several occasions, immediately upon taking the bets, she informed the investigator that she would telephone the bets in and thereupon she would place a telephone call; that on certain of these occasions the investigator overheard defendant state the name of the horse, the name of the track and the amount of the bet, over the telephone. He observed other persons placing bets on horse races with her on some of the occasions on which he was in her place of business. On the afternoon of July 29th the investigator observed the numbers AT-44722, which defendant Stanley dialed after taking his bet (Overt Act No. 2) and he determined that the number was of a telephone located at 4438½ 30th Street, San Diego. On August 1st, after placing a bet with defendant Stanley, the investigator again observed

her dialing the same number he had observed her dialing on July 29th, and again he heard her speak the name of the horses, the track and the amount of the bet into the telephone. The number dialed was AT-44722. On the morning of August 3rd the investigator observed defendant Stanley and appellant Cordon sitting in a booth in a coffee shop and observed them leaving it together. He again observed them leaving the same coffee shop on August 6th. In each instance they were engaged in conversation. On October 21st (the occasion of placing the bet alleged in Overt Act No. 3) Mrs. Stanley informed the investigator that the man with whom she met at the coffee shop was George Cordon; that at these meetings she gave him money or he gave her money; that Cordon "is the person she books for"; that he was a good person to book for and that he "treated her real good". She further stated that Cordon had collected money which was owed for a bet which she had accepted on credit.

Another investigator testified that on October 22nd, 1957, accompanied by investigator Schrader, he went to an apartment designated as 4438½ 30th Street; that he rang the door bell and a woman's voice answered; that he told her he was a police officer, had a search warrant, and asked to be admitted; that upon entering he saw defendant Phillips and observed a considerable amount of bookmaking paraphernalia in the room; that during the time they were in there the telephone rang incessantly; that while the investigator was interrogating defendant Phillips, appellant Cordon entered the house. (Overt Act No. 5). The investigator stated that appellant Cordon, in response to a question, remarked that he recognized the equipment and paraphernalia as a "bookie layout", but said he did not know anything about it, "that he had used a different system"; that Cordon admitted that he owned the premises but denied he knew anything about the bookmaking equipment or that he knew defendant Phillips; and that he also denied that he had met any

bookmakers or any woman or women downtown for coffee or lunch.

One Mary Jane Ducote testified that she had placed bets on horse races with defendant Stanley at Stanley's place of business; and that she had seen appellant Cordon there. Another witness testified that she was engaged in the bookmaking profession in August, 1957, and that she had telephoned her bets to the same telephone number to which the investigator telephoned; that Fay Stanley was telephoning the bets to AT-44722, which she was taking.

A police officer, testifying as an expert on bookmaking professions, stated that the paraphernalia found at the apartment operated by defendant Phillips in the premises owned by defendant Cordon was equipment commonly used by bookmakers in San Diego and was used for the purpose of recording and registering bets. The manager of the telephone company testified that his records showed that the number AT-44722 was the telephone number of an instrument located at 4438½ 30th Street. It was stipulated that these premises were owned by appellant Cordon and his wife.

Cordon testified in his own behalf and denied that he had ever seen his codefendant Phillips prior to the date of her arrest. He said he did not know of the activities being carried on in the premises in the back of his residence on 30th Street; that he told the officers that his wife did all of the renting and that as to most of the tenants "I don't know what they look like". He admitted knowing defendant Stanley and meeting her at Manning's Coffee Shop; admitted having financial transactions with her in an effort to give her a little moral support and a little bit of financial support. Defendant Stanley acknowledged taking money from Schrader and telephoning a bet in for him. She denied knowing defendant Phillips and admitted being friendly with appellant. She stated that she borrowed money from appellant and tried to pay it back. She denied telephoning the number AT-44722, admitted meeting Cordon at the coffee shop, but claimed it was "purely accidental". De-

fendant Phillips did not take the stand to testify.

[1,2] The gist of a criminal conspiracy is a corrupt agreement of two or more persons to commit an offense prohibited by statute, accompanied by some overt act in furtherance of the objects of the conspiracy. *People v. Sica*, 112 Cal.App.2d 574, 580-581, 247 P.2d 72; *People v. Brownstein*, 109 Cal.App.2d 891, 892, 241 P.2d 1056; Penal Code secs. 182-184. The existence of the agreement may be established by circumstantial evidence and may be inferred from acts and conduct of defendants in mutually carrying out a common purpose in violation of the statute. *People v. Benenato*, 77 Cal.App.2d 350, 358, 175 P.2d 296.

As between defendants Stanley and Phillips, the evidence is sufficient to show that they were guilty of violating section 337a of the Penal Code. The only question is the sufficiency of the evidence to show that defendant conspired with them for this purpose. The record discloses that the jurors were clearly told that no evidence of an act or declaration of an alleged conspirator is binding upon any other conspirator unless and until, independent and without the aid of such evidence, a conspiracy as alleged had been proven to be in existence at the time of the act or declaration. And it was also told that the mere association between one or more of the alleged conspirators was not sufficient to prove that such defendant was a member of the alleged conspiracy.

[3] Here, admittedly appellant and his wife were the owners of the premises where the bookmaking was being conducted. He lived in a house on the same lot and was seen, on several occasions, talking to one of the defendants at a coffee shop. He was familiar enough with the premises on 30th Street to enter when the officers were there and did observe the bookmaking paraphernalia which was present. He denied he knew his tenant, which apparently proved to be false, and ventured upon an

incredible explanation of his lack of knowledge of the activity carried on at these premises. Deception and falsehood as to the facts under consideration are evidence of a consciousness of guilt. *People v. Farrell*, 107 Cal.App.2d 25, 29, 236 P.2d 424. Appellant's testimony at the trial and that of the other codefendant who testified tended to connect the appellant with the alleged conspiracy and it might well be inferred that his appearance at the apartment of defendant Phillips was not just a coincidence.

[4] We conclude that the facts established were sufficient to admit the testimony of the co-conspirator, and the motion to strike it was properly denied. The denial of the motion for a directed verdict and for a new trial was authorized. There was sufficient evidence to submit the question of appellant's guilt to the jury.

[5] In *People v. Osslo*, 50 Cal.2d 75, 323 P.2d 397, it was argued that the condition of probation exceeded the trial court's power where the defendants, during the ten-year probation period, were precluded from holding any union position or receiving remuneration from any union. It was there held that where the defendants were guilty of crime growing out of union activities, it was not improper that restrictions be placed upon such activities as a condition of probation. It would appear that these same principles should here apply where appellant's activities were carried on mainly through the telephone exchange in connection with his house and his properties. It does not appear that this condition was harsh and unreasonable under the decisions of *People v. Frank*, 94 Cal.App.2d 740, 211 P.2d 350; *People v. Blankenship*, 16 Cal.App.2d 606, 609, 61 P.2d 352; *People v. Osslo*, supra; and Sec. 1203.1, Penal Code.

Judgment and order affirmed.

MUSSELL, Acting P. J., and McCABE, J. pro tem., concur.

W. R. COREY, Dick Haas Motors, Odeene Bateman and Ivarene Bateman, Husband and Wife, Plaintiffs and Appellants,

v.

CITY OF SAN DIEGO, Atchison, Topeka and Santa Fe Railway Co., Defendants and Respondents.*

Civ. 5857.

District Court of Appeal, Fourth District, California.

July 22, 1958.

Rehearing Granted Aug. 11, 1958.

For Opinion on Rehearing see 329 P.2d 99.

Action to try title to strip of real property in area delineated, in survey made pursuant to partition proceedings, as a public street. The Superior Court, San Diego County, L. N. Turrentine, J., entered judgment adverse to plaintiffs and they appealed. The District Court of Appeal, McCabe, J. pro tem., held, inter alia, that plaintiffs were entitled to prove alleged nonuse of street subsequent to partition proceedings in an attempt to bring into operation provisions of statute declaring that a road not worked or used for five years ceases to be a highway for any purpose.

Reversed and remanded.

1. Judgment ¶747(2)

Where action was brought to quiet title to strip of realty which had been delineated as a public street by prior partition proceedings, intent of parties, referees and court in partition action would be determined by the trial court from the evidence before it at trial of issues. West's Ann. Code Civ.Proc. §§ 748.5, 764, 766.

2. Municipal Corporations ¶663(2)

In action by abutting property owners to quiet title to strip of realty which had been designated as a public street in prior partition action, owners were entitled to prove alleged nonuse of public way subsequent to prior partition action in order to bring into operation statute declaring that road not worked or used for five years

ceases to be highway for any purpose whatever. West's Ann.Civ.Code, § 831; West's Ann.Code Civ.Proc. §§ 748.5, 1910, 2077, subd. 4.

Holliday & Folsom, David S. Folsom, San Diego, for appellants.

J. F. DuPaul, City Atty., Jack G. Whitney, Deputy City Atty., San Diego, for respondents.

McCABE, Justice pro tem.

Plaintiffs bring this action to quiet title to a strip of real property which lies in an area delineated on a Map of Middletown made by J. E. Jackson, described as California Avenue. Defendants are the City of San Diego (hereinafter called City) and Atchison, Topeka & Santa Fe Railway Co. (hereinafter referred to as Santa Fe). From a judgment entered in favor of defendants, plaintiffs appeal.

Historically, Middletown was one of four large areas of land within what is now the City of San Diego and in 1874 was undeveloped land. On October 21, 1874, in the case of Baldwin et al. v. Coutts et al., No. 869, (hereinafter referred to as Baldwin action) a partition decree for Middletown was signed in the 18th Judicial District of the State of California. The Baldwin action was brought to determine the conflicting claims and interests of numerous persons and entities in and to the real property of Middletown. The City of San Diego, the County of San Diego and the predecessors in interests of plaintiffs were among the parties named and appearing in the Baldwin action. Before October 21, 1874, the trial court appointed referees to partition Middletown. The report of the referees, dated October 12, 1874, was filed in the Baldwin case. The referees had a survey and map prepared subdividing Middletown into lots, blocks and streets. The map was referred to and by reference made a part of the decree in the Baldwin action. This map is commonly referred to as "J. E. Jackson Map", "J. E. Jackson Partition Map". "J. E. Jackson Partition Map of

1874", "Map of Middletown made by J. E. Jackson." In the Baldwin decree each litigant was given certain property described by lot or lots and block with reference to the J. E. Jackson Map. By the decree the City of San Diego was given specifically described property. The Baldwin decree made no specific mention of the disposition of the title to the land upon which the streets were laid out. In part, the Baldwin decree ordered, adjudged and decreed, "that the said Report and Map of the said Referees and all things therein, be and they are hereby ratified and confirmed, and that the partition therein and herein made and set forth, be firm, binding, effectual and final as to all parties and that pieces and parcels of land as by said Report and this Decree set off to the Said parties, be theirs, their heirs and assigns forever in Severalty. And this Decree shall ratify and Confirm unto the Said parties the pieces or parcels of land therein and herein set off to them the same as if they had each executed and delivered to each other deeds of release and quitclaim in due form and in accordance with said Report and this Decree." The J. E. Jackson Partition Map was filed in the county clerk's Office October 19, 1874 and the Baldwin decree was filed and became part of the official records of the County of San Diego.

On December 21, 1880, one C. P. Noell, one of the litigants in the Baldwin action deeded a certain interest in a strip of land which was part of California Avenue on the J. E. Jackson Map to the California Southern Rail Road Company, which interest has since vested in Santa Fe Railway. By this deed, Noell granted a right of way to "that portion of California Avenue that lies between the front line of each of said lots and blocks and the middle line of said California Avenue as comes within the route of said railroad according to the Map of said railroad Company's railroad * * *

Plaintiffs, by their complaint to quiet title allege: they and their predecessors in interest have been the owners of certain real property specifically described which

lies within the area delineated as California Avenue (now California Street) on the J. E. Jackson Partition Map of 1874; there was no dedication of or acceptance of said street; the street has never been used for a street by anyone; and since the filing of the J. E. Jackson Partition Map in 1874 the street has been used as if free from any dedication. Also, plaintiffs allege defendant Santa Fe is the owner of a certain specifically described portion of the area delineated on the Jackson Map as California Street. Defendant City answered and denied specifically the allegations of plaintiffs' complaint except it admits the J. E. Jackson Partition Map reflects an area marked California Street. No affirmative defenses were alleged by defendant City. Defendant Santa Fe answered and admitted by failure to deny that it owns the area specifically described in plaintiffs' complaint and the plaintiffs' allegations regarding dedication, non-use and use inconsistent with dedication and affirmatively pleaded the deed from one Noell.

It appears that the plaintiffs' allegations of ownership in defendant Santa Fe, and the affirmative pleadings of defendant Santa Fe do not limit its interest to a right of way but specifically alleges ownership. However the Noell deed attached as an exhibit to defendant Santa Fe's answer which was later admitted to evidence, states: "* * * hereby grant unto said California Southern Rail Road Company, its successors and assigns, a right of way, * * * over, in and upon the following premises * * *"

The pretrial conference order provided in part: "Issues 1. Whether or not the area in question is now a public street or whether title thereto should be quieted in the plaintiffs and the Railway Company."

On the trial date and during the opening statement of plaintiffs' counsel a title company "Litigation Guarantee," a copy of the Baldwin decree, a copy of the J. E. Jackson Partition Map of 1874 were received and marked as plaintiffs' exhibits. During the plaintiffs' opening statement all parties conceded that plaintiffs, respectively, owned

the property contiguous to the parcels of land in litigation. At the close of this opening statement, defendant City moved for a directed verdict. During the discussion on this motion there was introduced and marked as defendant Santa Fe's exhibits, a copy of the Noell deed and a map reflecting the location of the railroad in 1880. The trial court stated that apparently defendant City's motion was intended as a motion for judgment comparable to a motion for summary judgment. Defendant City concurred in this statement. Then, plaintiffs made an offer to prove the street had not been used as a street, the property had subsequently been sold to third persons, and the property in question had been used as if free from dedication. An objection to the offer of proof was sustained. The trial judge in effect ordered judgment entered in favor of defendant City subject to the easement in defendant Santa Fe, and ordered defendant to prepare findings and a decree.

The Conclusions of Law provide the rights and interests of plaintiffs' predecessors in interest and defendant City in California Street were determined in the Baldwin action; California Avenue was dedicated as a public way, road or street by judicial decree in the Baldwin action; the Baldwin decree "is binding, effectual forever on all parties named * * * their successors in interest, pursuant to Section 766 of the Code of Civil Procedure; defendant Santa Fe owns the easement it claims; and section 748.5 of the Code of Civil Procedure is inapplicable where a portion of partitioned property is set apart for a street pursuant to Section 764, Code of Civil Procedure. Judgment was entered accordingly.

Plaintiffs appeal from the judgment and "from the whole thereof." Defendant Santa Fe has not filed briefs on this appeal. On this appeal plaintiffs contend (1) the doctrine of *res judicata* is not applicable, (2) Section 748.5, Code of Civil Procedure is applicable, (3) defendant City abandoned any rights to the property under the provisions of Section 2620 Political

Code, (as it existed between 1874 and 1883) by the City's failure to work or use the property for a five years' period.

Defendant City contends (a) the street was set aside as a public way pursuant to Section 764, Code of Civil Procedure, in the Baldwin action; (b) the Baldwin decree was effectual forever on all parties to that action and their successors in interest and is *res judicata*; (c) Section 748.5, Code of Civil Procedure does not change the effect of Section 766, Code of Civil Procedure; (d) plaintiffs are barred by laches. It does not attempt to answer plaintiffs' contention (3).

As of the time the decree in the Baldwin action was signed and filed, Section 764, Code of Civil Procedure provided in part:

"* * * Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties or sold, but shall remain an open and public way, road or street, unless the referees shall set the same apart as a private way, for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient, in the judgment of said referees, to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways. * * *

In part, and in 1874, section 766 Code of Civil Procedure provided as follows:

"The Court may confirm, change, modify, or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

"1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or of any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life. * * *

"3. On all other persons claiming from such parties or persons, or either of them."

In view of the law apparently applicable to this type of case it is necessary for us to reverse the judgment and remand the case to the trial court for a trial on the issues. The evidence adduced at the trial will determine which, if any, of the law is applicable. In an attempt to be of assistance to the trial judge reference is made to certain case and codified law on the subject.

In *Machado v. Title Guarantee & Trust Co.*, 15 Cal.2d 180, 99 P.2d 245, the action was to quiet title to a strip of land which had been set apart for a public way in a partition proceeding in 1876, but which was never accepted or used or improved for such purpose. It was formally vacated and abandoned by the Board of Supervisors. By the partition proceeding the land was described by metes and bounds. Conveyances subsequent to the partition proceedings, all used the description of the land as set forth in the partition proceedings. The defendants, owners of parcels of land contiguous to the strip of land in question, contended each owned to the center of the strip of land. Defendants relied upon the presumption set forth in section 831, Civil Code and the law contained in section 1112, Civil Code, subdivision 4 of section 2077, Code of Civil Procedure. Apparently all parties to the Machado action obtained title through mesne convey-

ances from the parties to the partition action. In referring to section 764, *supra*, the court at page 184 of 15 Cal.2d, at page 247 of 99 P.2d, said:

"The declaration in the code section, as amended, that the 'portion so set apart' as a street shall not be 'assigned to any of the parties' must here be held to apply to the easement for public use and not to the fee title and may well have reference to the settled proposition that no matter how clearly it may appear that an owner of a parcel of land holds fee title to the center of an adjoining street subject to the public easement, and that the boundary of his parcel is technically, therefore, the center of the street, he nevertheless has no right to the possession or occupancy of any portion thereof while used as a street. But where, as here, the strip set apart was never accepted, used or improved as a street and was thereafter formally abandoned as such, such right of possession and occupancy may not be denied to the contiguous owners. We therefore find nothing in the cited code section that in any way tends to overcome or rebut the presumption 'highly favored in the law' that owners of lands adjacent to a road or street (even though abandoned) own to the center thereof. *Anderson v. Citizens' Sav. & Trust Co.*, 185 Cal. 386, 197 P. 113."

Reference may be made to *Loma Vista Inv., Inc., v. Roman Catholic Archbishop*, 158 Cal.App.2d 58, 322 P.2d 35, which cites and quotes from the Machado case.

[1] In determining intention the court in the Machado case, *supra*, 15 Cal.2d at page 186, 99 P.2d at page 248, said:

"The findings and judgment of the court below and our conclusion herein give effect to the undoubted intention of the original owner, Augustin Machado, and of the court in the petition proceeding to the end that the entire tract should be partitioned among the former's heirs at law in the manner

designated by him and thereafter effectively pass by mesne conveyances to their successors in interest. In the construction of boundaries, the intention of the parties is the controlling consideration. *Miller v. Grunsky*, 141 Cal. 441, 66 P. 858, 75 P. 48; 4 Cal. Jur. 373, sec. 2. Whenever possible, a court should place itself in the position of the parties and ascertain their intent, as in the case of any contract. As stated in *Miller & Lux, Inc., v. Secara*, 193 Cal. 755, 227 P. 171, 173, 'Intention, whether express or shown by surrounding circumstances, is all controlling * * *.'

The intent of the parties, referees and court to the Baldwin action will be determined by the trial court from the evidence before it at the trial of the issues. *Ander-son v. Citizens' Sav. & Trust Co.*, 185 Cal. 386, 197 P. 113 may be helpful to the trial court.

[2] Plaintiffs made an offer of proof regarding use and non-use of California Street in an attempt to bring into operation the provisions of section 2620, Political Code and section 748.5, Code of Civil Procedure. We believe the plaintiffs should have the opportunity to introduce evidence on the issues. Section 2620, *supra*, was not referred to in the Machado case. Section 2620, until its repeal in 1883, read: "A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."

In *Myers v. Daubenbiss*, 84 Cal. 1, 6, 23 P. 1027, 1029, the Supreme Court cited section 2620 and said: "But as the road so established was not opened, worked, or used for nearly 14 years afterwards, and under Section 2620, *supra*, had ceased to be a highway, 'for any purpose whatever,' it is clear that the judgment, of itself, did not justify the defendants in entering upon the plaintiff's land and doing the acts complained of." See, also, *Ferroggiaro v. Board of Public Works*, 52 Cal.App. 393, 395, 198 P. 810.

Defendant City's contentions (b) and (d) were not raised as an issue by its pleadings or by it in the pretrial order. In this regard, see Section 1910, Code of Civil Procedure; *Baird v. Hodson*, Cal.App., 327 P.2d 215; *Reed v. Norman*, 41 Cal.2d 17, 21, 256 P.2d 930; 29 Cal.Jur.2d, Judgments, Sec. 279.

Whether the provisions of section 748.5 is to be applied upon the trial of the issues is not for this court to determine on this appeal.

From the record, the defendant City "recognized" the easement of defendant Santa Fe which "recognition" is inconsistent with the denial in its answer. Upon analysis and with the evidence to be adduced this recognition may place the trial court at a disadvantage. The Noell deed relied upon by defendant Santa Fe is dated in 1880, which is six years after the Baldwin decree. To recognize the Noell deed as granting a right of way to predecessors in interest of defendant Santa Fe may be conceding non-use of California Street for five years after 1874 and effectuating the provisions of section 2620, Political Code, and thus conceding Noell's title and right to grant such a right of way across California Street. Also, if this "recognition" by defendant City is accepted as a stipulation the findings of the trial court might be inconsistent one with the other. If defendant City claims ownership of California Street since 1874, then Noell had no ownership upon which to grant a right of way to defendant Santa Fe. To that extent, possibly the Noell deed to defendant Santa Fe is a so-called "wild deed" and would merely becloud the title of the defendant City. These matters may be adjudged by the trial court upon the trial.

To prove their ownership through their predecessors' interest plaintiffs introduced and there was received in evidence a "Litigation Guarantee". Upon the trial plaintiffs may desire to introduce testimony as to the accuracy of the legal description in Paragraph I of the "Litigation Guarantee", Plaintiffs' Exhibit 1.

Judgment is reversed and the case is remanded to the trial court for a trial upon the issues.

MUSSELL, Acting P. J., and GRIFFIN, J., concur.



162 Cal.App.2d 298

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

William A. IRWIN and Raymond Lee Mulkey, Defendants,

William A. Irwin, Appellant.

Cr. 5990.

District Court of Appeal, Second District,
Division 3, California.

July 22, 1958.

Defendant was convicted of assault with deadly weapon with intent to commit murder, attempted robbery, robbery and burglary. The Superior Court of Los Angeles County, H. Burton Noble, J., rendered judgment and denied defendant's motion for new trial and defendant appealed. The District Court of Appeal, Shinn, P. J., held that it was improper for prosecution to attempt to impeach testimony of alleged associate of defendant by proof that he had made confession in which defendant was implicated, but that it was not established that such manner of interrogation constituted misconduct on part of prosecutor.

Affirmed.

1. Criminal Law ☞1154, 1171(1)

Error in introduction of evidence by people or improper statements or conduct on part of prosecutor do not add up to misconduct invalidating a conviction in absence of showing of bad faith and a purpose to take an unfair advantage of accused, and

such question is primarily, but not entirely, for trial court.

2. Criminal Law ☞338(2)

In prosecution for assault with deadly weapon with intent to commit murder, attempted robbery, robbery and burglary, in view of evidence that one of two men who robbed market in early morning was shot and was seen entering station wagon, that defendant's station wagon of similar description was backed up to rear door of house shortly after robbery, that occupant of house had left early that morning, returned at about time defendant's station wagon was there and was suffering from gunshot wound, it was proper to prove by occupant that he had been shot in early morning of day of robbery.

3. Criminal Law ☞706

In prosecution for assault with deadly weapon with intent to commit murder, attempted robbery, robbery and burglary, prosecutor did not act in bad faith when he questioned defendant's alleged companion in robbery with intention of offering in evidence companion's confession to probation officer if companion failed to implicate defendant, in view of assurance of prosecutor to court that he was expecting that companion would testify to facts which prosecutor understood had been stated to probation officer.

4. Witnesses ☞390

Where prosecutor was surprised by unexpected testimony of his witness, who had allegedly confessed before trial that he and defendant had participated in commission of crime but who at trial denied that defendant had participated, privilege of one who had been surprised by unexpected testimony of his witness to prove statement inconsistent with his testimony could not be used by prosecutor merely as means of getting before jury fact of witness' inadmissible confession.

5. Criminal Law ☞706

Witnesses ☞331½

In prosecution for assault with deadly weapon with intent to commit murder, attempted robbery, robbery and burglary, it

was improper for prosecution to attempt to impeach testimony of alleged associate of defendant by proof that he had made confession in which defendant was implicated, but it was not established that such manner of interrogation constituted misconduct on part of prosecutor.

6. Criminal Law Ⓒ706

In prosecution for assault with deadly weapon with intent to commit murder, attempted robbery, robbery and burglary allegedly committed at market from which two robbers were seen escaping in automobile of same description as that of defendant, it was proper for people to prove by defendant's alleged associate's wife, who testified that associate had used his automobile at approximately the time of robbery, that she and her husband had only one automobile and to prove by police officer that motor and radiator of that automobile were cold shortly after defendant's automobile was seen backed up to rear door of associate's residence for purpose of establishing that associate had left his home and returned to it in automobile other than his own, and, although interrogation of wife for sole purpose of proving that she testified falsely that associate had driven his own automobile was improper, it was not established that such manner of interrogation constituted misconduct on part of prosecutor.

7. Criminal Law Ⓒ684

The people have no right to withhold a part of their evidence in chief with intention of introducing it in the rebuttal.

8. Criminal Law Ⓒ684, 1168(2)

In prosecution for assault with deadly weapon with intent to commit murder, attempted robbery, robbery and burglary allegedly committed at market from which two robbers, one of whom appeared to be wounded, were seen escaping in automobile of same description as that of defendant, wherein wife of alleged associate of defendant testified that she and her husband owned only one automobile, that her husband left house early on morning of robbery and that he returned in a wounded condition, such facts constituted part of

people's case in chief and her testimony was not proper rebuttal, but in view of fact that, if wife had given testimony as part of people's case in chief, defense would not have undertaken to prove contrary facts, irregularity in calling wife in rebuttal as witness for the people was harmless.

9. Criminal Law Ⓒ438

In prosecution for assault with deadly weapon with intent to commit murder, attempted robbery, robbery and burglary allegedly committed at market by two robbers, exclusion of defendant's exhibit purporting to be photograph of partner in crime of person who, according to testimony of assaulted market owner, looked similar in size and general build to larger of his assailants was not improper in view of fact that partner photographed was at no time identified by market owner as man who accompanied defendant.

Cantillon & Cantillon, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

William A. Irwin and Raymond Lee Mulkey were jointly charged with (1) assault with a deadly weapon with intent to commit murder, (2) attempted robbery, and (3) burglary, and by amended information, Irwin was charged with robbery. Defendants were granted separate trials. In a jury trial Irwin was convicted of all four offenses, his motion for a new trial was denied and he appeals from the judgment and order.

It is not contended on the appeal that the evidence was insufficient to justify the verdicts. Samuel R. Sirianni was one of the owners of Phil's Market in Sylmar, Los Angeles County. At about 9 p. m., October 6, 1955, he closed the market and, upon the parking lot adjoining, was assailed by two men who handcuffed him and at the point of guns and a knife forced him to open the market and the safe from which they took \$7,000. They tied up Sirianni and fled.

No arrest was made until an attempted burglary of the market May 25, 1956, when Irwin and Mulkey were arrested. In the October robbery the men were not masked. Upon the trial Sirianni identified Irwin as one of the men who committed that robbery and also identified him as one of two men who attempted to rob him May 25, 1956. On the latter date Sirianni opened the market at about 6:40 a. m.; he noticed that some packages had been knocked to the floor, procured a gun, tiptoed to a rear room and switched on the lights. Two men, wearing masks, appeared with guns from behind boxes, and shots were exchanged simultaneously. The smaller of the intruders fell to the floor, Sirianni's gun jammed, he retreated, fell, rolled away from the gunfire and escaped. The mask worn by the larger man slipped and Sirianni recognized him as the man who had committed the October robbery. Sirianni and another man returned to the market in time to see two men getting into a late model tan Ford station wagon. The smaller of the two men was doubled up, holding his mid-section. Irwin and Mulkey were placed next at Mulkey's home which was about 18 minutes drive from the market. Helmi Lehtola, who lived next door to the Mulkeys, and had seen Irwin and his station wagon there on many occasions, testified that shortly after 7 a. m. on May 25th she saw Irwin's station wagon backed up to the rear door of the Mulkey's home; she observed Irwin looking for something in the back of the station wagon and shortly afterwards heard it leave, sounding as though it was going fast. Mrs. Mulkey, *called in rebuttal*, testified for the People that her husband left home about 7 a. m. on May 25th and returned between 7:30 and 8 a. m., announcing that he had been shot. She summoned a doctor, who notified the police. The officers soon came to the Mulkey home and, presumably through some lead unearthed there, at once set out to locate Irwin, who was driving about and in the afternoon drove to San Bernardino in his station wagon intending to pick up a nephew, William E. Smith, on his way to Big Bear Lake,

where they had planned to do some fishing. Irwin went on to a cabin at Big Bear alone. On the following evening Irwin's nephew came to the cabin and informed Irwin that the police were looking for him. On the next day he contacted an attorney in San Bernardino and on the fourth day thereafter visited the police with his attorney, when he was arrested and released on bail.

The principal ground urged for reversal is that the prosecutor was guilty of prejudicial misconduct in the questioning of Mulkey and Mrs. Mulkey in a manner that was intended to prove by indirection that Mulkey was guilty and that, therefore, Irwin was probably guilty.

[1] The question of misconduct is briefed with full recognition of the rule that error in the introduction of evidence by the People or improper statements or conduct on the part of the prosecutor do not add up to misconduct invalidating a conviction in the absence of a showing of bad faith and a purpose to take an unfair advantage of the accused. This is primarily, but not entirely, a question for the trial court. 4 Cal.Jur. 10 Year Supp. (1943 Edition) 1008-9.

Called as a witness for the People Mulkey testified he had known Irwin for about 30 years. He was shown a gun that was recovered near where the station wagon was parked, close to the market, at the time of the robbery, some gloves and a mask that were recovered at the scene of the robbery, and he testified that he had not seen them before. He testified that on the morning of May 25th, at a point remote from the market, he was shot in the mid-section with a pistol and still suffered from the wound. He denied having been with Irwin or at the market on May 25th. He was then asked: "Now, Mr. Mulkey, do you know a man by the name of Schrogin? A. No, sir.

"Q. He is a Probation Officer? A. Yes." At this point an objection was interposed by defense counsel and a colloquy took place between the court and counsel outside the hearing of the jury. Defense counsel assigned the questioning of Mulkey

as misconduct and moved for a mistrial. In the extended discussion which followed it was stated by the prosecutor that Mulkey in the previous week had told Probation Officer Schrogin that he and Irwin had planned the robbery and had related the circumstances of the shooting and his injury, although he denied that he had had a gun. It appeared in the discussion that Mulkey had been tried and convicted and that before his trial he had made a written confession, which he repudiated at the trial. The prosecutor stated that he had every reason to believe that Mulkey would testify to the facts stated in his confession. It was stipulated, at the request of defense counsel, that Mulkey had not told either of the deputies who were prosecuting the case that he had promised the probation officer that he would testify for the prosecution, and that when requested by the probation officer to reduce to writing his statement implicating Irwin he refused to do so. It was also admitted that the deputy district attorney had not interviewed Mulkey before calling him as a witness. The court denied the motion for a mistrial. Defense counsel moved that the court admonish the jury to disregard any inferences or suggestions that they might ordinarily make from the questions propounded to Mulkey with respect to his knowing Schrogin. When the court was prepared to rule upon this request the following took place:

"Mr. Cantillion: I guess we can let the thing stand the way it is. I will withdraw my motion for the admonishment.

"The Court: I think you will do more damage by an admonishment to the jury than if you leave it alone.

"Mr. Cantillion: I think your Honor is absolutely right. * * *

There was no further questioning of Mulkey.

The first point for discussion is defendant's contention that the prosecutor was guilty of misconduct in calling Mulkey as a witness, and especially in questioning him with respect to his knowing the Probation Officer Schrogin.

[2] It cannot be doubted that the fact that Mulkey had participated in the crimes would have had a strong tendency to implicate Irwin, but in view of the evidence that had been introduced, and was to be introduced, to prove that one of the robbers was shot and was seen entering a Ford station wagon, that Irwin's Ford station wagon of the same description as the one the man entered was backed up to the rear door of the Mulkey home shortly after the robbery, that Mulkey had left his home early that morning, returned at about the time Irwin's station wagon was there and was then suffering from a gunshot wound, it was proper to prove by Mulkey that he had been shot in the early morning of May 25th.

[3] The further questioning, which failed to elicit testimony that Irwin participated in the crime, and the reference to the probation officer presents another question, namely, whether it was misconduct to question Mulkey with respect to Irwin, with the intention of offering his confession to Schrogin if he failed to implicate Irwin. This appears to have been the prosecution's purpose. The People offered to prove the confession, which was refused by the court. We believe the court was warranted in holding that the prosecutor did not act in bad faith in view of his assurance to the court that he was expecting that Mulkey would testify to the facts which the prosecutor understood had been stated to Schrogin.

[4] Although one who has been surprised by unexpected testimony of his witness may be permitted to prove statements inconsistent with his testimony, this privilege could not be used by the prosecutor merely as a means of getting before the jury the fact of Mulkey's inadmissible confession. Any claimed impeachment of Mulkey's testimony would have been of the least possible significance in resolving the material factual issues as compared with the devastating harm to Irwin of evidence of the confession, if, as claimed, it implicated him. *People v. Albertson*, 23 Cal. 2d 550, 576-577, 145 P.2d 7; *People v.*

Lapin, 138 Cal.App.2d 251, 291 P.2d 575; *People v. McCullough*, 158 Cal.App.2d 310, 322 P.2d 289. It is contended that the prosecutor had no sufficient reason for assuming that Mulkey would testify in accordance with his confession when he had not been interviewed concerning the testimony he would give, but if this was merely an error of judgment it would fall short of misconduct. Mulkey was unpredictable. He had confessed at first, repudiated his confession at his trial, and had again confessed. Even if he had promised to testify in accordance with his confession, he might have refused to do so. In ruling that it was proper to interrogate Mulkey in a manner which resulted in his denying that he had been with Irwin or at the market on May 25, the court impliedly held that the prosecutor acted in good faith and in the reasonable belief that Mulkey would admit on the stand that he and Irwin committed the crimes. We cannot disagree with this ruling.

[5] It is apparent that the questioning of Mulkey, which developed that he knew the probation officer Schrogin, carried an implication that Mulkey had been convicted, which fact would have been seriously harmful to Irwin. But the purpose of the prosecutor appears to have been to lay a foundation for Mulkey's impeachment in order not to be bound by his denials and not merely to develop facts which would have tended to prove that Mulkey had been convicted. This is borne out by the fact that the People recognized throughout the trial that evidence of Mulkey's conviction would be inadmissible, made no effort to bring it to the attention of the jury, but carefully refrained from doing so. But whatever harm was caused, if harm there was, could probably have been corrected by an admonition which defense counsel at first requested. Even if the jurors were caused to suspect that Mulkey had been convicted this would have added but little to a conclusion reasonably deducible from the evidence that he was guilty. It appeared from the evidence, other than that given by Mulkey, that, in

all probability, he was the man who was shot in the market and who entered the station wagon holding his mid-section, since, admittedly, he arrived home in a wounded condition at the time Irwin had his station wagon backed up to the rear door of the Mulkey home. Counsel's withdrawal of his request that the jury be admonished was of the same significance as would have been a failure to make an assignment of misconduct. In such cases misconduct can only be treated as ground for reversal if harm to the accused is so grievous as to be beyond correction through the court's admonition. 3 Cal.Jur.2d 647-48. This, we believe, was not such a situation.

As previously mentioned, Mrs. Mulkey was called in rebuttal and testified for the People. In addition to her testimony we have mentioned, she testified that they had only one car, a 1947 Studebaker, that her husband left in it around 7 o'clock in the morning and returned from a half hour to an hour later. She did not see him drive in but she did move the car from the front to the rear of the house. Officer Kunkle, also called in rebuttal, testified that he went to the Mulkey residence about 8 o'clock a. m. on May 25th. He found a 1947 Studebaker on the premises; he checked it for blood and bullet holes, found none, raised the hood, felt the motor block and radiator and they were cold. When Mrs. Mulkey testified that her husband left the house in the Studebaker defense counsel moved for a mistrial on the ground that the witness had been called in bad faith, for the purpose of creating an inference that Mulkey was guilty and that, consequently, defendant was also probably guilty. A motion was made to strike the testimony of Mrs. Mulkey that her husband left in the Studebaker. In the discussion with the court it was conceded by the People that they intended to introduce evidence that the Studebaker had not been driven that morning. The court ruled that further testimony from Mrs. Mulkey that the Studebaker was the only car they owned and that her husband had been shot while he was away from the house was admis-

sible. Her testimony to those facts was received over objection of the defendant, after the witness had been admonished by the prosecutor to mention nothing concerning her husband's case or that he had been convicted.

It is argued that the prosecutor was guilty of misconduct for the reason that his only purpose in introducing the testimony of Mrs. Mulkey was to prove that she was willing to falsify for her husband and Irwin. From this it is contended the jury could have inferred that if she was willing to give false testimony in order to shield her husband he must have been guilty, and that because of his association with Irwin the latter must also have been guilty. The defendant's counsel are far from inexperienced in trial work and their suppositions as to the impression the testimony may have made upon the minds of the jurors may not be lightly disregarded. We do not put aside their argument as fanciful, but, as we shall see, the matter was not important.

[6] It was unnecessary for the People to elicit any testimony from Mrs. Mulkey for the purpose of contradicting it by the testimony of Kunkle. It was, however, proper for the People to prove by her that she and her husband had but one car, and it was manifestly proper to prove by Officer Kunkle that the motor and radiator of that car were cold shortly after Irwin's station wagon was seen backed up to the rear door of the Mulkey residence. Such evidence would have served the purpose of the People in their efforts to establish the fact that Mulkey had left his home and returned to it in a vehicle other than his own. But if an inference adverse to defendant might have been drawn by the jury, as counsel feel was probably done, it would have been of minor significance, and could scarcely have added any appreciable weight to the other evidence of Mulkey's participation in the commission of the offenses. It is unnecessary to repeat it or even to summarize the incriminating evidence, all of which forcibly pointed to the conclusion that Mulkey was shot dur-

ing the attempted robbery and was immediately taken to his home by Irwin. These were the essential facts which the People endeavored to prove. While it was unnecessary to elicit testimony from Mrs. Mulkey that her husband had driven away in his own car the other testimony which she gave was not improperly elicited. But aside from these facts we think there was no reason to suspect that the deputy district attorney did not act in entire good faith. The trial court did not err in holding that there was no misconduct in the questioning of Mrs. Mulkey.

[7,8] Although the point is but briefly mentioned by appellant, we cannot overlook the fact that it was improper to call Mrs. Mulkey in rebuttal as a witness for the People. There were three material and relevant facts to which she testified, namely, that she and her husband owned but one car, that her husband left the house early on the morning of May 25th and that he returned in a wounded condition. These were facts which constituted a part of the People's case in chief and they were the only facts which could properly have been proved by the testimony of Mrs. Mulkey. Her testimony was not proper rebuttal. It was not contradictory of any evidence that had been produced by the defense. The court ruled: "They [the People] are entitled, in my opinion, to produce any evidence from which a reasonable inference might be drawn counteracting his alibi defense." This was to fail to distinguish between evidence which is a part of the People's case in chief and evidence which is not, and may be introduced on rebuttal. The People have no right to withhold a part of their evidence in chief with the intention of introducing it in rebuttal. *People v. Rodriguez*, 58 Cal.App.2d 415, 419, 136 P.2d 626. If an objection had been made upon that ground it should have been sustained. However, we cannot see that the defendant suffered prejudice. The record clearly indicates that if Mrs. Mulkey had given the testimony which we hold was admissible as a part of the People's case in chief, the defense would not have

undertaken to prove that the Mulkeys had more than one car, that Mulkey did not leave the house early on the morning of the 25th or that he did not return in a wounded condition. The irregularity was but a harmless error.

[9] The final point is that the court erred in excluding from evidence a defendant's exhibit marked for identification. This purported to be a photograph of a partner in crime of one Brady. The supposed partner was a small man, Brady a large man. Sirianni, according to the testimony, had stated that Brady, in his picture, looked similar in size and general build to the larger of his assailants. It is argued that the picture of Brady's companion was of a dark-complexioned man, such as Irwin's companion, as described by Sirianna. Appellant argues that if Brady's companion was similar in appearance to the smaller of Sirianni's assailants, the jury might have concluded, if it had examined the photograph of Brady's companion, that Sirianni, noticing the similarity, had actually identified Brady as one of his assailants and not merely as one who resembled his assailant. We do not think this evidence would have had any tendency to overcome the fact testified to by Sirianni and the officers that Sirianni did not identify Brady as one of his assailants, but only stated that there was a resemblance. It is not at all clear that the photograph was excluded from evidence. It was denied admission when first offered, but was marked for identification. Later the court granted the motion of defense counsel for the receipt in evidence of all the defendant's exhibits that had been marked for identification. It does not appear that the photograph in question was not among them. But be this as it may, it would not have been error to exclude from evidence the photograph of Brady's companion, who at no time was identified by Sirianni as the man who accompanied Irwin.

Although we are of the opinion that there was improper interrogation of Mulkey by questions which were intended to

lay a foundation for his impeachment by proof of his confession following his conviction, and improper interrogation of Mrs. Mulkey as to the manner in which her husband left home on the morning of May 25th, for the sole purpose of proving that she testified falsely that he drove his own car, the contention that this manner of interrogation constituted misconduct on the part of the prosecutor has not been established. Moreover, while we have not related Irwin's testimony, we cannot agree that the question of his guilt was a close one. His defense consisted of his own uncorroborated testimony that he was at a lodge meeting the night of October 6, 1955, and that he was in bed at home at the time of the commission of the crimes on May 25, 1956, supplemented by the favorable testimony of numerous character witnesses. He was positively identified by Sirianni as a participant in the crimes and was directly tied to them by the circumstantial evidence.

The judgment and order are affirmed.

PARKER WOOD, J., and NOURSE,
justice pro tem., concur.



162 Cal.App.2d 388

**Flora JENNINGS et al., Plaintiffs and
Appellants,**

v.

**Marvin R. YOUNG and Gene A. Benskin,
Defendants,**

**Marvin R. Young, Respondent.
Civ. 5841.**

**District Court of Appeal, Fourth District,
California.**

July 28, 1958.

Rehearing Denied Aug. 22, 1958.

Hearing Denied Sept. 24, 1958.

Action arising out of automobile collision. The Superior Court of San Diego County, Joe L. Shell, J., rendered judgment in favor of defendants, and plaintiffs ap-

pealed. The District Court of Appeal, Mus-sell, Acting P. J., held that where motorist on two lane highway passed preceding station wagon and trailer on their right side and struck the right rear fender and bumper of defendant's next preceding automobile, and motorist's automobile rolled into oncoming automobile driven by plaintiff's decedent, defendant had right to assume that motorist would obey the law and either slow down or pass on the left, if motorist passed at all in face of oncoming automobile, and defendant's failure to pull over to the left to allow motorist to pass on defendant's right was not negligence and defendant was not liable for death of decedent and for damage to decedent's automobile.

Affirmed.

Automobiles $\Rightarrow$ 172(5)

Where motorist on two-lane highway passed preceding station wagon and trailer on their right side and struck the right rear fender and bumper of defendant's next preceding automobile, and motorist's automobile rolled into oncoming automobile driven by plaintiff's decedent, defendant had right to assume that motorist would obey the law and either slow down or pass on the left, if motorist passed at all in face of oncoming automobile, and defendant's failure to pull over to the left to allow motorist to pass on defendant's right was not negligence and defendant was not liable for death of decedent and for damage to decedent's automobile. West's Ann.Vehicle Code, § 529.

Irmas & Rutter, Beverly Hills and A. P. G. Steffes, Los Angeles, for appellants.

Higgs, Fletcher & Mack, San Diego, for respondent.

MUSSELL, Acting Presiding Justice.

This is an appeal from a judgment of nonsuit in favor of defendant Marvin R. Young in an action for wrongful death and property damage resulting from an automo-

bile collision. The action was brought by the widow and adult children of the decedent William A. Jennings. Defendant Benskin, driver of one of the cars involved in the collision, admitted liability and judgment was entered against him for the sum of \$16,533.

The collision involved occurred at about 4:40 p. m. on November 7, 1956, on highway 395 near the city of Escondido. At the scene of the accident highway 395 runs generally north and south and consists of a main traveled roadbed 24 feet in width with a broken white center line dividing the highway into two main traffic lanes, each 12 feet wide. The north and south main traffic lanes are both improved with shoulders of asphalt and concrete surfacing, each about 10 feet in width. At the outer edge of the shoulder of the northbound traffic lane there is an asphalt curb or "berm" about 15 inches high. At approximately one-half mile south of the place where the accident occurred the highway changes from four lanes to two lanes, one main traffic lane for northbound traffic and the other for southbound travel.

Defendant Young was traveling north in the right-hand lane of the highway in a 1953 Ford at a speed of approximately 55 miles per hour. When he was approximately one-half mile north of the point where the highway changed from four to two lanes, he looked in his rear view mirror and saw another car (a 1949 Ford) traveling north and passing a station wagon and trailer on its right-hand side. The 1949 Ford was being driven by the defendant Gene A. Benskin. When Young first saw the 1949 Ford and station wagon and trailer they were approximately 225 feet to his rear and the Ford was "going a lot faster" than the Young car. After having seen Benskin pass the station wagon and trailer, Young turned his eyes to the roadway in front and a few seconds later when he again looked in the mirror, the Benskin car was approximately 75 feet to the rear and was directly behind Young's car. Young, at this point, had no opinion as to the speed of the Benskin car except that it

was going faster than he was and he was trying to get out of Benskin's way when Benskin's car struck the right rear fender and bumper of his (Young's) car, and then struck or rolled into a car being driven south in the southbound traffic lane by the decedent William A. Jennings.

Appellant contends that the evidence established a prima facie case of negligence on the part of defendant Young and that it was error to grant a nonsuit as to him. It is argued that Young knew that the Benskin car had passed the station wagon and trailer on the right and was then traveling north on a straight line and that Young should have pulled over to the left to allow the Benskin car to pass on his right; that Young pulled "hard to the right" and that it was this sudden swerve which caused the collision. However, Young testified at the trial that he did not swerve but was continuing on a straight line at the time of the impact. While Young made a statement to a traffic officer that when it was apparent to him he was going to be hit from the rear by the Benskin car, he pulled hard to the right of the roadway to prevent a collision, there is nothing in his testimony or statement indicating that he left his proper traffic lane at any time before the impact. The record indicates that Young's car was about 6 feet from the center line of the highway when the accident happened and, since the Benskin car was directly behind him, Young quite properly attempted to let Benskin pass on the left. However, before he could get out of the way of the Benskin car, the accident happened. Young, who was traveling in his own traffic lane, had a right to assume that the Benskin car would obey the law and either slow down or pass on the left, if it passed at all in the face of oncoming southbound traffic. *Richards v. Stanley*, 43 Cal.2d 60, 69, 271 P.2d 23; *Orbach v. Zern*, 138 Cal.App.2d 178, 182, 291 P.2d 120.

Appellants argue that since Young had observed the Benskin car passing the trailer on the wrong side, he was negligent in failing to assume that Benskin would again violate the law by passing Young on the

wrong side. There is no merit to this argument. Under the circumstances shown by the record, Benskin was prohibited by law from passing the Young car on the right (Veh.Code, Sec. 529) and the evidence does not indicate that Young believed that Benskin would endeavor to pass him on the right. There is no substantial evidence that Young did not act as a reasonably prudent person would have acted under similar circumstances and we conclude that the judgment of nonsuit herein was proper.

Judgment affirmed.

GRIFFIN, J., and McCABE J. pro tem.,
concur.



161 Cal.App.2d Supp. 870

Robert POTTER, Plaintiff and Appellant,

v.

**Louis SOLK, etc., Defendant and
Respondent.**

Civ. A. No. 49.

Appellate Department, Superior Court,
San Bernardino County, California.

July 8, 1958.

Conversion action for possession of truck or its value. The Municipal Court of San Bernardino Judicial District, Thomas M. Haldorsen, J., rendered judgment adverse to plaintiff and denied new trial, and plaintiff appealed. The Appellate Department of the Superior Court, Hilliard, J., held that the sole purpose of statute providing that in case of sales contract, if tender is accepted, all title of seller in property levied upon shall pass to party to action making the payment, is to effect a subrogation of party making payment to all rights of vendor including right of repossession and sale of property for default in payment of installments due under sales contract, and that attaching

creditor, who levied upon debtor's truck, which was subject to conditional sales contract, obtained an assignment of contract from conditional vendor and then released attachment, was entitled to sell truck at private sale for nonpayment of installments due under contract.

Affirmed.

1. Courts — 190(6)

Under rules on appeal from municipal courts in civil actions, requirement of certification of engrossed statement by trial judge is mandatory unless parties stipulate that statement, as originally served or engrossed, is correct. West's Ann.Rules on Appeal from Municipal Courts—Civil Cases, rules 7, 15(d).

2. Courts — 190(6)

Where it appeared that engrossed statement of facts was not certified by municipal court as result of failure on part of clerk of court to present engrossed statement to municipal judge for certification or neglect of judge, Appellate Department of Superior Court would, upon its own motion, direct municipal court to certify engrossed statement on appeal. West's Ann.Rules on Appeal from Municipal Courts—Civil Cases, rules 7, 12(b), 15(d).

3. Attachment — 195

The sole purpose of statute providing that, in case of sales contract, if tender is accepted, all title of seller in property levied upon shall pass to party to action making the payment, is to effect a subrogation of party making payment to all rights of vendor, including right of repossession and sale of property for default in payment of installments due under conditional sales contract, and attaching creditor, who levied upon debtor's truck, which was subject to conditional sales contract, obtained an assignment of contract from conditional vendor and then released attachment, was entitled to sell truck at private sale for nonpayment of installments due under contract. West's Ann.Code Civ.Proc. § 689b(6).

J. Frederick Rosen, Coachella, for appellant.

Bayard R. Rountree, Twenty Nine Palms, for respondent.

HILLIARD, Judge.

This is an appeal from a judgment in favor of defendant-respondent, and order which denied the appellant's motion for new trial, in an action in conversion to recover possession of a Dodge pick-up truck, or its value, together with damages for withholding of the vehicle.

The record contains a document entitled "Engrossed Settled Statement of Facts as Ordered by the Court". Docket entries of the trial court indicate that notice of appeal was filed on December 12, 1957. Thereafter, a "Proposal of Narrative Statement" was filed on December 23, 1957. This latter document is not included in the record on appeal, but we assume it is the notice of appellant's desire to set forth the oral proceedings by a settled statement as required by Rule 7 of the Rules on Appeal from Municipal Courts in Civil Cases.

On January 29, 1958, the docket discloses the filing of "Plaintiff's proposed Statement of facts", and thereafter, on February 13, 1958, the filing of "Objections to Plaintiff's proposed statement". Neither of these documents have been included in the record on appeal, but it is apparent that they were considered by the trial court as the proposed statement of appellant, and respondent's proposed amendments thereto. Hearing upon the objections was set for February 21, 1958, and the matter submitted for decision of the trial court at that time.

By minute order of March 4, 1958, the trial court ordered the proposed statement settled "as submitted by respondent", and directed that the statement be engrossed by appellant as settled within 10 days from date thereof. Counsel for appellant then served and filed such engrossed statement of facts. No objections were interposed thereto by respondent, but the record discloses that the trial court has failed to cer-

tify the engrossed statement as required by Rule 7.

Appellant asserts this lack of certification is a fatal defect in the record on appeal.

[1] The requirement of certification of the engrossed statement by the trial judge is mandatory unless the parties stipulate that the statement, as originally served or engrossed, is correct (Rules 7 and 15(d)), and this Court has previously held that the lack of an engrossed or settled statement, and the failure of the trial court to certify the record on appeal, was a proper basis for dismissal of such appeal. *Smith v. Bering Monroe Motors*, 127 Cal.App.2d Supp. 831, 272 P.2d 963.

Respondent contends that the statement is properly settled, and is an adequate record without the necessity of certification. We cannot agree with this contention but believe the subject merits some brief discussion.

[2] In the case now before this Court for consideration, both appellant and respondent have substantially complied with the procedural requirements of Rule 7. The defect in the record exists either as the result of failure upon the part of the clerk to present the engrossed statement to the judge for certification, or the neglect of the judge in this final step of authentication of the record. In the absence of objections to the engrossed statement, it is presumed to have been engrossed in accordance with the order of the trial judge. The lack of such certification requires that this Court, as a preliminary step to consideration of the appeal, should require that such certification be properly made. Pursuant to Rule 12(b) of Rules on Appeal from Municipal Courts in Civil Cases; this Court, upon its own motion, has directed the trial court to certify the engrossed statement on appeal, and now expresses its opinion upon the questions of substantive law presented by the appeal.

A brief résumé of the facts is indicated.

Defendant-respondent in this action (hereinafter referred to as Solk) was the plaintiff in a prior and separate action in

which the appellant (hereinafter referred to as Potter) was the defendant. Such action was instituted for the purpose of recovering a money judgment, and a writ of attachment was issued therein at the request of Solk. Pursuant to such writ the constable levied upon a 1955 Dodge pick-up truck owned by Potter. Third-party claim was filed by Pacific Finance Company, as conditional vendor of the truck. Solk then tendered the balance due on the contract to the constable, who paid such amount to Pacific Finance Company, and the latter then executed a written assignment of the contract to Solk. Thereafter Solk instructed the constable to release the attachment. Written notice was given by the constable to each party of his intention to release the truck pursuant to such instructions. At the time and place specified in the notice, Solk alone appeared and took possession of the truck. Prior to this event Solk had notified Potter of his intention to release the attachment, asserted that he had been subrogated in the position of the conditional vendor, claimed default by nonpayment of installments under the contract, demanded payment of the balance due, and advised Potter that he would proceed to sale of the truck upon nonpayment of said balance.

Potter failed to make payment in accord with the demand and thereafter Solk sold the truck at private sale at a price which approximated the balance due on the contract.

This action in conversion followed, and Potter claims that the possession and sale of the truck by Solk was illegal for the following reasons:

(1) Payment of balance due under the contract, by tender to the constable, did not effect an assignment of the vendor's rights to the attaching creditor;

(2) Provisions of 689b (6) C.C.P. are applicable only in the event the action proceeds to judgment in favor of the attaching creditor;

(3) Assignment of the conditional vendor's interest, either by contract or by operation of law, after levy of attachment,

subrogates the attaching creditor to the rights of vendee and not the vendor;

(4) Since the truck was in custodia legis it could not be sold except upon judgment or order of the Court.

Prior to the amendment of C.C.P. 689.6 in 1949, the Code specifically provided that, upon payment of balance on the contract

"then the title shall pass to the buyer and the property may be sold as in this chapter provided, free of all lien or claim of the seller."

The amendment of 1949 provided that

"If the tender is accepted, all right, title and interest of the seller shall pass to the party to the action making the payment."

This same provision was carried over in the re-drafting of C.C.P. 689b (6), and in the following language:

"* * * if the tender is accepted, all right, title, and interest of the seller in the property levied upon shall pass to the party to the action making the payment."

Counsel for appellant asserts that the payment by Solk to Pacific Finance Company of the balance due under the contract did not result in a subrogation of the vendor's rights, and cites in support of his contention the case of *Casady v. Fry*, 115 Cal.App.Supp. 777, 6 P.2d 1019. That case, however, was decided prior to the 1949 amendment of C.C.P. 689.6, and the opinion of the court was manifestly correct under the law as it then existed.

Counsel for respondents contends that his client became subrogated to the rights of Pacific Finance Company upon payment of the balance due on the contract, and relies upon the case of *Flores v. Stone*, 1913, 21 Cal.App. 105, 131 P. 348, 351, 352.

327 P.2d—63

While there may appear to be some similarity in the factual situation, that case is readily distinguishable from the case at bar. The *Flores* case involved the purchase and attempted foreclosure of a chattel mortgage by an attaching creditor after levy upon a part of the mortgaged property. It subsequently appeared that a substantial portion of the mortgaged property was exempt from levy of attachment or execution. The issues before the Court related to the merging or waiver of liens, and extinguishment of the indebtedness. The case is authority for the proposition that the attaching creditor is not precluded from taking an assignment of the mortgage or the mortgage debt, and such action does not extinguish the debt nor constitute a waiver of the right of foreclosure.

[3] We are here concerned with the interpretation of an express statutory provision which states that upon acceptance of payment all rights of the seller shall pass to the party making the payment. The sole purpose of such Section is to effect a subrogation by the party making the payment to all rights of the vendor. Such rights necessarily include the right of repossession and sale of the property for default in the payment of installments due under the sales contract.

We may dispose of other contentions of appellant by noting that the law contemplates that such rights may be acquired while the property is in custodia legis and that no sale was attempted or accomplished by respondent until the vehicle had been released from the levy of the attachment.

The judgment and order denying new trial are affirmed.

COUGHLIN, P. J., and MITCHELL, J., concur.

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50 Cal.2d 613

**In the Matter of the ESTATE of Carrie
Haseltine THOMPSON, Deceased.**

Don R. LEHMAN, Appellant,

v.

Howard S. CROSBY et al., Respondents.

L. A. 24757.

**Supreme Court of California,
In Bank.**

July 15, 1958.

Proceeding on petition for an allowance of attorney's fees in addition to an allowance of executor's fees. From an order of the Superior Court, Los Angeles County, Harold W. Schweitzer, J., denying the petition, the plaintiff appealed. The Supreme Court, Shenk, J., held that where testatrix nominated petitioner as her sole executor and further directed that in the event petitioner, who was a practicing lawyer, acted as executor and also acted as his own attorney, he should be allowed his fees as executor together with fees which might be allowable to attorney for executor, petitioner was entitled to an allowance of attorney's fees in addition to allowance of executor's fees.

Order reversed.

Opinion, 320 P.2d 604, vacated.

1. Executors and Administrators Ⓒ497

Generally, if an executor, who is a practicing lawyer, elects to act as his own attorney in performance of legal services incident to administration of the estate, he will not be entitled to an allowance against estate for his professional services in absence of some statutory provision entitling

him thereto. West's Ann.Prob.Code, §§ 901, 910.

2. Executors and Administrators Ⓒ490

Where testatrix nominated petitioner as her sole executor and further directed that in the event petitioner who was a practicing lawyer, acted as executor and also acted as his own attorney, he should be allowed his fees as executor together with fees which might be allowable to attorney for the executor, petitioner was entitled to an allowance of attorney's fees in addition to an allowance of executor's fees. West's Ann.Prob.Code, §§ 101, 901, 910.

3. Wills Ⓒ439

A will must be interpreted according to intention of testator and that intention must be given effect as far as possible. West's Ann.Prob.Code, § 101.

Robert S. McClean and McClean, Salisbury, Greenwald & McClean, Los Angeles, for appellant.

No appearance for respondents.

SHENK, Justice.

This is an appeal by Don R. Lehman from an order denying his petition for an allowance of attorney's fees in addition to an allowance of executor's fees. He had acted in the dual capacity as executor and attorney for himself as executor in proceedings for the probate of the estate of Carrie Haseltine Thompson, deceased.

Mr. Lehman, hereinafter designated the petitioner, is a duly licensed attorney at law and in the lifetime of the decedent acted as her attorney. By a second codicil attached to her will she nominated him as her sole

executor and further directed, "that in the event [he] acts as Executor hereunder, and also acts as his own attorney * * * he shall be allowed his fees as Executor, together with the fees which may be allowable to the attorney for the Executor." Mrs. Thompson died February 22, and on March 19, 1956, on his own petition, the petitioner was appointed executor of her will. She left no immediate family, her beneficiaries being her nurse, certain friends, and various "in-laws." The value of the estate was slightly less than \$100,000. The appellant acted both as executor and as attorney throughout the proceedings in probate and in his final account sought and was allowed the statutory executor's fees as well as extraordinary fees. He also sought an additional allowance of \$2,586.75, that being the amount which ordinarily would be fixed as the fee for the attorney for the executor in accordance with statutory provisions. Prob.Code, §§ 901, 910. The trial court found that the legal services rendered to the estate by him were valued in the amount sought, but concluded that the provision in the will for the additional payment of attorney's fees was void. The allowance was accordingly denied.

[1] The general rule with reference to the question involved is set forth in *Re Estate of Parker*, 200 Cal. 132, 251 P. 907, 49 A.L.R. 1025 wherein the court denied the payment of statutory attorney fees to a law firm of which the executor was a partner. It was stated at page 135 of 200 Cal., at page 909 of 251 P. of the opinion in that case: "[I]f the executor * * * being himself a practicing lawyer, elects to act as his own attorney in the performance of the legal services incident to the administration of the estate, the general rule is that he will not be entitled to an allowance against the estate for his professional services, in the absence of some statutory provision entitling him thereto." See also *In re Estate of Vokal*, 121 Cal.App.2d 252, 263 P.2d 64; *In re Estate of Lair*, 70 Cal.App.2d 330, 161 P.2d 288; *In re Estate of Scherer*, 58 Cal.App.2d 133, 136 P.2d 103. It is noted that such a statutory provision was enacted

in the State of New York where, in 1916, the Legislature changed the rule to provide in addition to executor's fees, for the payment for legal services rendered by attorneys for themselves as executors in probate proceedings (Laws 1916, ch. 596), and the statute changing the rule has received judicial approval. *In re Runk*, 181 App. Div. 461, 168 N.Y.S. 970; *Id.*, 224 N.Y. 570, 120 N.E. 875.

[2] The reason for the rule in this state, as declared in *Re Estate of Parker*, supra, 200 Cal. at page 137, 251 P. at page 909, quoting from *Broughton v. Broughton*, 5 De Gex, M. & G. 160 (43 Eng. Reprint, 831), is as follows: "[N]o person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. * * " The petitioner does not dispute the propriety of the foregoing declarations in *Re Estate of Parker* and in other decisions to the same effect. He contends that there are other considerations which require another exception to the rule, namely, in those cases where the testator or testatrix expressly provides in the testamentary document for the allowance of both executor's and attorney's fees to the same person. Such a testamentary direction was not made in *Re Estate of Parker* nor in the other cases following the theory of that decision, whereas in the present case Mrs. Thompson's intention was expressed in clear and unequivocal language and leaves no doubt but that she wished the petitioner to receive the compensation for legal services if he should choose to perform them. Unquestionably there is firmly implanted in our law a policy which should control with a force equal to that of the legislative direction in the State of New York. Such policy is that of giving full force and effect to the clear intention of a testatrix. Prob. Code, § 101. Here that intention is present, and the petitioner's position should be sustained.

The precise question appears to be a novel one insofar as direct adjudication is

concerned. In the matter of *In re Estate of Ellis*, 66 Ohio App. 121, 32 N.E.2d 23, a testator provided in his will that his designated executrix, an attorney, might perform legal services for the estate as well as the ordinary duties as executrix. The court refrained from passing on the question whether the provision in the will was against public policy for the reason that the point was not argued by the parties. The court held that the provision was otherwise valid and that the executrix was entitled to compensation accordingly. In a number of other states the courts have approved the payment of additional compensation to personal representatives of estates of decedents for the performance of legal services. In doing so they have not concerned themselves with policy considerations. They have held generally that as the personal representative would have been authorized to employ another as attorney and would have been entitled to an allowance for his legal services, he was entitled to an allowance for those fees where he has performed the legal services himself. *In re Estate of Wilson*, 1910, 83 Neb. 252, 256, 119 N.W. 522; *Sloan v. Duffy*, 1903, 117 Wis. 480, 485, 94 N.W. 342; *Wisner v. Mabley's Estate*, 1899, 74 Mich. 143, 152, 41 N.W. 835; see also *In re Williams' Estate*, 1928, 147 Wash. 381, 266 P. 137; *Alexander v. Bates*, 1899, 127 Ala. 328, 28 So. 415.

Although the problem has not been squarely presented in probate proceedings, a similar question involving substantially the same considerations has been resolved in favor of the intention of the trustor in cases dealing with transactions between a trustee in his fiduciary capacity and in his individual capacity. The Restatement of the Law, Trusts, section 170, comments (page 440) states: "By the terms of the trust the trustee may be permitted to sell trust property to himself individually * * or otherwise to deal with the trust property on his own account." The rule is expressed in 2 *Scott on Trusts*, section 170.9

(p. 1213) as follows: "By the terms of the trust the trustee may be permitted to do what in the absence of such a provision in the trust instrument would be a violation of his duty of loyalty." The cases in other jurisdictions involve for the most part real estate transactions wherein the trustee might make an individual profit by buying and selling property to and from the trust. The basic policy in those cases prohibits such transactions (Civ.Code, § 2229), but this policy is deemed to have been overridden where in conflict with a specific direction in the governing instrument. In the present case the same considerations are present in favor of compliance with the expressed wishes of the testatrix. By imposing her faith and trust in her designated executor and providing for his compensation, the purpose of the policy which might otherwise restrict self-dealing transactions can no longer be accomplished and the policy is no longer a controlling consideration. There is here the added safeguard of a statutory standard by which the services performed for the estate may be objectively evaluated.

[3] It is well settled that the paramount rule in the construction of a will is that the will must be interpreted according to the intention of the testator (*In re Estate of Wilson*, 184 Cal. 63, 66-67, 193 P. 581; *In re Estate of Murphy*, 157 Cal. 63, 69, 106 P. 230; *In re Estate of Young*, 123 Cal. 337, 344, 55 P. 1011; *In re Estate of Newman*, 68 Cal.App. 420, 423, 229 P. 898; 26 Cal.Jur. 897), and that intention must be given effect as far as possible. Prob.Code, § 101. In the present case there can be no dispute as to the intention of the testatrix and hence the only problem is the fulfillment of that intention. Her direction in disposing of her estate should be given effect as she has provided.

The order is reversed.

GIBSON, C. J. and CARTER, TRAYNOR, SCHAUER, SPENCE, and MC COMB, JJ., concur.

162 Cal.App.2d 314

Betty W. BROWN, Plaintiff and Appellant,
v.

Louis A. BROWN, Jr., Defendant and
Respondent.

Civ. 22855, 23074.

District Court of Appeal, Second District,
Division 2, California.

July 23, 1958.

Rehearing Denied Aug. 18, 1958.

Hearing Denied Sept. 17, 1958.

Divorce action. The Superior Court of Los Angeles County, Alfred E. Paones-sa, J., entered order denying wife's motion to amend interlocutory judgment of divorce nunc pro tunc and order denying wife's application for an award of attorneys fees and costs in connection with her appeal from the first order. The wife appealed. The District Court of Appeal, Herndon, J., held that the record failed to show the necessity for such an award.

Orders affirmed.

1. Judgment ⇨326

Where oral stipulation clearly indicated intention of parties that the judgment, which was to be prepared by plaintiff's attorney, was to constitute the formal and final embodiment of their agreement, and the judgment clarified ambiguities in the stipulation, and formal written judgment was in fact prepared by plaintiff's attorney, there was no such "clerical error" in judgment as would permit an amendment nunc pro tunc on the application of the plaintiff.

See publication Words and Phrases, for other judicial constructions and definitions of "Clerical Error".

2. Judgment ⇨325

On motion to amend judgment, it is exclusive province of trial judge to determine whether any clerical error was made or whether the judgment provided as he intended it to provide.

3. Judgment ⇨305

A judge who has made a decision may thereafter determine whether judgment as written expresses his decision, but he should not direct amendment unless he is satisfied

that original entry does not clearly express the order which was made.

4. Judgment ⇨306

A clerical mistake in judgment can be corrected by an amendment.

5. Judgment ⇨297

Trial courts can modify or amend their judgments only as prescribed by statute.

6. Judgment ⇨326

A final judgment can be amended nunc pro tunc only for purpose of making record conform to truth, and not for purpose of revising and changing judgment to correct a judicial error.

7. Divorce ⇨182

An award of attorneys' fees and costs to aid wife's prosecution of appeal from order denying her motion to amend interlocutory judgment of divorce nunc pro tunc is not a matter of absolute right and may be made only upon a finding of necessity.

8. Divorce ⇨182

Where trial court is satisfied from the record before it that wife's proposed appeal from order denying her motion to amend an interlocutory judgment of divorce nunc pro tunc is not undertaken in good faith or with reasonable belief that it has merits, wife's application for an award of attorneys' fees and costs to aid her prosecution of the appeal should be denied.

9. Divorce ⇨182

An application for allowance of attorneys' fees and costs on appeal in divorce action is addressed to sound discretion of trial court and its order will not be disturbed by the reviewing court unless abuse of that discretion is clearly shown.

10. Divorce ⇨182

In divorce action, record failed to show necessity for award of attorneys' fees and costs to aid wife's prosecution of appeal from order denying her motion to amend interlocutory judgment of divorce nunc pro tunc.

11. Divorce ⇨150(1)

The findings and report of court commissioner favorable to application of wife for award of attorneys' fees and costs to

aid her prosecution of appeal from order denying her motion to amend interlocutory judgment of divorce *nunc pro tunc* were advisory only and were in no way binding upon the court. West's Ann.Code Civ.Proc. § 259a.

Joseph W. Fairfield and Ethelyn F. Black, Los Angeles, for appellant.

Greenbaum, Baker & Ancel, Los Angeles, for respondent.

HERNDON, Justice.

Plaintiff appeals from (1) an order denying her motion to amend an interlocutory judgment of divorce *nunc pro tunc*; and (2) a subsequent order denying her application for an award of attorney fees and costs in connection with her appeal from the order first mentioned.

[1] When this divorce action was called for trial, both parties being present with their counsel, plaintiff's attorney informed the court that the parties had come to an agreement with respect to the division of their property, and proceeded to offer an oral stipulation in accordance therewith. There were numerous items of property, representing in the aggregate a very substantial estate. The only portion of the lengthy stipulation involved in this appeal relates to the rights which plaintiff was to be given with respect to a certain parcel of real property. It was stipulated that plaintiff was to have "[t]he use of lot 34 located in Palmdale, and all of the income to be derived from said real property. In the event said property is leased for commercial purposes, Mrs. Brown is to have the right to remove the main house located upon said real property and to retain title to said house as her separate property."

Defendant's counsel joined in the stipulation, and both parties expressly declared that they understood and approved it. The concluding provision of the stipulation was to the effect that its terms would be embodied in the interlocutory judgment which was to be prepared by plaintiff's attorney, and submitted to defendant's attorney for

approval before being presented to the court for signing and filing. The case thereupon proceeded as an uncontested matter. The clerk's minute order set forth the stipulation in substantially the same language as above quoted. In due course plaintiff's attorney prepared, defendant's counsel approved, and the trial judge signed an interlocutory judgment which was entered on February 24, 1954. With respect to the above mentioned parcel of real property, the judgment provided that plaintiff should have "The use of Lot 34, Tract 7682, located in Palmdale, California, and the *residential rental* income derived therefrom. In the event said property is leased for commercial purposes, the plaintiff, Betty W. Brown, has the right to remove the house on said real property and retain title thereto as her separate property, *whereupon her right to the income from said real property shall terminate.*" (Emphasis added.)

On February 27, 1957, three years after the entry of judgment, plaintiff (through substituted counsel) filed her notice of motion to amend the judgment *nunc pro tunc* by substituting the inclusive words "all of" for the limiting words "*residential rental*" used to describe the income to which plaintiff was entitled, and by striking the clause which would operate to effect a termination of her right to the income in the event the lot was leased for *commercial* purposes. The amendment would have had the effect of conforming the judgment almost exactly to the literal terms of the oral stipulation. The basis of the motion was that there were substantial variances between the terms of the stipulation and those of the judgment, and that these variances were the result of a clerical error in the judgment.

In denying the motion, however, the trial judge made it very definite that no clerical error was involved. With reference to the language of the judgment the court stated: "It merely clarified that which they wanted, as I understood the stipulation, * * *" With reference to the language of the original oral stipulation, the court commented: "It's ambiguous enough

that they had the right to clarify it in a more specific citing of their intentions, and as I said before, [the judgment was] prepared by the very attorney who represented the wife who is complaining."

And, finally, as to his intentions with reference to the terms of the judgment, the trial judge declared: "I find from studying the file that it was my intention that whatever stipulation they entered into was to be spelled out more specifically by the decree and that's the reason I made the order. That counsel for the plaintiff should prepare it and it should be examined by counsel for the defendant to make sure that they spelled out every bit of that stipulation and that's what they did as far as I'm concerned. I made no error. I signed the decree. I intended to sign it and that's going to be my ruling. I'll take no evidence."

We conclude that the instant appeal is unmeritorious. It appears to us that the actions and declarations of the trial judge as above recited were in all respects reasonable and proper. The oral stipulation itself clearly indicated the intent of the parties that the judgment, which was to be prepared by plaintiff's attorney, was to constitute the formal and final embodiment of their agreement. The ambiguity or incompleteness of the oral stipulation and the consistency of the clarifying language of the judgment are self-evident. The trial judge's comments suffice to eliminate any semblance of basis for a claim of clerical error.

[2] Even if it were conceded for the purpose of this discussion that there was error in the judgment in the form of a substantial departure from the intent of the stipulation, plaintiff could not prevail on this appeal. It was the exclusive province of the trial judge to determine whether any clerical error was made or whether the judgment provided as he intended it to provide.

[3,4] The following statement of the applicable law found in *Kohlstedt v. Hauseur*, 24 Cal.App.2d 60, 74 P.2d 314, and

quoted with approval in *Carpenter v. Pacific Mut. Life Ins. Co.*, 14 Cal.2d 704, at pages 708-709, 96 P.2d 796, at page 798, is completely decisive of the instant appeal: "It is for the judge who made the original decision to decide whether the judgment as written expresses his decision. [Citations.] In acting upon the matter the judge is exercising one of the functions of his judicial office and he will not direct the amendment unless he is satisfied that the original entry does not clearly express the order which was made. [Citation.] In the case of *Livesay v. Deibert*, supra [3 Cal. App.2d 140, 147, 39 P.2d 466], the court further said: 'It was for the trial judge to determine whether the order was complete and all that he intended it to be or whether it was deficient. If the mistake was clerical, it could be corrected. If it was judicial, it could not be. It must be presumed that he found it to be his own clerical error; otherwise he would have had no right to make the second order. The facts were completely and solely within his own knowledge. He alone knew whether a mistake had been made and how it had been made. He had a right to rely upon his own memory [citation] and his determination of the fact is conclusive. [Citations.]'"

Plaintiff's argument that the minute order should prevail over the formal written judgment prepared by her own attorney is even more unreasonable and futile than a similar contention unsuccessfully urged by the appellant in *Edelen v. Edelen*, 150 Cal.App.2d 681, 683, 310 P.2d 486, 487: "Appellant contends further that the minute entry or order of April 26, 1956, constitutes the decision, and not the signed, written judgment. The question of whether the court's remarks at the conclusion of a hearing are the rendition of a decision, or whether they are only an announcement of a decision the court contemplates making by a signed judgment, depends upon the court's statements and intentions at that time. Here the judge obviously intended, and so ordered, that counsel for the husband should prepare

a form of written judgment and submit it to the court for signature, which was done. The attorney for the wife surely did not, at the time the written judgment was presented to him for approval, believe that the minute entry constituted the decision, otherwise he would not have approved in writing the interlocutory judgment as to form to the end that it could be submitted to the trial judge for his signature."

[5, 6] Trial courts can modify or amend their judgments only as prescribed by statute. *Bowman v. Bowman*, 29 Cal.2d 808, 814, 178 P.2d 751, 170 A.L.R. 246. A final judgment can be amended *nunc pro tunc* only for the purpose of making the record conform to the truth, and not for the purpose of revising and changing the judgment to correct a judicial error. *McLaughlin v. McLaughlin*, 141 Cal.App.2d 494, 496, 296 P.2d 878.

The obvious conclusion from the foregoing is that plaintiff's motion to amend the interlocutory judgment was properly denied.

Appeal from Order Denying Attorneys' Fees and Court Costs

[7-10] There is no merit in the appeal from the order denying plaintiff's application for an award of attorneys fees and costs to aid her prosecution of the appeal above decided. No sufficient showing was made to establish either that the award was necessary or that the appeal was being prosecuted in good faith. Such an award is not a matter of absolute right and may be made only upon a finding of necessity. *Kalmus v. Kalmus*, 103 Cal.App.2d 405, 422, 230 P.2d 57; *Loeb v. Loeb*, 84 Cal.App.2d 141, 148-149, 190 P.2d 246. Where the trial court is satisfied from the record before it that the proposed appeal is not undertaken in good faith or with reasonable belief that it has merit, the application should be denied. *Stewart v. Stewart*, 156 Cal. 651, 656, 105 P. 955; *Ganann v. Ganann*, 109 Cal.App.2d 346, 351, 240 P.2d 722. An application for an allowance of attorneys fees and costs on appeal is addressed to the sound discretion of the trial court

and its order will not be disturbed by the reviewing court unless abuse of that discretion is clearly shown. *Ganann v. Ganann*, supra; *Couser v. Couser*, 125 Cal.App.2d 475, 477-478, 270 P.2d 496; *Currin v. Currin*, 125 Cal.App.2d 644, 652, 271 P.2d 61; *Spurgeon v. Spurgeon*, 145 Cal.App.2d 33, 36, 301 P.2d 903; *Kellett v. Kellett*, 2 Cal.2d 45, 48, 39 P.2d 203; *Primm v. Primm*, 46 Cal.2d 690, 696, 299 P.2d 231.

[11] Plaintiff relies heavily upon the fact that a court commissioner, acting pursuant to section 259a of the Code of Civil Procedure, previously had made findings and recommendations favorable to her application. This reliance is misplaced. The findings and report of the commissioner were advisory only and in no way binding upon the court. *Ellsworth v. Ellsworth*, 42 Cal.2d 719, 723, 269 P.2d 3.

Each of the orders appealed from is affirmed.

FOX, P. J., and ASHBURN, J., concur.



162 Cal.App.2d 158

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Irene DOYLE, Defendant and Appellant.
Cr. 3428.**

**District Court of Appeal, First District,
Division 2, California.**

July 16, 1958.

Defendant, charged with the murder of her husband, was convicted of voluntary manslaughter. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., denied motion to reduce judgment to involuntary manslaughter and for probation and defendant appealed. The District Court of Appeal, Dooling, J., held

that defendant's admissions that "I guess I let him have it" and that her husband dared her to stab him and that she did, were sufficient to support conviction but that the trial judge mistakenly believed that he was without power to reweigh the evidence in passing on the motion to reduce to involuntary manslaughter.

Judgment reversed for sole purpose of affording defendant the opportunity to present again to trial court her motion to reduce judgment and her application for probation, with directions.

1. Homicide ⚡33

Voluntary manslaughter is a willful act, characterized by the presence of an intent to kill engendered by sufficient provocation or by absence of premeditation, deliberation and malice aforethought. West's Ann.Pen.Code, § 192, subd. 1.

2. Criminal Law ⚡409

Defendant's admissions that "I guess I let him have it" and that her husband had dared her to stab him and she did, were sufficient to support jury's implied finding that defendant had intent to kill and to sustain conviction for voluntary manslaughter. West's Ann.Pen.Code, § 192, subd. 1.

3. Homicide ⚡340(4)

Although violation of assault with a deadly weapon statute may be either a felony or a misdemeanor, second-degree murder instruction which stated that it was a felony and which defined deadly weapon as any instrument which, used in the manner in which it appeared to have been used, is capable of producing and is likely to produce death or great bodily injury was not prejudicially erroneous in view of fact that defendant was not found guilty of second-degree murder but of voluntary manslaughter. West's Ann.Pen.Code, § 245.

4. Assault and Battery ⚡56

If defendant attempted to commit a violent injury upon her husband's person with a knife thirteen inches long, such a knife so used would be a "deadly weapon"

within assault with a deadly weapon statute. West's Ann.Pen.Code, § 245.

See publication Words and Phrases, for other judicial constructions and definitions of "Deadly Weapon".

5. Criminal Law ⚡982

If defendant voluntarily used a knife thirteen inches long in killing her husband, she was not eligible for probation. West's Ann.Pen.Code, § 1203.

6. Criminal Law ⚡982, 993

The trial judge in passing on motion to reduce conviction of voluntary manslaughter to involuntary manslaughter and for probation had power to reweigh the evidence. West's Ann.Pen.Code, § 1203.

7. Criminal Law ⚡982

Ordinarily, a judgment of voluntary manslaughter is the equivalent of one for involuntary manslaughter since the punishment is the same, but in view of fact that if defendant voluntarily used deadly weapon in killing her husband, she would not be eligible for probation, the distinction was important. West's Ann.Pen.Code, § 1203.

8. Criminal Law ⚡982

The fact that fatal wound was inflicted by a deadly weapon did not compel conclusion, as a matter of law, that defendant was using the weapon and was therefore ineligible for probation. West's Ann.Pen.Code, § 1203.

John J. Fahey, Jr., San Francisco, Herbert Chamberlin, San Francisco, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was charged with the murder of her husband. The jury found her guilty of voluntary manslaughter. On the night of the killing appellant and her husband were visiting friends. The husband was drinking heavily and refused to go home. Appellant twice attempted to telephone for a taxi and her husband cursed and quar-

reled with her. Finally about 3 a. m. they did leave for home in a taxi. Appellant testified that both times that she had attempted to telephone for a cab her husband had slapped her and that he continuously struck her about the head on the way home in the taxi. After they got home her husband continued to strike and shake her. She tried to telephone but her husband continued to strike her. She "grabbed the nearest thing I could reach," which was a 13-inch kitchen knife. Her husband put his hand on hers and kept slapping her and said: "I dare you" and "I'll help you" and he "kept hitting me and hitting me." She further testified that he grabbed her hand and pulled it down. He fell to the floor on his face and appellant tried to turn or stir him. She noticed the knife under him and picked it up, washed it and replaced it in the rack. She then telephoned for an ambulance and the police. The husband was dead on arrival at the hospital. Death was caused by a wound in the groin two inches deep.

Appellant told Officer Samarin who arrived about 3:30 a. m. that her husband had slapped her at the party, in the cab and after they got home and when he threw her cat out that was too much and she picked up the knife to frighten him. He dared her and "I guess I let him have it."

She told Inspector McDonald that her husband had slapped her and thrown her cats out. She took the knife from the rack and when he dared her to stab him, she did.

Appellant makes four points on appeal which we take up in order.

[1,2] 1. *The evidence is insufficient to support the verdict of voluntary manslaughter.*

"Voluntary manslaughter is a wilful act, characterized by the presence of an intent to kill engendered by sufficient provocation and by the absence of premeditation, deliberation and (by presumption of law) malice aforethought. Penal Code, section 192, subdivision 1, defines voluntary manslaughter as the unlawful killing of a human being, without malice 'upon a sudden quarrel or

heat of passion.'" *People v. Bridgehouse*, 47 Cal.2d 406, 413, 303 P.2d 1018, 1022.

Appellant's admissions that "I guess I let him have it" and that her husband dared her to stab him and she did are sufficient to support the jury's implied finding that she had the intent to kill included in the above definition.

[3] 2. *The instruction concerning a deadly weapon was prejudicial error.*

As a part of the definition of second degree murder, that it includes the unlawful killing of a human being with malice aforethought in the perpetration or attempt to perpetrate "any other felony," the court instructed that one of such felonies is the violation of Penal Code section 245, assault with a deadly weapon. The court defined deadly weapon:

"A deadly weapon is any object, instrument or weapon which, used in the manner in which it appears to have been used, is capable of producing and is likely to produce death or great bodily injury."

Appellant first argues that since the violation of Penal Code section 245 can be either a felony or a misdemeanor it was error to instruct that it was a felony. However where an offense may be punished as either a felony or a misdemeanor "the charge stands as a felony for every purpose up to judgment." *Doble v. Superior Court*, 197 Cal. 556, 576-577, 241 P. 852, 860; *People v. Graff*, 144 Cal.App.2d 199, 206, 300 P.2d 837.

Appellant further complains that the portion of this instruction which reads "which, used in the manner in which it appears to have been used" assumed that appellant used the knife in an assaulting manner when there was a conflict in the evidence on that subject. The identical instruction has been held erroneous where the evidence is conflicting as to whether the defendant "used the weapon in an assaulting manner." *People v. Butler*, 118 Cal.App.2d 16, 20, 257 P.2d 109; *People v. Simpson*, 87 Cal.App.2d 359, 362-364, 196 P.2d 933. The error was held cured in *People v. Laya*, 123 Cal. App.2d 7, 17, 266 P.2d 157, by the addition

of the word "if" before the word "used." Such a refinement appears to impute to a jury more astuteness than experience in the trial of jury cases might lead one to expect.

[4] Since the appellant was not found guilty of second degree murder the jury cannot have been misled by the instruction into holding that because a deadly weapon was used the crime must be murder in the second degree. However appellant argues that because of this instruction the jury was precluded from finding appellant guilty of involuntary manslaughter under the instruction that involuntary manslaughter may consist in "the commission of an unlawful act not amounting to a felony," since the jury had been instructed that assault with a deadly weapon is a felony. The jury was expressly instructed that: "An assault with a deadly weapon is an unlawful attempt coupled with a present ability, to commit a violent injury upon the person of another with a deadly weapon." The jury must, to find that this felony had been committed, not only find that the 13-inch knife was a deadly weapon but also that appellant made an "unlawful attempt * * * to commit a violent injury upon the person" of her husband. If the jury found that the knife was used only defensively or threateningly and that in his struggle with her the decedent accidentally impaled himself without an "attempt" by appellant "to commit a violent injury" on his person, it could not under the instructions find that appellant had committed the felony of assault with a deadly weapon. It must to so find determine not only that the knife was a deadly weapon but also that appellant attempted to commit a violent injury upon her husband's person with it. If appellant did attempt to commit a violent injury upon her husband's person with a knife 13 inches long there could be no question that such a knife so used would be a deadly weapon. *People v. Urrutia*, 58 Cal.App.2d 468, 471, 137 P.2d 48; *People v. Caberera*, 104 Cal. App. 414, 417, 286 P. 176. We are satisfied that under the instructions as a whole the appellant suffered no prejudice.

3. and 4. *The court committed error as a matter of law in denying the motion to reduce the judgment to involuntary manslaughter and in denying the application for probation.*

[5, 6] The appellant made a timely motion to reduce to involuntary manslaughter and for probation. The latter motion depended on the former since, if appellant voluntarily used the knife in killing her husband, she was not eligible for probation. Under Penal Code section 1203 a defendant who "used * * * a deadly weapon upon a human being in connection with the perpetration of the crime of which he was convicted" is ineligible for probation. The record is clear from the statements of the trial judge that he mistakenly believed that he was without power to reweigh the evidence in passing on the motion to reduce to involuntary manslaughter. In reaching this conclusion the trial judge relied upon *People v. Sheran*, Cal.App., 306 P.2d 1057. That case, decided by this court, supported the trial judge's view, but after he had acted in reliance upon it, the Supreme Court, which had granted a hearing therein, definitively held that in passing upon such a motion the trial judge does have the power to reweigh the evidence. *People v. Sheran*, 49 Cal.2d 101, 315 P.2d 5.

[7] Ordinarily a judgment of voluntary manslaughter is the equivalent of one of involuntary manslaughter since the punishment is the same. *People v. Huntington*, 8 Cal.App. 612, 616, 97 P. 760. However the distinction becomes important in this case because if voluntary appellant is ineligible to probation for the reason above stated.

[8] The People argue that the appellant in any event suffered no prejudice since the trial judge expressly found that in the commission of the homicide appellant *used* a deadly weapon. In this connection the trial judge stated: "The fact would remain that a deadly weapon was used because it produced a deadly effect." This is a misconception of the law. "The fact that the fatal wound was inflicted by a deadly weapon does not compel the conclusion, as a matter

of law, that defendant was 'using' the weapon and was therefore ineligible for probation." *People v. Southack*, 39 Cal.2d 578, 591, 248 P.2d 12, 20; *People v. Johnson*, 140 Cal.App.2d 613, 295 P.2d 493.

Appellant is entitled to have the trial judge reweigh the evidence in passing upon her motion to reduce to involuntary manslaughter and if the judge after so doing grants the motion, then to entertain her application for probation.

The judgment is reversed for the sole purpose of affording appellant the opportunity to present again to the trial court her motion to reduce the judgment and her application for probation, with directions to the trial court to act thereon in accordance with this opinion.

DRAPER, J., concurs.

KAUFMAN, Presiding Justice.

I concur but in so doing I wish to make it clear that the trial judge has a discretion to grant or deny probation in passing on the motion of appellant.



162 Cal.App.2d 117

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Louis JANISSE, Defendant and Appellant.
Cr. 6117.

District Court of Appeal, Second District,
Division 1, California.

July 14, 1958.

Defendant was convicted of unlawfully furnishing narcotics to minors with a charge of a previous violation and from a judgment in the Superior Court of Los Angeles County, Herbert V. Walker, J., the defendant appealed. The District Court

of Appeal, White, P. J., held that the evidence sustained conviction.

Judgment affirmed.

1. Poisons ☞9

Evidence sustained conviction of unlawfully furnishing a minor a narcotic known as marijuana, as against claim of defendant that testimony of the complainant was incredible and inherently improbable. West's Ann.Health & Safety Code, § 11714.

2. Criminal Law ☞553

In prosecution for unlawfully furnishing minors narcotics, alleged inconsistencies in testimony of the minors did not render their testimony per se unbelievable so as to require the trial judge as the trier of fact to wholly disregard it. West's Ann.Health & Safety Code, § 11714; West's Ann.Code Civ.Proc. §§ 1847, 2061.

Walter L. Gordon, Jr., James L. Garcia,
Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Lynn
Henry Johnson, Deputy Atty. Gen., for
respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused in Count I of a violation of Section 11714 of the Health and Safety Code in that he did on or about April 24, 1957, furnish to Gerald Lyle De Bere, a minor of the age of 16 years, a narcotic, to wit, marijuana. Count II charged defendant with a violation of the foregoing code section, in that on April 24, 1957 he furnished to Michael Stewart Coonce, a minor of the age of 15 years, a narcotic known as marijuana. It was further alleged that defendant had been previously convicted of a violation of Section 11500 of the Health and Safety Code, a felony, in the Superior Court of Los Angeles County, on January 17, 1956. Defendant pleaded not guilty, and denied the prior conviction. When the cause was called for trial, a jury trial was duly waived, and by

stipulation the cause was submitted on the transcript of the testimony adduced at the preliminary examination, each side reserving the right to offer additional evidence, which they did. Defendant was adjudged guilty on both counts. No finding was made on the allegation of a prior conviction. Defendant was sentenced to state prison on each count, the sentences to run concurrently. From the judgment of conviction defendant prosecutes this appeal.

The factual background surrounding this prosecution may be summarized as follows:

In April of 1957, the minor Coonce lived at 5018 Seventh Avenue, in the city of Los Angeles. Some twenty workmen were engaged in the installation of a sewer in the immediate vicinity of said minor's home. Defendant was one of these workmen and worked "right in front" of the minor's home. On Tuesday morning, April 23, 1957, the two minors, accompanied by one Kenny, drove up to the home of Coonce and entered. When they returned to the automobile defendant spoke to them saying "something about us looking like we came out of the house smoking a joint". The minor Coonce "Just laughed" and all three entered the vehicle. The next morning, April 24, the minor De Bere again came to the home of Coonce. The former observed defendant and waved to him. Both minors had a conversation between themselves concerning marijuana. De Bere inquired of Coonce, "I wonder if that fellow out there (referring to defendant) has got any weed?", to which Coonce replied, "I don't know. Ask him." Thereupon, both minors went out to where defendant was working in front of the house. Coonce inquired of defendant, "Do you have a joint?" Defendant answered in the affirmative and handed Coonce a marijuana cigarette. Both boys thanked defendant and Coonce handed him 50 cents. Defendant stated he was hungry and the minors offered to fix him a lunch. Returning to the house Coonce obtained a sandwich which he took to defendant who then returned the 50 cents previously given him.

The cigarette which the boys received was wrapped in brown paper with the ends tucked in. The boys smoked it, inhaling air into the lungs as far as they could, and then holding the smoke as long as they could. The smoking cigarette smelled like burning leaves or bark and made the throat dry. The boys became "high", and they left the house and walked around. De Bere felt as if he were "floating". He felt real "fast" and after a while he "slowed down". Everything was "pretty". He looked at people and talked. To Coonce, at first things seemed "funny", but a little while later he felt "serious". After a while both boys felt their sensations of hunger and thirst to be greatly stimulated, there was a marked difference in the pupils of their eyes, and they felt tired and sleepy.

About 2:00 o'clock the minors returned from the walk and they started thinking about getting "high" again. Coonce went out to defendant and inquired if he "had any more". Defendant replied, "Yes, I will give you some roaches." He stated that he would put them in a roll and drop them. Coonce came back to the house, informed De Bere, and then went to the front porch to wait to receive the "roaches". A "roach" is a partially smoked marijuana cigarette. Defendant dropped, on the ground, a matchbook containing two partially smoked marijuana cigarettes. This matchbook was recovered by Coonce who returned with it to De Bere inside the house. The latter had observed the transaction by looking out through the mailbox in the door. The two boys smoked the partially smoked marijuana cigarettes and received a similar reaction to the reaction they had received from the marijuana cigarette they had smoked earlier in the day, only they did not get quite as "high".

Officer Edwin O. Hall, Los Angeles Police Department, Narcotics Division, listened to the minors relate the events set forth above. It was his opinion that the substance which the boys had received and smoked was a narcotic, marijuana.

Sworn as a witness in his own behalf defendant denied commission of the crimes

charged against him. He testified that on April 24, 1957 he was employed as a workman on a storm drain in the area here in question. He testified that while he had seen the minor De Bere prior to April 24, he never had any conversation with him. That he could not recall having seen the minor Coonce prior to the preliminary examination. That on the Monday before his arrest he had shouted at a group of boys who were pushing a car down the street to stop blocking the trucks; that one of the boys made a "smart" remark, and that Michael Coonce had been among this group. Defendant testified that on the morning of April 24, 1957 he had left work about 10:30 to go to the bank and had not returned until 12:30 in the afternoon; that he had not seen the boys and had no marijuana cigarettes in his possession.

Coleman Davis testified that on April 24, 1957 he was working about 300 feet from defendant; that he had never seen the latter talking to any boy on the street; and that defendant had left between 10 and 11 to go to the bank and had returned at 12:30.

On cross-examination, defendant admitted he had previously been convicted of the crime of possession of marijuana. When defendant was asked if he had stated to a police officer, "I was working there Wednesday, yes, I remember that kid giving me lunch Wednesday, but it was for nothing", he denied making any such statement. Officer Lang of the Los Angeles Police Department testified in rebuttal that defendant had made such a statement to him. On cross-examination Officer Lang further testified that he had asked defendant if the day before the offense he (defendant) had had a conversation with the boys regarding smoking marijuana; that he had specifically asked defendant if he (defendant) had made the statement, "Look at those two bad boys blowing a joint"; that defendant had replied, "I don't think I made that statement, but I may have said something about 'blowing a joint'"; that defendant stated he had been "shucking" (kidding) when he made this remark; that defendant stated that the boy had given him

a lunch for nothing, and that defendant stated he had never given anyone a marijuana cigarette or a partially smoked marijuana cigarette. Defendant, testifying on surrebuttal, denied making these statements to Officer Lang.

Appellant's sole contention on this appeal is that, "The evidence of the complaining witnesses are so highly inconsistent as to render their stories improbable and therefore, the evidence is insufficient to sustain the guilt of defendant beyond a reasonable doubt." In support of this claim, appellant asserts that the testimony is incredible in that it discloses that he had furnished marijuana gratuitously to the two minors whom he had never seen before. That it is inherently improbable that people who possess narcotics go around promiscuously giving it away to strangers. But, appellant overlooks the testimony in the record that the day before the transaction here in question he had a conversation with the minors concerning the use of marijuana. Also, that he considered himself sufficiently acquainted with one of the boys to greet him with a friendly wave of the hand when he saw the boy on the street. Thus, it would appear that appellant and the minors were not complete strangers on April 24, 1957. There is also evidence that the boys gave appellant 50 cents for the marijuana they received, which 50 cents appellant returned to the boys after he was furnished with a lunch. The evidence therefore, indicates that the alleged transaction was not entirely gratuitous on the part of appellant.

[1] We are satisfied that appellant's contention cannot be sustained. In the case of *People v. Lyons*, 47 Cal.2d 311, 319, 320, 303 P.2d 329, 334, the court was confronted with a similar argument and in rejecting it said:

"Appellant next assails the testimony of the prosecuting witnesses as inherently improbable. This contention cannot be sustained. The rule is thus stated in *People v. Huston*, 1943, 21 Cal.2d 690, 693, (134 P.2d 758):

"Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. (Citing case.) To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. (Citing cases.) Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'"

Viewed in the light of the rule announced in the case just cited, it is manifest that the testimony of the two minor witnesses cannot reasonably be strictured as being inherently improbable.

[2] As to appellant's argument that there were inconsistencies in the testimony of the two minors, as well as contradictions, it may well be said that it rarely happens that a case is presented on appeal in which some inconsistencies in the testimony of certain witnesses may not be discovered. As has often been said, reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Undoubtedly, for this reason, our constitution provides that the appellate courts are not authorized to review evidence, except where on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. In accord with the spirit and intent of the constitutional provision, the legislature has ordained that the duly constituted trier of facts is the exclusive judge of the credibility of witnesses (Code Civ. Proc., Sec. 1847), and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by the law that it shall be

conclusive proof of the fact to which it relates (Code Civ. Proc., Sec. 2061). While the alleged variances or inconsistencies asserted to be apparent in the testimony of the two minors, and the contradictions referred to undoubtedly afforded opportunity for a persuasive argument to the trial judge against the reliability of their testimony, we see in them nothing from which a reviewing court could justly conclude that their entire testimony is *per se* unbelievable, and that it was therefore the duty of the trial judge not only to wholly disregard it, but to accept the denial thereof by appellant and find that his guilt had not been disclosed by the evidence to a moral certainty and beyond a reasonable doubt.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.



162 Cal.App.2d 147

PARAMOUNT CITRUS ASSOCIATION,
Inc., a corporation, Plaintiff and
Appellant,

v.

W. C. JACOBSEN, as Director of Agriculture
of the State of California, et al.,
Defendants and Respondents.

Civ. 22626.

District Court of Appeal, Second District,
Division 3, California.

July 15, 1958.

Rehearing Denied Aug. 14, 1958.

Hearing Denied Sept. 10, 1958.

Action by packer and shipper of citrus fruit seeking an injunction enjoining the enforcement of a marketing order for lemon products and for declaratory judgment declaring the order to be void. Judgment for defendants in the Superior Court of Los Angeles County, Clarence M. Hanson, J., and the plaintiff appealed. The District Court of Appeal, Patrosso, J. pro

tem., held that the marketing order was not invalid.

Judgment affirmed.

1. Statutes ⚡219

Contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such unless it is clearly erroneous or unauthorized.

2. Agriculture ⚡2

One engaged in processing lemons by producing frozen lemon concentrate, lemonade and lemon juice, was not engaged in the "operation of canning of fresh fruits" as used in the statute conferring authority upon Director of Agriculture to promulgate marketing orders and amendments thereto and hence the marketing order did not require the assent of 65 per cent of the number of processors engaged in processing of lemons in addition to the assent of the processors who processed 65 per cent or more of the total volume of lemons processed. West's Ann.Agric. Code, §§ 1300.12(f), 1300.13(b), 1300.16(a) (1).

See publication Words and Phrases, for other judicial constructions and definitions of "Operation of Canning of Fresh Fruits".

3. Agriculture ⚡2

A marketing order for lemon products regulating the market for processed lemon products was not invalid on the ground that the notice given by the director of the public hearing for amendments to the order recited that the hearing was to be held upon the request of the lemon products advisory board, in view of the statute indicating that the purpose thereof is to make it mandatory upon the director to hold a public hearing and to give notice thereof before issuing a marketing order or any amendment thereto, it being immaterial that the director may have been motivated to exercise the power to call a hearing at the request of an agency which did not have the power to com-

pel him to do so. West's Ann.Agric.Code, §§ 1300.12(d, e), 1300.15.

4. Agriculture ⚡2

A marketing order for lemon products was not invalid as not legally adopted because public hearing called to consider it was not concluded prior to July 15, 1955 as provided therein in view that the statute contains no limitation as to the time that such public hearing shall be held provided that the statutory notice is given and that the duty laid upon the director in connection with hearings is a continuous one, governed by the statute and not by the terms of any order or regulation issued by the director in conflict therewith. West's Ann.Agric.Code, §§ 1300.12(d, e), 1300.15.

5. Trial ⚡388(4)

Where certain allegations of the complaint were admitted by answer, no finding thereon was required.

6. Trial ⚡388(1)

Where no evidence was adduced in support of special defenses pleaded in the answer, no finding thereon was required.

7. Appeal and Error ⚡1071(6)

Alleged failure to find upon certain allegations in the complaint and special defenses in the answer was harmless where if the trial court had found in favor of plaintiff and against the defendants thereon it would not have affected the ultimate result.

G. V. Weikert, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Alberta Gattone, Deputy Atty. Gen., John E. Fourt, Deputy Atty. Gen., for respondents.

PATROSSO, Justice pro tem.

Plaintiff, a packer and shipper of citrus fruit, including lemons in fresh and processed form, instituted this action against the Director of Agriculture of the State of California and other defendants, seeking an injunction enjoining the defend-

ants from enforcing the Marketing Order for Lemon Products which became effective September 28, 1955, and for a declaratory judgment declaring said marketing order to be void. Judgment was entered in favor of the defendants and plaintiff appeals.

Appellant attacks the validity of the marketing order upon the ground that, for several reasons hereinafter to be mentioned, the order was not adopted in compliance with the requirements of section 1300.16(a) (1) of the Agricultural Code which defines the authority of the director to promulgate marketing orders and amendments thereto.

The marketing order in question is an amendment of the preexisting order which became effective November 3, 1954, and, among other things, extended such previous marketing order for a period of one year commencing October 1, 1955. The marketing order regulates the market for processed lemon products by withholding from the market a certain percentage of the lemons acquired by the processors for processing. It operates only upon processors,¹ of which appellant is one, and is operative at the point at which the processor receives the lemons for processing. At that point he is required to withhold a certain percentage of those lemons or the products processed therefrom, from the market for delivery to the stabilization pool.

Plaintiff and others in the same industry are engaged in processing the entire lemon by breaking it up into its component parts. The processed products fall into two categories—peel products and the juice products. The juice component comprises about 37 percent of the whole lemon used for processing. None of the processors is engaged in canning whole fresh lemons

or lemon segments. Appellant's juice operations for the year covered by the marketing order, were as follows: Frozen lemon concentrate 91 percent of the total juice products produced; frozen concentrate for lemonade 2 percent and frozen single strength lemon juice, 7 percent.

The process followed in the production of juice products, as disclosed by the evidence and the trial court's findings, is substantially as follows: The lemons are washed and placed in a Brown extractor, in which the lemons are cut in half and the juice extracted. The juice is then run through a fine screen to remove the seed, pulp and fruit cells, and some of the oil in the juice is evaporated. For the production of lemon concentrate, the water is evaporated out of the lemon juice in the quantity required to produce the concentration desired. The concentrate is then placed in various types of containers—cans, 50-gallon drums and barrels—and frozen. It is not sterilized by heat and it is dependent upon freezing and its own acidity for preservation. The frozen lemonade concentrate consists of a mixture of lemon concentrate, fresh lemon juice and sugar. When water is added to it by the ultimate consumer, the result is lemonade. This is packed in six-ounce cans. It is not sterilized by heat and in the main is not heat treated, but is dependent upon freezing for its preservation. Frozen single strength lemon juice is produced in the same manner as lemon concentrate except that no water is removed by evaporation. It is packed in cans and frozen. Like the lemonade, it is not sterilized by heat and in the main is not heat treated, being dependent upon freezing for preservation.

The first reason assigned by appellant in support of its contention that the mar-

1. "Processor" means any person engaged within this State, in the operation of receiving, grading, packing, canning, fermenting, distilling, extracting, preserving, grinding, crushing or changing the form of an agricultural commodity for the purpose of preparing such agricultural commodity for market or of marketing such

commodity, or any other activities performed for the purpose of preparing such commodity for market or of marketing such commodity, but shall not include a person engaged in manufacturing from an agricultural commodity, so changed in form, another and different product." Agri.Code, § 1300.12(f).

keting order is not valid is that it was not assented to by 65 per cent of the *number* of the processors of lemon products within the State of California. It is, however, conceded that the marketing order was assented to by processors who processed more than 65 percent of the total *volume* of the lemons processed within the state.

The argument in support of this contention is that the operation in which plaintiff is engaged—processing lemons by producing frozen lemon concentrate, lemonade and lemon juice in the manner hereinbefore described, constitutes “the operation of canning of fresh fruits” as these words are used in section 1300.16(a) (1) of the Agricultural Code² which is the statute conferring authority upon the Director of Agriculture to promulgate marketing orders and amendments thereto. Unless the premise upon which this argument is predicated is true, the contention falls. Thus the question: Does the operation of producing and packaging of lemon juice products in the manner hereinbefore described, constitute the “canning of fresh fruits” as those words are used in the statute?

Upon this score the trial court made the following findings of fact in addition to those hereinbefore referred to: “III That none of said lemon juice products

produced by plaintiff rely upon sterilization by heat and hermetic sealing for their preservation. That all of said products rely upon freezing for their preservation. IV That the terms ‘canning’ and ‘canning of fresh fruits’ have a clear, fixed, well-established, common and well-understood meaning. That that meaning is particularly well understood in the agricultural industry and in the canning, preserving and processing industry and in the wholesale and retail trade where such commodities are marketed. V That the term ‘canning’, in its common and well understood sense and particularly as it is understood in industry and trade, means a process of preservation by sterilization by heat and hermetic sealing; that if either process of sterilization by heat or of hermetic sealing is absent the process is not ‘canning’ even though cans may be used as containers; that where an additional process, such as freezing, is necessary to effect preservation, the operation is not that of ‘canning’ within the established and well-understood meaning, and within the trade and industry meaning of that term. VI That the term ‘canning of fresh fruits’, within the common and well-understood meaning and within the trade and industry meaning of the term, means the preservation by sterilization by heat and hermetic sealing

2. “No marketing order or major amendment thereto, directly affecting handlers, issued pursuant to this chapter, shall become effective unless and until the director finds that such marketing order or amendment thereto has been assented to in writing by the handlers engaged in the marketing activity or activities regulated by such marketing order who handle not less than sixty-five percent (65%) of the *volume* of the agricultural commodity regulated thereby which is processed or distributed within the area defined in such marketing order or amendment thereto, or that such marketing order or amendment thereto has been assented to in writing by not less than sixty-five per cent (65%) of the *number* of handlers engaged in the marketing activity or activities regulated by such marketing order; *provided, however, that any marketing order or major*

amendment thereto directly affecting processors engaged in the operation of canning of fresh fruits or vegetables or canning or packing of dried fruits shall not be made effective by the director unless and until the director finds that such marketing order or amendment thereto has been assented to in writing by such processors engaged in the marketing activity or activities regulated by such marketing order or amendment thereto who processed not less than sixty-five percent (65%) of the volume of such agricultural commodity which is processed within the area defined in such marketing order or amendment thereto and by sixty-five percent (65%) of the number of such processors engaged in the marketing activity or activities regulated by such marketing order or amendment thereto.” (Emphasis added.)

of fruit in whole or recognizable form. That lemon juice products produced by plaintiff after processing are not fruit in whole or recognizable form * * * VIII That the operations engaged in by plaintiff in the manufacture of its lemon juice products constitute preservation by freezing of such products. IX That the operations engaged in by plaintiff in the production of its lemon juice products do not constitute the operation of canning of fresh fruits."

Finding III is not specifically attacked by the appellant. As to the remaining findings which we have quoted the complaint is that these consist "of conclusions which invade the province of the court" and are unsupported by the evidence. Neither objection is well taken.

As to the first, in the complaint it is alleged, among other things, that at all the times therein mentioned, "in processing citrus fruit, including lemons, plaintiff was and now is engaged in the operation of canning of fresh fruit." This allegation is specifically denied by defendants in their answer. Thus the factual issue was tendered as to whether appellant was in fact engaged in the operation of canning of fresh fruits. This was the ultimate fact which the court was called upon to determine. In any event, if it be conceded that these findings are misplaced conclusions of law, the court having, as previously noted, found expressly as to the nature of appellant's operations, no prejudice was suffered by the appellant unless it be determined that the probative facts so found do not warrant the conclusion drawn therefrom, namely: that appellant's operations did not constitute the "operation of canning of fresh fruits." To this question we now address ourselves.

Upon the trial considerable testimony was adduced by both parties through witnesses engaged in the business of processing lemons for the production of juice products, as to whether such operation constituted the canning of fresh lemons. While this evidence was conflicting, that

adduced upon behalf of the defendants was to the effect that within the industry the terms "canning of fresh fruits" means the preservation by heat and hermetic sealing of fruits in whole or recognizable form; that in the terminology employed in the industry, a fruit was not a juice and a juice was not a fruit. The court accepted the testimony of the defendants' witnesses and we are unable to say that it was not warranted in so doing.

It further appears, and the trial court so found, that continuously since the words "canning of fresh fruits" were incorporated in section 1300.16(a) (1) of the Agricultural Code (Stats.1939, c. 665, p. 2132), the Director of Agriculture has placed upon the terms "canning" and "canning of fresh fruits" an administrative construction in accordance with the trial court's finding, and has so continuously construed said language as it applies to the marketing order for lemon products since the first marketing order covering such activity was adopted on March 10, 1951; and that since that time the director, as the administrative agent charged with the duty of administering the California Marketing Act, has continuously construed said language as being inapplicable to any of the processing operations engaged in by the members of the industry regulated by said marketing order.

[1] The rule is well settled that "[T]he contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." *Richfield Oil Corp. v. Crawford*, 1952, 39 Cal.2d 729, 736, 249 P. 2d 600, 604.

[2] In the light of the testimony introduced upon the trial and heretofore adverted to, it may not be said that this administrative construction is clearly erroneous. Moreover, aside from the evidence as to the understanding of the language in question among those engaged

in the particular activity, we find it difficult to believe that in common parlance the use of the phrase "canned fresh lemons" would be understood as referring to or being descriptive of a can of frozen lemon concentrate or lemon juice or that a reference to the contents thereof as "canned fresh lemons" would be understood as meaning that the can contained only the juice of lemons in some form. Thus we agree with the trial court's conclusion that appellant was not engaged in the operation of "canning of fresh fruits" and that the marketing order in question did not require the assent of 65 percent of the *number* of the processors engaged in the processing of lemons in addition to the assent of the processors who processed 65 percent or more of the total *volume* of lemons processed.

[3] Appellant next contends that the marketing order was not validly adopted because the notice given by the director of the public hearing called to consider amendments to the marketing order recites that the hearing was to be held "upon the request of the Lemon Products Advisory Board." The argument here is that the director is not required to hold a public hearing to consider the issuance of a marketing order or amendments thereto at the request of the advisory board, or otherwise stated, that the board is not authorized by the statutes to request the director to call and hold such a public hearing for the purposes stated. We see no merit in this claim.

Section 1300.13(b) of the Agricultural Code, to which appellant points in support of its contention, prescribes the pro-

cedure which must be followed by the director in issuing a marketing order or an amendment to an existing marketing order, and reads as follows:

"Whenever the director has reason to believe that the issuance of a marketing order, or amendments to an existing marketing order, will tend to effectuate the declared policy of this act with respect to any agricultural commodity, he shall, either upon his own motion or upon application of any producer or handler of such commodity, or any organization of such persons, give due notice of, and an opportunity for, a public hearing upon a proposed marketing order or such amendments to such existing marketing order."

A reading of this section makes it crystal clear that the purpose thereof is to make it mandatory upon the director in any and all events, to hold a public hearing and give notice thereof before issuing a marketing order or any amendment to an existing marketing order. It expressly provides that he may call and hold such public hearing upon his own motion and must do so at the request of any "producer or handler" of the commodity to be regulated thereby. We need not pause to consider the validity of appellant's argument that the advisory board³ is not a "producer⁴ or handler"⁵ or "any organization of such persons" within the meaning of these words as used in the statute. If it be conceded that it is not, and that the director was not *required* to call and hold a public hearing at its request, this does not detract from his power to call and hold such a public meeting inasmuch as he is expressly author-

3. Any marketing order issued by the director must provide for the establishment of an advisory board to assist the director in the administration of the marketing order. The members thereof are appointed by, and hold office at the pleasure of the director. The members of such board must be producers and/or handlers of the particular commodity regulated by the order. Among the duties of the board is that of recommending to the director amendments to the marketing order. Agric.Code, § 1300.15.

4. " 'Producer' means any person engaged within this State in the business of producing, or causing to be produced for market, any agricultural commodity as herein defined." Id. 1300.12(d).

5. " 'Handler' means any person engaged within this State as a distributor in the business of distributing an agricultural commodity in intrastate commerce, or any person engaged as a processor in the business of processing an agricultural commodity." Id. 1300.12(e).

ized to do so upon his own motion. That he may have been motivated to exercise such power at the request of an agency which did not have the power to compel him to do so, is clearly of no consequence.

Appellant further contends that the marketing order was not legally adopted because of the fact that the public hearing called to consider the same, was not concluded prior to July 15, 1955. The facts in this connection which are undisputed are these: On June 3, 1955, the director in accordance with the statute, called a public hearing to be held on June 15th, 1955, at which there would be received and considered suggested amendments to the then existing marketing order for lemon products and any requests with reference to the modification, suspension or termination of said marketing order. Notice of such hearing was given as required by law, and the hearing was held at the time and place specified, at the conclusion of which the hearing was recessed to a future date with the announcement that the director would give notice as to the time of the reconvening of the hearing. On July 7, 1955, the director gave notice in the manner prescribed by the statute of reconvening the hearing on July 19, 1955, at which time the hearing was reconvened and finally concluded.

As previously noted, the marketing order with which we are here concerned is an amendment of the pre-existing marketing order which had become effective November 3, 1954. The latter order, as does the one herein involved, contained a provision reading as follows:

"Section A. *Effective Time.* This Marketing Order shall become effective on the date specified by the Director and shall continue in effect until September 30, 1955, or until sooner suspended or terminated by the Director, or by operation of law, in accordance with the provisions of the Act. The Director shall call a public hearing at least once a year during the term of this Order for the purpose of considering any proposed amendments and requests with reference

to modification, suspension or termination of this Order. Such hearings shall be held not later than July 15 of each year."

It is by virtue of the foregoing provision of the marketing order that appellant seeks to support his contention that the order was not legally adopted because the hearing to consider the same was not concluded prior to July 15th. We do not agree.

[4] The powers and duties of the Director of Agriculture to issue a marketing order or amendments to an existing order, are prescribed by Agricultural Code, section 1300.13, subd. (b) of which is hereinabove quoted at length. Thereby the duty is laid upon the director "*whenever*" he "has reason to believe that the issuance of a marketing order, or amendments to an existing marketing order, will tend to effectuate the declared policy of this act" to give notice of and hold a public hearing upon such proposed marketing order or such amendments to such existing marketing order. The statute contains no limitation as to the time or times that such public hearing or hearings shall be held, provided that the statutory notice thereof be given. The duty laid upon the director in this respect is a continuous one, and this being so, he may not shirk or limit the same by any provision in an existing marketing order. His power to call and hold such hearings and the procedure therefor being prescribed by statute, the propriety of the manner in which the same was exercised in a particular instance is to be tested by the terms of the statute—not by any order or regulation that may have been issued by the director in conflict therewith.

[5-7] Finally appellant complains that the trial court failed to find upon certain allegations in plaintiff's complaint and three special defenses pleaded in defendants' answer. With respect to the allegations in plaintiff's complaint referred to, they were admitted by the answer and consequently no finding thereon was required. *Sacre v. Chalupnik*, 1922, 188

Cal. 386, 390, 205 P. 449; Weaver v. Fickett, 1927, 82 Cal.App. 116, 122, 255 P. 257. As to the special defenses pleaded in the answer, no evidence was adduced in support thereof and likewise no finding thereon was required. McKelvey v. Wagy, 1910, 157 Cal. 406, 409, 108 P. 268. Moreover, if the trial court had found in favor of the plaintiff and against the defendants upon each of the special defenses, this would in nowise have affected the ultimate result. Other objections to the findings have heretofore been adverted to and disposed of adversely to appellant's contentions.

The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



162 Cal.App.2d 175

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Edward Hawthorne STILLWELL, Defendant and Appellant.

Cr. 6005.

District Court of Appeal, Second District,
Division 2, California.

July 16, 1958.

Rehearing Denied Aug. 6, 1958.

Coram nobis proceeding. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered order denying petition, and the petitioner appealed. The District Court of Appeal, Herndon, J., held that record failed to show any neglect or wrongdoing of defense counsel or any corroboration by public official of alleged assertion of defense counsel that a guilty plea would lead to grant of probation.

Affirmed.

1. Criminal Law §997(15)

In coram nobis proceeding, record failed to show any neglect or wrongdoing of defense counsel or any corroboration by public official of alleged assertion of defense counsel that guilty plea would lead to grant of probation.

2. Criminal Law §997(9)

Coram nobis will not issue to vacate a plea of guilty on sole ground that the plea was induced by a misleading statement by defense counsel.

3. Criminal Law §997(9)

Where the statement by counsel represents that a commitment was made by some responsible state official, coram nobis is not available in absence of a showing that the representation was apparently corroborated by acts or statements of official.

4. Criminal Law §997(5)

A defendant's claim that his counsel did not competently represent him cannot be considered in a coram nobis proceeding.

5. Criminal Law §997(6)

To prevail in a coram nobis proceeding the petitioner must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of filing his petition.

Edward Hawthorne Stillwell, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Dep. Atty. Gen., for respondent.

HERNDON, Justice.

This is a patently unmeritorious appeal from an order denying petition for the writ of error *coram nobis*. Petitioner was sentenced to state prison on May 10, 1956. In November of the same year he filed a petition for writ of error *coram nobis*, which was denied. The instant petition, which was filed on May 10, 1957, is the second application for the same writ.

[1] The gist of the allegations contained in the present petition is that defendant was induced to enter a plea of guilty to a felony charge by (a) the statement of his attorney to the effect that the district attorney had given a promise of probation in consideration of the plea, and (b) the unqualified assurance of his attorney that a plea of guilty would lead to his being granted probation.

Defendant does not allege that any representation or commitment was made directly to him by any responsible official, but indicates that he acted solely upon the advice and statements of his own counsel. The petition incorporates exchanges of communications between defendant and his counsel in which the latter brands as "a deliberate falsehood" defendant's assertion that counsel had told him the district attorney had "agreed" to probation in exchange for a plea. The attorney characterized defendant's other allegations as "fabrications, misstatements, and misquotations of what was said to you and done in connection with your case."

[2-5] "[C]oram nobis will not issue to vacate a plea of guilty on the sole ground that the plea was induced by a misleading statement by defense counsel." *People v. Rodriguez*, 143 Cal.App.2d 506, 508, 299 P.2d 1057, 1058; *People v. Kirk*, 98 Cal. App.2d 687, 693, 220 P.2d 976. Where the statement by counsel represents that a commitment was made by some responsible state official, *coram nobis* is not available in the absence of a showing that the representation was apparently corroborated by the acts or statements of the official. *People v. Gilbert*, 25 Cal.2d 422, 443, 154 P.2d 657; *People v. Rodriguez*, *supra*. A defendant's claim that his counsel did not competently represent him cannot be considered in a *coram nobis* proceeding. *People v. Flores*, 147 Cal.App.2d 243, 247, 305 P.2d 90. To prevail in such proceeding the petitioner must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him

at any time substantially earlier than the time of filing his petition. *People v. Ayala*, 138 Cal.App.2d 243, 246, 291 P.2d 517.

The record here contains no showing, nor even a suggestion, that the alleged statements of defense counsel were apparently corroborated by the act or statement of any public official. There is nothing in the record to substantiate any charge of neglect or wrongdoing on the part of defense counsel. The unexplained tardiness of the petition in itself was a sufficient justification for its denial.

The order is affirmed.

FOX, P. J., and ASHBURN, J., concur.



162 Cal.App.2d 130

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Richard WILSON, Defendant and
Appellant.
Cr. 3449.

District Court of Appeal, First District,
Division 2, California.

July 15, 1958.

Prosecution for conspiring to sell narcotics and for unlawful sale of narcotics wherein narcotics agent testified that he spoke to certain person, giving the conversation, and that such person pointed to agent and to defendant and defendant then nodded and that agent subsequently purchased narcotics from defendant. From adverse judgment of the Superior Court, City and County of San Francisco, Walter Carpeneti, J., the defendant appealed. The District Court of Appeal, Dooling, J., held that order of proof of conspiracy did not prejudice defendant.

Judgment affirmed.

Criminal Law §1169(7)

In prosecution for conspiring to sell narcotics and for unlawful sale of narcotics wherein narcotics agent testified that he spoke to a certain person, giving the conversation, and that such person pointed to agent and to defendant and defendant then nodded and that agent subsequently purchased narcotics from defendant, order of proof of conspiracy did not prejudice defendant. West's Ann.Health & Safety Code, §§ 11500, 11502; West's Ann.Code Civ.Proc. § 1870, subd. 6.

L. Thomas Hehir, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was charged with conspiring with one Fred Dalton to violate sections 11500 and 11502 Health and Safety Code and with a substantive violation of section 11502 (agreeing to sell a narcotic and delivering another substance in lieu thereof). He was found guilty by a jury on both counts.

An agent for the State Narcotics Bureau testified that he met Dalton in front of a pool hall in San Francisco and asked Dalton if he had any stuff (a common term for narcotics). Dalton said no, but his man Jimmy had some. "He'll take care of you." Dalton pointed to appellant who was standing about 10 feet away inside the pool hall. "Jimmy [appellant] nodded his head in recognition that Dalton had pointed to me and pointed to him * * *" The witness then immediately walked over to appellant, told him that Dalton had sent him and he wanted to purchase some heroin. Wilson said that it would cost \$10, the witness gave him \$10 and appellant returned in about 20 minutes and gave the witness a package containing a white powder. Chemical analysis established that the powder was not heroin but an innocuous substance.

The only point made on appeal is that the trial court admitted in evidence, over proper objection, the conversation with Dalton without proof of a conspiracy. Code Civ.Proc. § 1870(6).

On the facts of this case the order of proof was unimportant. If the witness had testified that he spoke to Dalton, without giving the conversation, and that Dalton pointed to him and to appellant and appellant then nodded, and had then testified to his conversation and transaction with appellant, prima facie proof of conspiracy would have been made and the foundation for the conversation with Dalton laid. The order of proof did not therefore prejudice appellant. *People v. Ferlin*, 203 Cal. 587, 599, 265 P. 230; *People v. Griffin*, 98 Cal.App. 2d 1, 47-48, 219 P.2d 519.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.



162 Cal.App.2d 421

Thomas E. CHAPMAN, Petitioner,

v.

SUPERIOR COURT of the State of California, In and for the COUNTY OF LOS ANGELES, Respondents.

Civ. 23153.

District Court of Appeal, Second District,
Division 3, California.

July 30, 1958.

Employer brought an action to enjoin former employee from divulging trade secrets and for damages. The employee's motion to quash service of summons was denied. The employee petitioned for alternative writ of mandate to review the denial. The District Court of Appeal, Patrosso, J. pro tempore, held that evidence sus-

tained finding that former employee whose employment required him to live in Trinidad, British West Indies, but who before employment was a resident of California and who maintained a mailing address as well as bank account in California, was, even though living in Trinidad, a resident of California at time cause of action pleaded arose within meaning of statute authorizing entry of personal judgment against resident based on substituted service.

Alternative writ discharged and peremptory writ denied.

1. Judgment ⇨17(2)

Under statute authorizing rendition of personal judgment upon substituted service against one who was a resident of state at time cause of action arose, word "resident" is used in reference to domicile and hence means "domiciliary". West's Ann.Code Civ.Proc. § 417.

See publication Words and Phrases, for other judicial constructions and definitions of "Resident" and "Domiciliary".

2. Domicile ⇨4(2)

While residence is dependent largely upon intention, that intention is to be gathered from one's acts.

3. Domicile ⇨10

In employer's action against former employee for damages and to enjoin former employee from divulging trade secrets, evidence on motion to quash service of process sustained finding that former employee, who was a resident of California before taking job which required him to live in Trinidad, British West Indies, and who still maintained a California mailing address and bank account, was a "resident" of California at time of cause of action arose within meaning of statute authorizing entry of personal judgment against resident based on substituted service, notwithstanding that he was living in Trinidad. West's Ann.Code Civ.Proc. § 417; 26 U.S.C.A. (I.R.C.1954) § 911.

4. Appeal and Error ⇨1010(1)

Appellate court may not substitute its judgment for that of a trier of fact

where its findings are supported by substantial evidence.

5. Process ⇨96(5)

Fact that plaintiff's affidavit in support of order for publication of summons stated that party resided out of the state of California, did not foreclose court from finding that party was a resident of state. West's Ann.Code Civ.Proc. § 417.

Winston, & Winston, Long Beach, for petitioner.

Harold W. Kennedy, County Counsel and Wm. E. Lamoreaux, Assistant County Counsel, Los Angeles, for respondent.

Houser & Beam, Long Beach, for Real Party in Interest.

PATROSSO, Justice pro tem.

Mandate to review the action of the respondent court in denying petitioner's motion to quash service of summons.

Eastman Oil Well Survey Company, hereinafter referred to as plaintiff, instituted an action against the petitioner in the Superior Court of Los Angeles County on September 17, 1957, wherein it seeks damages and an injunction to restrain petitioner, a former employee, from divulging and making available to plaintiff's former customers trade secrets, knowledge of which he acquired by reason of his employment. From the allegations of the complaint it appears that the cause of action therein pleaded arose during the month of June 1957. Upon the filing of the complaint plaintiff applied for an order for the publication of summons supported by an affidavit stating that the petitioner was a resident of Trinidad, British West Indies. The court made such an order, and the record discloses that petitioner was personally served with summons in the action in Trinidad on November 27, 1957. Thereafter petitioner made a motion to quash the service of summons and vacate the order of publication on the ground that petitioner was not a resident of the county of Los Angeles at the time the cause of action arose nor at the time

of the commencement of the action nor at the time of the service of summons, which motion, as previously indicated, was denied.

The question presented is whether the evidence before the trial court, in the form of affidavits, is sufficient to sustain its finding that defendant was a "resident" of the State of California at the time the cause of action pleaded in plaintiff's complaint arose.

[1] At the outset it should be noted that the word "resident" in section 417 of the Code of Civil Procedure, with which we are here concerned, and which authorizes the rendition of a personal judgment upon substituted service against one who was a resident of this state at the time the cause of action arose "is used in reference to domicile, and hence means 'domiciliary'." *Smith v. Smith*, 1955, 45 Cal.2d 235, 240, 288 P.2d 497, 499.

Supporting the trial court's finding that petitioner was such a resident, the following appears: In June 1955, petitioner, then admittedly a resident of Long Beach, California, was employed by the plaintiff for overseas duty at a salary of \$15,600 per year and assigned to service with the Antilles Petroleum Company in Trinidad. Petitioner's transportation to Trinidad was provided by his employer and he remained in such employment at said place until July 1, 1957. During all of this time he maintained a savings account and checking account in a bank in the city of Long Beach and on the bank's records his residence is stated to be 5533 Hersholt Avenue in that city. Throughout this period, pursuant to petitioner's direction, his employer deposited all of his payroll checks in these bank accounts. As late as March 4, 1957, less than two months preceding the termination of his employment, petitioner rented a safe deposit box in the same bank giving the same address as his place of residence and which box he has continued to maintain since that time. On July 11, 1956, in answer to a communication from an officer of the plaintiff with respect to the matter of

his vacation, petitioner stated that his wife, whom he had married in Trinidad on December 10, 1955, was expecting a child and that it did not seem feasible to take a vacation at that time. The letter then proceeds to state that "My two years in Trinidad will be completed in May of 1957. At that time I would like to return to the States for a vacation & then take on a new assignment or switch with one of the other men who are out at that time. I know it's quite a few months in advance, but I want you to know in plenty of time in the event something new comes up, there is someone available for a long term job. It doesn't have to be exactly in May, say any time after the 1st of the year. This is briefly all the plans we have made." Petitioner's employer had an established vacation policy or plan under which its employees stationed overseas received travel allowances permitting them to return to their permanent homes in the United States from the point of their employment after 18 months at the employer's expense. Petitioner exercised his rights under this plan by returning from Trinidad to the United States in February of 1957 and drew \$1,144 from his employer for travel expenses. Upon arriving in the United States he visited his employer's home office in Denver, Colorado, and then went to 5533 Hersholt Avenue, Long Beach, where he spent the balance of his time before returning to Trinidad. On July 11, 1956, petitioner made written application to his employer for group insurance on behalf of his wife and himself, wherein his address is stated as 5533 Hersholt Avenue, Long Beach. In the city directory of Long Beach issued during each of the years 1955, 1956 and 1957, petitioner is listed as residing at the same address last mentioned, and he admitted maintaining the same as his mailing address throughout this period. He also was the holder of an operator's license issued by the Motor Vehicle Department of the State of California in May, 1955, wherein his residence is stated to be at the address previously mentioned and he at

no time thereafter filed with the department a notice of change of address.

In opposition to this showing, petitioner filed an affidavit wherein he states that at all times since June 7, 1955, he has resided in Trinidad and that "it was his intention at all times subsequent to July 1, 1955, to remain permanently or indefinitely in said Trinidad, or in some foreign country as a resident thereof," and that he has no intention of returning to the United States for the purpose of residing therein. He further states in his affidavit that the property at 5533 Hersholt Avenue is owned by his brother; that he has no interest therein and that it is occupied as a home by his mother; that he merely uses this address for convenience as a mailing address and that he has never claimed it as his residence. Affidavits to like effect with respect to the ownership and occupancy of the property at 5533 Hersholt Avenue were filed by petitioner's mother and brother. Attached to petitioner's affidavit there is a copy of a letter addressed to him by an officer of the plaintiff under date of August 29, 1956, which, in his affidavit he states "advises affiant that affiant qualified to apply for exemption under the provisions of Section 911 of the Income Tax law of the United States of America as a Non-Resident [26 U.S.C.A. § 911]." A reference to this letter, however, and a copy of excerpts from the United States Treasury Regulations attached thereto, discloses that the exemption therein referred to relates to any citizen of the United States "present in a foreign country or countries during a total of at least 510 full days during any period of 18 consecutive months." This exemption is not confined to bona fide residents of a foreign country or countries as petitioner's affidavit suggests.

[2] Petitioner argues that residence (domicile) depends largely upon intention. This is undoubtedly true, but that intention is to be gathered from one's acts. In re Estate of Gordon, 1904, 142 Cal. 125, 129, 75 P. 672. Contrary to the assumption of petitioner, the statement that he at all times subsequent to July 1, 1955, intended to re-

main permanently in Trinidad or some foreign country, did not foreclose the trial court from considering his acts and declarations indicating a contrary intention. Certainly his letter of July 11, 1956, previously adverted to did not indicate that he intended to remain permanently in Trinidad but rather the contrary. Equally inconsistent with his presently expressed intention is the fact that all of his earnings during the period of his presence in Trinidad were deposited in bank accounts maintained by him in the city of Long Beach, and the further fact that as late as February, 1957, he rented a safe deposit box in the same bank for a period of a year and then gave the Long Beach address as his residence. Moreover, the statement in his affidavit "that it was his intention to remain permanently and indefinitely in said Trinidad or in some foreign country" is equivocal.

In 16 Cal.Jur.2d, p. 649, section 4, it is said: "To establish a domicile, two things are necessary: (1) the taking up of a physical or actual residence in a particular place, and (2) the intent to make it a permanent abode. Union of act and intent is essential; and until such union occurs one retains his former domicile. One does not lose a former domicile by going to and stopping at another place for a limited time with no intention to reside there permanently, though the absence may continue for a number of years."

[3] From the evidence before it the trial court was warranted in concluding that petitioner's presence in Trinidad was occasioned solely by reason of his employment, which place of employment was at all times subject to change by his employer. In speaking of a similar situation, this court in Rhodes v. Rhodes, 1947, 80 Cal.App.2d 723, at page 725, 182 P.2d 275, at page 276, said: "It has been uniformly held that a change of residence occasioned by the exercise of duties in connection with governmental civilian employment, irrespective of the length of time, does not bring about a change of domicile in the absence of clear proof of a concurrent intention to aban-

don the old domicile and acquire a new one." And continuing at page 726 of 80 Cal.App. 2d, at page 277 of 182 P.2d: "In Section 244 of the Government Code is found codified the well-established rule of this and other jurisdictions that a residence can be changed only by the union of act and intent and that mere temporary absence from one's domicile for the purpose of engaging in employment, however long, will not effect a change of domicile where the intention is to be absent for that purpose alone and upon the termination of such employment to return to the former established domicile. See, *In re Estate of Peters*, 124 Cal.App. 75, 77, 12 P.2d 118; 28 C.J.S. Domicile § 13, p. 32."

While the cited case involved a civilian employee of the government, the reasoning would seem equally applicable to one such as the petitioner whose employment necessarily takes him from place to place.

[4] While the trial court could, on the evidence before it, have reached a different conclusion from that which it did, inasmuch as its finding is supported by substantial evidence we may not substitute our judgment for that of the trier of fact.

[5] Finally, petitioner contends that the trial court could not properly find that petitioner was a resident of this state by reason of the fact that in the affidavit filed by the plaintiff for the order of publication of summons it is stated that the petitioner "resides out of the State of California." However a similar contention was urged and rejected in *Smith v. Smith*, supra, 45 Cal.2d 235, 243, 288 P.2d 497. Moreover, in addition to the reasons therein assigned, the affidavit for publication of summons in the instant case is dated October 25, 1957, and discloses that it is based upon a statement made to the affiant by the petitioner on September 24, 1957. The question before the trial court here was not whether petitioner was residing out of the state of California on October 25, 1957, but whether he was such resident or domiciliary when the

cause of action pleaded in plaintiff's complaint arose, namely: in June 1957.

The alternative writ is discharged and a peremptory writ of mandate is denied.

SHINN, P. J., and WOOD, J., concur.



162 Cal.App.2d 225

W. ROSS CAMPBELL CO., a California corporation, Plaintiff and Respondent,

v.

Joseph PESKIN, Defendant and Appellant.
Civ. 22729.

District Court of Appeal, Second District,
Division 3, California

July 18, 1958.

Action by broker against building owner for commission for providing a tenant to lease the building. The Superior Court, Los Angeles County, V. P. Lucas, J., entered judgment for broker, and owner appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to establish that broker had produced a client ready, willing, and able to lease the building on owner's terms.

Judgment affirmed.

1. Brokers ⚡86(3)

In action by broker against building owner for commission for providing prospective tenant ready, willing, and able to lease building for stated period at stated rental, evidence sustained trial court's determination that, in regard to new construction on the premises to be leased, minds of owner and prospective tenant met as expressed in the proposed lease.

2. Brokers ⚡86(1)

In action by broker against building owner for commission for providing a pro-

spective tenant ready, willing, and able to lease building for stated period at stated rental, evidence was sufficient to establish that owner had agreed to make available to prospective tenant the lighting fixtures and compressor installed by the then existing tenant.

3. Landlord and Tenant ⇨22(3)

Where building owner promised prospective tenant that he would try to get a firm agreement from the then existing tenant to vacate by certain date, owner was bound to make an earnest and good faith effort to obtain the agreement.

4. Brokers ⇨86(1)

In action by broker against building owner for commission for providing a prospective tenant ready, willing, and able to lease building for stated period at stated rental, evidence was sufficient to establish that owner alone was responsible for failure of existing tenant to surrender its lease.

5. Brokers ⇨11

Property owner who has engaged a broker to find a purchaser or a lessee for owner's property has duty to act in good faith and not to intentionally discourage, embarrass, or prevent the accomplishment of the proposed transaction.

6. Brokers ⇨52, 54

Where building owner employed broker to obtain tenant to lease building, broker's duty was fully performed when it produced a prospective tenant willing to lease on owner's terms, and, therefore, execution of the lease was not a prerequisite to broker's right to a commission.

7. Brokers ⇨63(1)

Where broker, employed by building owner to obtain a tenant for the building, produced a prospective tenant who agreed with owner upon terms of a lease, but owner's fault prevented consummation of the lease, owner would owe broker the commission even if commission was to have been paid only on consummation of the lease.

8. Brokers ⇨7

Where building owner had employed broker to obtain tenant for building, owner

could not unilaterally make a new contract with broker.

9. Brokers ⇨86(5)

In action by broker against building owner for commission for obtaining tenant for building, evidence was sufficient to establish that broker had produced a prospective tenant ready, willing, and able to lease the building on owner's terms.

Herbert Schwab, Beverly Hills, for appellant.

McCutchen, Black, Harnagel & Greene, G. William Shea, Ann E. Stodden, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal by defendant Peskin, owner of a commercial type building, from a judgment of \$16,605 awarded plaintiff as a commission for providing a corporate client which was ready, able and willing to lease the building for ten years at a rental of \$4,585 per month. It is not questioned that plaintiff was employed by defendant as broker under an oral agreement or that if a commission was earned it would have amounted to the sum that was awarded.

The findings established all the facts necessary to a recovery by plaintiff. Most of them were contained in a written stipulation. The sole question is whether the evidence was insufficient to support one or more of the findings of the controlling facts. This, as we shall see, narrows down to the simple question whether plaintiff's client was willing to lease on defendant's terms. We may as well say here that the essential findings had ample support in the evidence.

Defendant's building was occupied by North American Aviation Company under a lease which ran to September 1, 1956. On October 5, 1955, American wrote a letter to defendant's authorized agent stating it did not desire to renew its lease and was willing to surrender possession at any time after January 1, 1956. Plaintiff's salesman, Dickson and Harrison, aware of American's

intention, offered their services to Peskin in finding a new tenant. Harrison procured a written offer of Monadnock Mills to lease the building and submitted it to Peskin. The stated term was ten years from January 1, 1956 and the base rental \$4,585 per month. On November 2, American wrote Peskin withdrawing its offer to vacate by January 1st, but stating that it would be willing to vacate by May 15th, or possibly sooner. November 7, Peskin in writing stated to plaintiff the terms upon which he would lease to Mills for a term commencing May 15th. In general, they were identical with the terms of Mills' offer. Both proposals stated as a necessary condition that North American would have to execute a firm agreement to surrender its lease and the premises by the date of the commencement of Mills' lease.

There were some differences in the two proposals, principally a change of the date of commencement of the term from January 1st to May 15th, to which Mills assented. The findings, express and implied, established that in all important respects in which the proposals differed there was later reconciliation and agreement. The terms of the two proposals were numerous and comprehensive. They were the subject of extensive negotiation between the attorneys for Mills and the attorney for Peskin. Mr. Shea and Mr. Doty represented Mills and Mr. Schwab represented Peskin in drafting a lease that would be satisfactory to their respective clients. Throughout the interval between November 22nd and December 27th, 1955, letters were exchanged between counsel, drafts of a lease were prepared and submitted, many changes were agreed upon, and on December 27th, the final draft executed by Mills in triplicate was submitted to Peskin through Mr. Schwab. Without objection to any of the terms of the lease, Mr. Schwab delivered them to Peskin who signed three duplicate originals. These were retained by Peskin and were never delivered to Mills.

Peskin testified that he signed the documents by mistake and that immediately thereafter upon discovering what he had

done he cut off his signatures with the scissors. He did not inform his attorney that he had signed the documents by mistake and had removed his signatures; he did not tell his secretary that his signatures had been removed; the secretary informed Mr. Schwab that the leases had been executed and in all good faith Mr. Schwab informed Mr. Doty of that fact. Peskin did not make any objection to any of the terms of the lease but retained them in his possession. Long afterwards when he appeared to give his deposition in the present action, he produced the documents with his signatures removed and his attorney then learned that Peskin claimed that he had signed the duplicate leases by mistake.

Early in January 1956, Peskin contacted American through Mr. Pehrson, its real estate administrator and negotiated and entered into a renewal of American's lease for a period of five years commencing September 1, 1956. In the meantime, the parties had fixed January 23, 1956 as the date when Peskin would furnish a firm agreement of American to vacate by May 15th. On January 23rd, Mr. Doty by telegram to Peskin demanded performance of the agreement and offered to pay to Peskin \$20,632.50 as agreed advance rental. Peskin did not reply and Mills of necessity withdrew from the picture.

In attacking the finding that plaintiff produced a satisfactory tenant that was ready, able and willing to lease upon defendant's terms, Peskin advances three contentions: (1) Mills had demanded that at its option Peskin would be required to construct an additional building with 20,000 feet of ground floor space, and that he had never agreed to this condition. (2) Mills required that the lighting fixtures and a compressor which had been installed by American should remain in the building and be made available for use by Mills. Peskin says he did not agree to this condition. (3) It was understood that no lease could be made to Mills unless American agreed to surrender its lease by May 15, 1956. Peskin contends that American refused to surrender its lease or to vacate and that without

his fault leasing the premises to Mills became impossible through the action of American.

These three contentions are utterly devoid of merit.

[1] Mills' proposal would have required Peskin to add to the building at Mills' option 20,000 square feet of ground floor space to be constructed in accordance with Mills' specifications. Peskin's counter proposal stated that 20,000 feet of additional floor space would be constructed in accordance with specifications to be agreed upon by the parties. In the proposed lease, the addition was to be "of the same general type and quality of construction as the existing building," and should be not less than 10,000 nor more than 20,000 square feet of ground floor space. It is not contended that Peskin had any objection to the requirement stated in the lease that the building should in general conform to the construction of the existing building. It is clear that this provision of the lease was the result of negotiation and that it was satisfactory to all parties. The court impliedly so found and there was persuasive evidence that such was the fact. Defendant does not deny that he agreed to construct the additional building. He contends only that his proposal to construct it according to specifications to be agreed upon was too vague and indefinite to be enforceable. Aside from the fact that the terms of his proposal were superseded by the provision in the lease, it is of no concern in the present action whether his obligation was enforceable. No one is seeking to enforce it, and plaintiff's right to a commission was not dependent upon the construction of the additional building. The court correctly determined that in respect of the new construction there was a meeting of the minds as expressed in the lease.

[2] The next contention is that Peskin never agreed to make available to Mills the lighting fixtures and the compressor. This is contrary to the express provisions of both written offers. In Peskin's offer he agreed to "acquire by purchase or otherwise" the

fixtures and make them available to Mills at the commencement of the lease. American had stated to Peskin the price of \$18,500 and he made no objection to the price. Defendant's argument is that he could not have been required to purchase the fixtures because he had made no agreement with American to purchase them but, as we say, he ignores the fact that he made the agreement with Mills. There is no merit whatever in this argument.

The next contention is that Peskin was unable to make the lease with Mills because American refused to vacate the premises.

In Peskin's offer of November 7th in reply to Mills' proposal he stated: "The lease is to commence on or about May 15, 1956, or sooner if the lessor can give possession sooner. * * * Upon the acceptance of this proposal and the execution of a lease between the undersigned and Monadnoc Mills, *an agreement of termination will be entered into between the undersigned and the present tenant.* It must be understood, however, that in the event the present tenant withdraws its offer to terminate its existing lease and to surrender the premises as of May 15, 1956, for any reason whatsoever, then this offer and any agreements between the undersigned and Monadnoc Mills shall be void and of no effect. *As soon as this offer is accepted by and binding upon Monadnoc Mills, the undersigned will attempt to secure a binding agreement of termination and surrender from his present tenant and upon securing such agreement, this proposal and acceptance hereof shall be in full force and effect.*" (Emphasis added.)

The court found: "Said lease called for certain obligations to be performed solely by defendant. Defendant was at all times able to perform his obligations under and pursuant to said lease, but failed to do so, and on or about January 19, 1956, defendant repudiated said lease and refused to perform thereunder." The finding means that Peskin was able to procure from American a firm agreement to surrender its lease and possession by May 15th. Oddly enough, the briefs make no mention of this

finding, nor of the evidence upon which it was based, although plaintiff does assert generally that Peskin was required to act in good faith.

[3-5] Peskin's promise that he would try to get a firm agreement from American that it would vacate by May 15th bound him to make an earnest and good faith effort to obtain the agreement. It is evident that he did not know that his promise imposed upon him the duty to act in good faith. He made no effort whatever to obtain American's agreement to vacate the premises and he argues that he had no duty to even ask for it. There was conclusive evidence that he repudiated his agreement with Mills and acted in utter bad faith. It is evident that "good faith" was not in his vocabulary or his conception of proper business methods. As applicable in the present case good faith requires that an owner who has engaged a broker to find a purchaser or lessee for his property has a duty to act in good faith and not to intentionally discourage, embarrass or prevent the accomplishment of the proposed transaction. *Coulter v. Howard*, 203 Cal. 17, 23, 262 P. 751.

It will appear from a brief statement of defendant's testimony that he alone was responsible for American's failure to surrender its lease. Shortly after he received the lease he contacted Mr. Pehrson, American's real estate administrator. He testified that he told Pehrson that he had no deal with Mills; the proposition was absolutely unacceptable to him; he was through with them; the property was available for lease and that North American came first. In writing, he released American from its offer to surrender its lease and he entered into a new lease with American for a five year term. He could have had a firm agreement from American to surrender its lease if he had asked for it. And yet in the face of all this, Peskin argues that American refused to vacate the premises and that since it was understood that American must surrender its lease or there could be no lease to Mills, plaintiff did not procure a prospective tenant who

was willing and able to meet his terms. The contention is little short of absurd.

We come to a contention of defendant not previously mentioned. In his letter of November 7th enclosing Peskin's proposal, Mr. Schwab stated, as requested by Peskin: "I am handing you herewith a written proposal for a lease between the undersigned and Monadnoc Mills. It is understood that if in the event for any reason whatsoever, it is impossible to consummate such lease, I shall not be liable to you for any commissions." It is argued that this proposal superseded the oral commission agreement and that no commission was earned because the lease transaction was not consummated.

[6-8] Despite the testimony of Peskin the court found that he had executed the lease with full knowledge of its terms. Defendant contends that the finding is unsupported by the evidence. We do not believe there was a delivery of the lease or an intention to deliver it. Peskin had to obtain American's agreement to vacate and deliver it with the lease before the deal could be closed with Mills and he could get the check that was awaiting him. His conduct clearly indicated, and the court would have been justified in believing, that he intended to hold onto the Mills lease until he had had an opportunity to get a more satisfactory deal with American, and that he removed his signatures when that had been accomplished. But the finding of execution is not an essential one. The fact that it has insufficient support in the evidence avails defendant nothing. Execution was not necessary in order for plaintiff to earn its commission. Plaintiff's duty had been fully performed when it produced a satisfactory tenant willing to lease on Peskin's terms. *Woodbridge Realty v. Plymouth Development Corp.*, 130 Cal.App.2d 270, 278 P.2d 713. There are several reasons why it is immaterial whether Peskin executed the lease. In the first place plaintiff had already produced Mills' offer to lease the building; defendant had negotiated with Mills and the terms of a lease had been agreed upon. Plaintiff was not

required to do more than this. Peskin could not unilaterally make a new contract with plaintiff. In the second place, failure of consummation of the lease was due to the fault of defendant. He would owe plaintiff the commission, even if it was to be paid only upon consummation of the lease. *Collins v. Vickter Manor, Inc.*, 47 Cal.2d 875, 306 P.2d 783.

[9] Upon the facts found, which were amply supported by the evidence, plaintiff's right to a judgment for a commission was clearly established.

The judgment is affirmed.

PARKER WOOD, J., and NOURSE, J.
pro tem., concur.



162 Cal.App.2d 85

Edgar William DICKENSON, Lawrence Vir-
gil Harris, and Lester Loeser, Peti-
tioners and Appellants,

v.

MUNICIPAL COURT OF SAN DIEGO JU-
DICIAL DISTRICT, COUNTY OF SAN
DIEGO, State of California, Respondent.
Civ. 5834.

District Court of Appeal, Fourth District,
California.

July 11, 1958.

Hearing Denied Sept. 3, 1958.

Prohibition proceeding to restrain Municipal Court from trying proceedings in which petitioners were charged with violation of sections of municipal code dealing with regulation and licensing of automobile wrecking establishments. The Superior Court, San Diego County, L. N. Turrentine, J., denied writ and petitioners appealed. The District Court of Appeal, Mussell, Acting P. J., held that refusal to grant writ was not an abuse of discretion in absence of showing that delay would prejudice petitioners' rights or that they would suffer hardship other than expense

ordinarily incident to trial and appeal, especially in view of fact that questions of fact might be involved and that defense of constitutionality of one section of code might be available as to some of charges and not as to others.

Affirmed.

Prohibition §5(4)

Where petitioners were charged in Municipal Court with violation of sections of municipal code and their demurrer, challenging constitutionality of section, was overruled, refusal of Superior Court to grant writ of prohibition restraining Municipal Court from trying proceeding was not an abuse of discretion in absence of showing that delay in proceeding would prejudice petitioners' rights, or that they would suffer hardship other than expense ordinarily incident to trial and appeal especially in view of fact that questions of fact might be involved and that defense of unconstitutionality of one section of ordinance might be available as to some of charges and not as to others.

Swing, Scharnikow & Staniforth and Le Roy Seckler, San Diego, for appellants.

R. J. Curran, City Prosecutor, San Diego, and John L. Newburn, Deputy City Prosecutor, San Diego, for respondent.

MUSSELL, Acting Presiding Justice.

On January 26, 1956, complaints were filed in the Municipal Court of the San Diego Judicial District, County of San Diego, charging the appellants with the commission of seven misdemeanors in violation of various sections of the City of San Diego Municipal Code. The sections involved deal with the regulation and licensing of auto wrecking establishments in the city of San Diego and are substantially as follows:

Section 33.0903. Regulations—General.

It shall be unlawful for any person to engage in the business of an automo-

bile wrecker, unless such business is carried on, maintained or conducted in compliance with the following regulations:

Section 31.0121. Permit Requirements.

No person shall engage in any business required to be licensed under the provisions of this Code until such license is first obtained.

Section 33.0903.1. Regulations—Enclosed Premises.

That such business shall be carried on, maintained or conducted entirely inside an enclosed building or buildings, unless the premises on which such business is carried on, maintained or conducted shall be entirely enclosed by a solid fence or wall at least six (6) feet in height and constructed according to the requirements of the building code of said City.

Section 33.0903.2. Regulations—Maintenance of Fences.

That such fence or wall shall be maintained in a neat, substantial, safe condition and shall be painted.

Section 33.0903.3 provides that a sign as therein described must be displayed on the property and regulates signs on the outward fence thereof.

Section 33.0903.4. Regulations—Gates. Gates for access to the premises shall swing inwardly, and such gates shall be kept closed when the premises are not open for business.

Section 33.0903.5. Regulations—Height of Piles.

That no automobile salvaged parts, metals, tires and/or accessories shall be piled, or permitted to be piled, in excess of the height of the enclosing fence or wall or nearer than two feet thereto.

Section 33.0903.6. Regulations—Inflammable Liquids.

That all gas, oil or other inflammable liquid shall be drained and removed

from any unregistered motor vehicle located thereon.

Section 33.0903.7. Regulations—Access for Inspection.

That the premises shall be so arranged that reasonable inspection or access to all parts of the premises can be had at any time by the proper fire, health, police and building authorities.

Appellants, by demurrer, challenged the constitutionality of these sections. After the Municipal Court judge overruled the demurrer, appellants entered pleas of "not guilty" and trial was set for December 3, 1956, in said court. Appellants then filed a petition for a writ of prohibition in the Superior Court of San Diego county and an order restraining and prohibiting the said Municipal Court from entertaining, passing upon, hearing, trying and deciding motions, proceedings and trials based upon said complaints. An order granting an alternative writ of prohibition and order to show cause was issued by the said Superior Court and on August 9, 1957, said court ordered "That the alternative writ of prohibition is discharged and a peremptory writ is denied." The appeal herein is from this order. Appellants contend that section 33.0903.7 is void for vagueness and uncertainty and that the remaining sections involved are arbitrary, unreasonable and impose unconstitutional burdens upon appellants, entirely foreign to the legitimate objects of the police power.

The record shows that there has been no trial in the Municipal Court on the charges contained in the complaints filed and that appellants seek to avoid further proceedings in said court by the use of a writ of prohibition. This is an extraordinary writ and the question arises as to whether the court abused its discretion in refusing to grant it under the circumstances of this case.

In 42 American Jurisprudence, Prohibition, Section 7, Page 143, it is said:

"There is a division of opinion among the courts as to whether the

writ of prohibition is grantable only in the discretion of the court or as a matter of right on demand of the person seeking such relief. It is commonly said, and this seems to be the majority rule, that the writ is not one of right but one of sound judicial discretion, to be granted or refused according to the facts and circumstances of the particular case. It is the settled rule that ordinarily it will not issue where there is another legally adequate remedy, as by appeal or otherwise, or where the jurisdiction of the lower court is debatable, or depends on facts *de hors* the record, or where application for the writ is made by a stranger to the record."

In *Rescue Army v. Municipal Court*, 28 Cal.2d 460, 466-467, 171 P.2d 8, 12, the court, in deciding whether trial and appeal were adequate remedies under the circumstances of that case, said:

"A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of the extraordinary writ of prohibition. [Citations.] Experience has shown that most of the meritorious defenses are sustained and most of the unsubstantial constitutional or other objections are weeded out at the proper time on the proper showing during the trial or on appeal. These remedies are therefore considered adequate in the usual situations. If this were not so, then whenever jurisdiction is challenged prohibition would lie and the trial of the case would be interrupted until the reviewing court passed upon the intermediate question and appellate courts in many cases would be converted into *nisi prius* courts. [Citation.]

* * * * *

"The fact that the remedies of trial and appeal were considered adequate in some cases and not in others does not mean that the application for the writ was arbitrarily granted in one and refused in another or that the decisions

cannot be reconciled on principle. It is difficult, if not impossible, to lay down a hard and fast rule which will govern all situations, and it must be determined in each case, not only on the basis of precedent but from an examination of all the facts, whether there is an adequate remedy in the ordinary course of law. A reviewing court, in order to prevent a failure of justice, has discretion in accordance with established legal principles and practice, to determine the circumstances which justify the use of prohibition to restrain a lower tribunal from acting without or in excess of its jurisdiction. And in the exercise of that discretion it may take into consideration the desirability of the prompt settlement of an important jurisdictional question so that a multiplicity of void proceedings in other cases will be prevented."

In the instant case the facts alleged are sufficient to justify the trial court in denying the writ on the ground that appellants have adequate remedy by trial in the Municipal Court and by appeal therefrom to the Superior Court. There are no facts alleged showing that trial and appeal would be inadequate. While it is alleged in the petition for the writ herein that petitioners will be subjected to unreasonable expense, inconvenience and delay if the trial in the Municipal Court is permitted to proceed, the mere fact that more time would be consumed by a trial is not sufficient to show that the court abused its discretion in denying the writ. The record shows that the complaints herein were filed on January 26, 1956, and it does not appear that further delay would prejudice the rights of the petitioners. The record further supports the inference that appellants have made no showing of hardship other than the expense ordinarily incident to trial and appeal. It may also be reasonably inferred that where, as here, there are several complaints and charges, questions of fact may be involved and the defense of unconstitutionality of one section of the ordinance may be avail-

able as to some of the charges and not as to the others. These matters can be considered and decided during a trial or on an appeal.

Since we conclude that there was no abuse of discretion shown in the order denying the writ and that the remedy of trial and appeal or other remedies are adequate under the circumstances of this case, it is unnecessary to here pass upon the constitutionality of the various questioned provisions of the San Diego Municipal Code.

The judgment and order are affirmed.

GRIFFIN, J., and McCABE, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.



162 Cal.App.2d 7

In the Matter of the ESTATE OF Anne McNally LIDDLE, Deceased.

James W. HARVEY, as Administrator of the Estate of Kathleen Ann Coffey, Deceased, Appellant,

and

Elizabeth K. MacPherson, Helen Keating, Mary Stella Keating, and Estate of Robert P. Keating, Deceased, Appellants,

v.

John F. P. BYRNE, George J. O'Sullivan, Regina O'Sullivan, George J. (Jack) O'Sullivan, Margaret O'Sullivan McMorro, Edward P. Coffey, Herbert L. V. Coffey and Cameron C. Coffey, Respondents.

Civ. 22334.

District Court of Appeal, Second District, Division 2, California.

July 7, 1958.

Rehearing Denied Aug. 1, 1958.

Hearing Denied Sept. 3, 1958.

Action involving determination of title to certain stock in a testamentary trust. The Superior Court, Los Angeles County, John Gee Clark, J., entered an order and decree adverse to certain parties and they appealed from such order and decree. The

District Court of Appeal, Ashburn, J., held that where certain stock was left in a testamentary trust to a life tenant, and upon her death to a named remainderman, or in the event of his death to his "heirs-at-law", and remainderman predeceased life tenant leaving as his only heir his wife, who died intestate approximately six years before life tenant, wife of remainderman had an indefeasible interest in the stock upon the death of her husband, under the terms of such trust, and as her interest in the stock was unconditional and indefeasible, it passed when she died intestate to her own heirs-at-law, through inheritance of her estate, and such stock did not pass to heirs of remainderman on theory that gift to heirs of remainderman was a class gift with membership determinable only at time of death of life tenant.

Appeals from minute order dismissed, decree reversed with instructions.

1. Executors and Administrators Ⓒ315(6)

Where neither a decree of partial distribution of balance remaining in a trust estate to the trustees, nor an order of final distribution of the trust attempted to construe will setting up such trust with respect to disposition of funds following death of life tenant, but in each instance reference was made directly or impliedly to the terms of the will without any attempt at construction under such circumstances, neither of such orders constituted a final memorial of the intention of the testatrix or of the meaning of the will, but each of such orders left the matter open for adjudication after consideration of the will itself, and therefore, neither of such orders was res judicata on question of to whom remainder was to pass.

2. Wills Ⓒ506(2)

The word "heirs" is a technical term, meaning, in a technical sense, the persons who would be entitled to succeed at a person's death to his estate, in case of intestacy, by virtue of succession statutes.

See publication Words and Phrases, for other judicial constructions and definitions of "Heirs".

3. Wills ⚡506(1)

In the absence of clear and unambiguous indications of a different intention to be derived from the context of a will, class described as testator's heirs, to whom a remainder is given by will, is to be ascertained at the death of the testator.

4. Wills ⚡506(1)

A bequest to heirs of a designated person is a gift to a class, and one of the recognized incidents of such a gift is that the class closes when increase in the number of its members becomes an impossibility.

5. Wills ⚡524(1)

"Closing of the class" is concerned with that time after which no more members can be admitted, and does not refer to the time after which the membership cannot decrease.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Closing of the Class".

6. Wills ⚡687(2)

Where certain stock was left in a testamentary trust to a life tenant, and upon her death to a named remainderman, or in the event of his death to his "heirs-at-law", and remainderman predeceased life tenant leaving as only heir his wife, who died intestate approximately six years before life tenant, wife of remainderman had an indefeasible interest in the stock upon the death of her husband, under the terms of such trust, and as her interest in the stock was unconditional and indefeasible it passed when she died intestate to her own heirs-at-law, through inheritance of her estate, and such stock did not pass to heirs of remainderman on theory that gift to heirs of remainderman was a class gift with membership determinable only at time of death of life tenant.

7. Appeal and Error ⚡133

Where a minute order was made by a trial judge prior to his signing of formal findings and decree, and such minute order called for counsel for certain of the parties to prepare findings and an order, and to serve same on other parties, such minute order called for an attorney order, and therefore was not appealable.

Frank S. McGorty, Dorothy E. Handy, San Francisco, for appellant Harvey.

George H. Sullivan, Julien R. Bauer, San Francisco, for appellants MacPherson and Keating.

O'Gara & O'Gara, San Francisco, for respondents.

ASHBURN, Justice.

This is a controversy over the title to 150 shares of stock in California-Portland Cement Company which were left in a testamentary trust for the benefit of Miss Florence McNally during her lifetime and upon her death to go to Edward I. Coffey or, in the event of his death, to his "heirs-at-law." Mr. Coffey predeceased Miss McNally, leaving as his only heir his wife, Kathleen Ann Coffey; she died intestate about six years before the life tenant. The heirs and administrator of the estate of Kathleen Coffey claim the stock, as do certain remote cousins of Mr. Coffey. The latter group prevailed in the trial court and the other claimants appeal.

Kathleen Coffey's heirs are three sisters and "the Estate of Robert P. Keating, deceased," a brother (designated herein as the Keating claimants.) The respondents (known as the Byrne claimants) are "in the fifth degree of relationship to said Edward I. Coffey, deceased, to wit, first cousins once removed." The Keating claimants contend that Kathleen Coffey was sole heir of Edward I. Coffey, and that the remainder estate vested in her immediately upon his death and passed to her own heirs when she died intestate. The Byrne claimants argue in effect that the gift to the heirs-at-law of Edward I. Coffey was a class gift whose membership was determinable only at the time indicated for distribution, death of Miss McNally; that Kathleen Coffey was then deceased and they are the only persons who answer the description of heirs of Mr. Coffey at the time of death of Miss McNally on April 4, 1953.

By paragraph Fourth of the will of Anne McNally Liddle, who died October 11, 1942, a trust consisting of 1,000 shares of stock in California-Portland Cement Company

was created for the benefit of her sister, Florence McNally, during her lifetime; the will further directed the trustees "upon the death of my said sister to divide and distribute said One Thousand (1000) shares of said stock as follows: * * * One Hundred Fifty (150) shares of said stock to go to and belong to Edward I. Coffey, my Attorney, of San Francisco, California, and the remaining One Hundred Fifty (150) shares of said stock to John O'Gara, my Attorney of San Francisco, California. In the event of the death of any of said Richard J. Burke, Edward I. Coffey or John O'Gara the shares of stock allotted to them shall go to their heirs-at-law." It was also provided in said will (paragraph Thirty-Fourth): "I direct that my shares of California Portland Cement Company stock in no event be sold or otherwise disposed of during the life time of my sister." By codicil, testatrix further directed that her trustees were authorized upon the death of Miss McNally to sell, if necessary for payment of debts etc., such number of shares of the cement stock as might be absolutely required for that purpose "and thereupon to divide the remainder of said shares of cement stock among the beneficiaries named in said Fourth paragraph in proportion to the number of shares bequeathed to them by said Fourth paragraph." The trustees have not sold any part of the said shares.

The will and codicils having been duly probated, application was made for partial distribution which was granted by order of May 27, 1943, distributing said cement company stock to the designated trustees "subject to the provisions of decedent's will," with the further direction "that said trustees shall keep, manage and control the corpus of said trust according to the terms, conditions and provisions of the will and codicils of decedent for the term of the natural life of said beneficiary, and also to make ultimate distribution thereof as so provided in decedent's said will." No other

or further definition of powers and duties of the trustees was then made.¹

Upon termination of the trust through the death of Florence McNally, on April 4, 1953, the trustees filed their ninth and final account and petition for distribution pursuant to § 1120, Probate Code. That petition discloses the fact of death of beneficiaries Arthur J. Hawkins and Beatrice Hawkins and alleges the proper distribution to be made of their share; the same is true of the share of deceased beneficiary John O'Gara. Concerning the Coffey interest, it says: "That Edward I. Coffey survived Anne McNally Liddle and predeceased said Florence McNally; that he left surviving his wife, Kathleen Coffey, who subsequently died prior to the death of said Florence McNally. That said Will provides that distribution is to be made to the heirs-at-law of said Edward I. Coffey; that the heirs-at-law of said Edward I. Coffey and/or Kathleen Coffey are at this time unknown to petitioners who are endeavoring to locate such heirs; that a determination of such heirs, their addresses and the respective share in said trust to which each would be entitled will involve a long and unreasonable delay; that it is for the best interests of all concerned in said trust that distribution be made to all known beneficiaries in said trust and that the shares of the Coffey heirs be retained for distribution until such time as they have been located, identified with certainty and the respective share of each determined.

"It is represented, therefore, that distribution of the balance remaining in said trust estate, should be made as follows: * * * To heirs-at-law of Edwin I. Coffey, deceased 15% or $\frac{3}{20}$ thereof." The prayer asks, "that a decree be made distributing the balance on hand in said trust estate to the beneficiaries entitled thereto as hereinabove set forth; that said Trustees be directed to retain the share of said trust estate to which Edward

1. The decree of final distribution makes no mention of the subject matter of the trust.

I. Coffey would have been entitled had he survived distribution thereof until such time as it has been determined to whom such distribution is to be made." The hearing upon this petition resulted in an order of July 23, 1953, settling the account and ordering distribution, which order, so far as it concerns the Coffey interest, says: "It Is Further Ordered that the balance remaining on hand in said trust estate after the payment of fees and closing costs, be distributed as follows: * * * To heirs-at-law of EDWIN I. COFFEY,² deceased 15% or $\frac{3}{20}$ thereof.

"It Is Further Ordered that said Trustees retain the share of said trust estate to which Edward I. Coffey would have been entitled had he survived distribution thereof until such time as it has been determined to whom such distribution is to be made."

This was followed in 1954 and 1955 by the filing of petitions of (1) the Keating claimants, (2) James W. Harvey, as administrator of Estate of Kathleen Ann Coffey, deceased, (3) of the Byrne claimants and (4) certain other claimants,³—each seeking a determination of the identity of the persons entitled to take the share of Edward I. Coffey. The only difference in the positions taken by Harvey, the administrator, and the other Keating claimants is that Harvey claims the right to possession for purpose of administration and the heirs of Mrs. Coffey seek to bypass the probate proceeding and to take their shares directly from the Liddle trustees. The petitions having been consolidated for hearing, the result was the decree now on appeal.

The trial judge's ruling was based primarily upon the last quoted paragraph of said order of July 23, 1953. The findings say: "7. That by said decree of July 23, 1953, said court distributed to the heirs at law of Edward I. Coffey living on April 4, 1953, the trust estate

to which Edward I. Coffey, deceased, would have been entitled to receive had he survived the life tenant, Florence McNally. * * * 8. The following persons, petitioners herein, are the only heirs at law of said Edward I. Coffey, deceased and were the only such heirs at law living on the date of death of said Florence McNally, to wit, April 4, 1953, and on the date of said decree of distribution, July 23, 1953: [Here follow the names of the Byrne claimants]; that the said named persons are the only persons answering the description or constituting the class of heirs at law of said Edward I. Coffey, deceased, described in said decree of distribution made and entered on July 23, 1953." The conclusions say that the Keating claimants "are barred and estopped by said decree of distribution made and entered on July 23, 1953, from claiming or asserting that said [Byrne claimants] are not the sole heirs of Edward I. Coffey, deceased." The decree conforms to said findings and conclusions and undertakes to effectuate them. The view that the order of July 23, 1953, renders the issues of this case *res judicata* is not sustainable.

[1] It will be noted that neither the decree of partial distribution to the trustees nor this order of final distribution of the trust attempts to construe the will with respect to the Coffey bequest. In each instance reference is made directly or impliedly to the terms of the will without any attempt at interpretation. In such circumstances neither of the orders can constitute a final memorial of the intention of the testatrix or the meaning of the will. Each of them leaves the matter open for adjudication after consideration of the will itself (In re Ewer's Will, 177 Cal. 660, 663, 171 P. 683; In re Estate of Lockhart, 21 Cal. App.2d 574, 578-579, 69 P.2d 1001; Manning v. Bank of California, 216 Cal. 629, 637-638, 15 P.2d 746; Canfield v. Security-First Nat. Bank, 13 Cal.2d 1, 18-19, 87 P.2d 830), and in the light of parol evidence (cf.

2. It was stipulated and found that Edwin I. Coffey and Edward I. Coffey were the same person.

3. All petitions other than those of Harvey, Keating claimants, and Byrne claimants were later dismissed voluntarily.

Paley v. Superior Court, 137 Cal.App.2d 450, 457, 290 P.2d 617; In re Estate of Sargavak, 41 Cal.2d 314, 319, 259 P.2d 897, In re Estate of Pierce, 32 Cal.2d 265, 273-274, 196 P.2d 1) if the occasion therefor arises.

So far as the order of July 23, 1953, is concerned it is patent that it cannot operate as *res judicata*. We again quote the pertinent language: "To heirs-at-law of Edwin I. Coffey, deceased 15% or $\frac{3}{20}$ thereof.

"It Is Further Ordered that said Trustees retain the share of said trust estate to which Edward I. Coffey would have been entitled had he survived distribution thereof until such time as it has been determined to whom such distribution is to be made." The last quoted paragraph, read in the light of the petition, inescapably withholds an adjudication as to the identity of the heirs-at-law of Edward I. Coffey. The use of the phrase "to which Edward I. Coffey would have been entitled had he survived distribution thereof" cannot be held to have decided anything; it is merely descriptive of the subject matter with which the paragraph deals. The concluding words, "until such time as it has been determined to whom such distribution is to be made" reveal an unmistakable withdrawal of that issue from the proceeding. Section 1911, Code of Civil Procedure, says: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." *Stark v. Coker*, 20 Cal.2d 839, 843, 129 P.2d 390, 392: "[I]t is also true that that only is adjudged in a former judgment which appears upon its face to have been adjudged or which was actually and necessarily included therein or necessary thereto." Code Civ.Proc., § 1911. And when it affirmatively appears that an issue was not determined by the judgment, it obviously is not *res judicata* upon that issue. A judgment is not an adjudication as to matters

which the court expressly refrains from determining." To the same effect, see, *In re Estate of Hill*, 149 Cal.App.2d 779, 787, 309 P.2d 39; *In re Estate of Wilson*, 147 Cal. 108, 111, 81 P. 313; *Barnes v. Dobbins*, 118 Cal.App.2d 808, 814, 258 P.2d 1112; *In re Estate of de Laveaga*, 50 Cal.2d 480, 326 P.2d 129. The court having erroneously ruled that, as matter of law and through operation of the doctrine of *res judicata*, the Byrne claimants are the heirs-at-law of Edward I. Coffey, it now appears that the question of heirship is an open one upon this appeal.

As a practical matter the ruling in favor of the Byrne relatives would leave the title to this stock hanging *in caelo* during a six-year suspension of the power of alienation.⁴ Cf. Civ.Code §§ 716, 771. Kathleen Coffey died in July, 1947, and the trust did not terminate until the death of Florence McNally in April, 1953. If the heirs are to be determined as of the latter date (as ruled below), there was no one who could convey good title to the Coffey remainder during that six-year period,—this because of possible fluctuation in the class of pseudo heirs at law. Such a situation is opposed to the declared policy of this State.

Probate Code § 28 provides: "Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death." Civil Code, § 694: "A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest." Probate Code, § 106: "* * * Technical words are not necessary to give effect to any species of disposition by a will; but technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by

4. Such a construction of this will might render the class gift void as violative of the statutory inhibition upon suspension of power of alienation,—for Miss McNally might have lived more than 25 years (the

period specified in § 715 Civil Code in July, 1947) after Mrs. Coffey's death, the event creating the suspension. See, 38 Cal.Jur.2d § 21, p. 470; Restatement of Law of Property, § 371, p. 2160.

the testator, and that he was unacquainted with such technical sense." Probate Code § 108: "A testamentary disposition to 'heirs,' 'relations,' 'nearest relations,' 'representatives,' 'legal representatives,' 'personal representatives,' 'family,' 'nearest (or next) of kin' of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of Division II of this code. Such terms are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person." In re Estate of Stanford, 49 Cal.2d 120, 124, 315 P.2d 681, 683: "In construing the language of a bequest, such as we have here, the primary common law rule in favor of early vesting of title in remaindermen and the preference for vested rather than contingent remainders is firmly established in this state." At page 127 of 49 Cal.2d, at page 685 of 315 P.2d: "'All these sections (various sections of the Civil Code) show the unmistakable intention of the statutory law to declare that a devise or bequest shall vest at the testator's death unless some other intention is expressed in the will. This policy has been recognized and approved by the California decisions.'"

[2,3] "The word 'heirs' is a technical term, and in its 'technical sense' one's 'heirs' means the persons who would be entitled to succeed at his death to his estate, in case of intestacy, by virtue of our statute relative to succession." In re Estate of Newman, 68 Cal.App. 420, 425, 229 P. 898, 900. Hence, § 106, Probate Code, requires that the phrase "heirs at law" be construed as referring to the person or persons who would take Mr. Coffey's property by inheritance upon his dying intestate. The general rule is thus stated in the Newman case, supra, 68 Cal.App. at page 424, 229 P. at page 900: "It is a general rule of testamentary construction, so universally recognized as to render unnecessary a full citation of

the cases which support it that, in the absence of clear and unambiguous indications of a different intention to be derived from the context of the will, read in the light of the surrounding circumstances, the class described as testator's heirs, or such persons as would take his estate by the rules of law if he had died intestate, to whom a remainder is given by will, is to be ascertained at the death of the testator." It is further said, 68 Cal.App. at page 431, 229 P. at page 902: "Unless the will affords clear and unequivocal evidence to the contrary, all doubts will be resolved in favor of the heirs at law at the time of testator's death."

Unless the Liddle will furnishes evidence to the contrary it must be interpreted as referring, when using the term "heirs-at-law," to Mrs. Kathleen Coffey who was during her lifetime the sole heir apparent of Mr. Coffey. From and after his death on June 20, 1943, he could not have any other heirs in fact; the book was closed. If the Byrne relatives take his share of the stock they must do so as a class of pseudo heirs whose membership is determined at the time of distribution upon the death of Miss McNally, and this can be true only as a result of some affirmative evidence found in the will to the effect that such was the testatrix' desire. In the Newman case, supra, which was cited with approval at page 129 of 49 Cal.2d; at page 686 of 315 P.2d of the Stanford decision, supra, the testator provided for distribution upon termination of a trust "to my heirs at law" and it was held "that the words 'heirs at law' wherever and whoever they may be, according to the laws of succession of the State of California' mean those who are the heirs of Charles Newman at the moment of his death." 68 Cal.App. at page 431, 229 P. at page 903.

Dickey v. Walrond, 200 Cal. 335, 253 P. 706. The will and decree provided that upon termination of a certain trust "the estate in fee should pass as follows: An undivided one-half to his wife and an undivided one-fourth to each son, qualified, however, by the following language to wit: 'In the event of the death of my said wife

during the life of this trust, then the undivided one-half part that would otherwise have gone to her shall go to her heirs at law." 200 Cal. at page 337, 253 P. at page 707. It was held that this meant heirs determined as of the time of the wife's death. At page 339, of 200 Cal., at page 708 of 253 P., the court said: "The word 'heirs' * * * means the persons who would be entitled to succeed at his death to his estate in case of intestacy, by virtue of our statutes relative to succession." [Citations.] 'The "heirs" of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will.' [Citations.] The husband under our law is, of course, an heir of his deceased wife." At page 340 of 200 Cal., at page 708 of 253 P., quoting from *In re Estate of Watts*, 179 Cal. 20, 175 P. 415: "The word 'heirs' is a technical term, and is used to designate 'the persons who would by the statute succeed to the real estate (or, in California, estate of any kind) in case of intestacy.'" *Clarke v. Cordis*, 4 Allen, Mass., 446, 480. "The 'heirs' of a person," said this court in *Hochstein v. Berghauser*, 123 Cal. 681, 687, 56 P. 547, 549, "are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will." "In connection with this *Dickey* case it is to be observed that Mr. Coffey took a vested fee upon condition subsequent that he outlive the life tenant, Florence McNally. We think this conclusion is required by application of *In re Estate of Stanford*, supra, to the facts before us. That opinion also seems to indicate that Kathleen Coffey, as the sole heir of Edward I. Coffey, likewise took a future interest which vested upon the death of Mrs. Liddle, or certainly not later than the death of Edward I. Coffey, with enjoyment of possession postponed until termination of the trust upon the death of Florence McNally; that said estate was

transmissible by her through death or otherwise.

Dickey v. Walrond, supra, held that the wife's estate was a contingent one, saying at page 344 of 200 Cal., at page 709 of 253 P.: "What was her estate, if any, after the death of her husband, independent of the trust provisions? Plainly it was a fee if she survived the termination of the trust period, and nothing if she did not. In other words, it was an estate on condition precedent as provided in sections 709 and 1346 of our Civil Code. * * * Here it is perfectly plain that with reference to the trust estate, the widow had what is known as a contingent remainder, and so did her heirs at law." If it were held at bar that Kathleen Coffey took a contingent estate at the death of testatrix Liddle, that fact did not alter the further one that the contingency was fulfilled when she survived her husband, and what was previously a contingent remainder (if it was one) became vested in her as his sole heir at law. Cf. 33 Am.Jur. § 71, p. 532; 22 Cal.Jur. § 14, p. 810.

[4, 5] Of course, a bequest to heirs of a designated person is a gift to a class (*In re Estate of Newman*, supra, 68 Cal.App. 420, 424, 229 P. 898; *In re Estate of Newman*, 146 Cal.App.2d 780, 784, 304 P.2d 748; 57 Am.Jur. § 1262, pp. 834-835), and one of the recognized incidents of such a gift is that the class closes when increase in the number of its members becomes an impossibility. "A class is said to close when it can no longer increase. Closing of the class is concerned with that time after which no more members can be admitted. It does not refer to the time after which the membership cannot decrease." *Simes & Smith*, *Law of Future Interests*, Second Edition, § 632, p. 67.⁵

Section 106 Probate Code and the cases above quoted require technical terms in a will to be construed in a technical sense

5. The *Stanford* case holds that the interest of a class member who dies before distribution does not lapse or augment the shares of the other members; the heirs or legatees of the deceased member take her share. It was to make this

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rule clear that the court, 49 Cal.2d at page 129, 315 P.2d at page 686, overruled *In re Estate of Clark*, 65 Cal.App. 2d 636, 149 P.2d 465. In any event the heirs of Mrs. Coffey could not lose all interest in the trust estate.

"unless the context clearly indicates a contrary intention." Examination of Mrs. Liddle's will discloses no such contrary intention. On the contrary, paragraph Thirty-Second thereof recites ownership of 4800 acres of Kings County land then under lease to Associated Oil Company, and gives: "An undivided one-twentieth ($\frac{1}{20}$) to Edward I. Coffey and Kathleen Coffey, in joint tenancy with the right of survivorship." A codicil states that testatrix no longer owns said 4,800 acres but does own oil, gas and mineral rights in several other parcels in Kings County which she gives to her trustees to lease and manage, the proceeds of sales or leases to be divided among the corporations and persons named as devisees in paragraph Thirty-Second of the will and in the proportions named therein. It is evident that testatrix had Mrs. Kathleen Coffey in mind as an object of her bounty, for the realty (or its proceeds) was to go to her automatically upon the death of her husband by virtue of her status as surviving joint tenant. No hint of a desire that she should not succeed her husband, Edward, in ownership of the shares of stock appears in the will.

Looking to the authorities generally applicable to the instant situation it appears that the preponderance of cases uphold the right of Mrs. Coffey to succeed to the husband's share of the trust. Restatement of the Law of Property, § 308, p. 1706, says: "When a limitation is in favor of the 'heirs,' 'heirs of the body,' 'next of kin' or 'relatives' of a designated person, or in favor of other groups described by words of similar import, and the persons who come within the term employed to describe the conveyees are to be determined by a statute governing the intestate succession of property, then the statute is applied as of the death of the designated ancestor, unless an intent of the conveyor to have the statute applied as of some other date is found from additional language or circumstances." Comment a, at page 1707: "a. *Rationale*. A statute which prescribes the rules applicable to intestate succession operates by ascertaining the takers thereunder at the mo-

ment of the death of the person who has died intestate. When such statute is employed to determine who comes within the descriptive term employed to designate the conveyees under a conveyance, it is reasonable to infer that the conveyor intended the statute to be similarly applied. It is possible for the conveyor to provide that the statute should be applied as if the ancestor died at a time either before or after his actual death. Such possibility is recognized in the statement incorporated into the rule stated in this Section that an intent of the conveyor to have the statute applied as of some other date may be found from additional language or circumstances." Section 309, page 1723: "When a limitation is made in favor of the 'heirs,' 'heirs of the body,' 'next of kin' or 'relatives' of a designated person, or in other words of similar import, then, unless a contrary intent of the conveyor is found from additional language or circumstances, the interest of a member of the group ascertained by the application of a statute governing the intestate succession of property at the time required by the rule stated in § 308 is not subject to any requirement of survival to a date later than the time of the application of such statute." The argument that a different rule applies to the case of Mrs. Coffey because her gift is a substitutional one cannot prevail. The Restatement says in Comment f on § 309, at page 1729: "The fact that the gift to the described group is substitutional does not cause the postponement of the application of the statute to a period subsequent to the death of the designated ancestor."

Simes & Smith, Law of Future Interests, Second Edition, § 732, page 200: "Normally, when a gift has been made to the 'heirs' or 'next of kin' of a named individual, the donor has said in effect that he wants the property distributed as the law would distribute it if the named person died intestate. Accordingly, the normal time for applying the statute of descent or distribution is at the death of the named individual. This is, however, merely a rule of construction, and if the testator or grantor manifests

an intention that the statute be applied either at an earlier or a later time, such intention will be given effect."

96 C.J.S. Wills § 695(5), page 46: "The words 'heirs,' 'next of kin,' 'legal representatives,' or the like may be construed in two senses, either in their primary sense of those falling within the class at the date of the testator's death or their secondary or artificial sense of those answering the description at a date or event subsequent on the assumption that the testator died at such later date." At page 50: "Ordinarily, a gift to the 'heirs,' 'next of kin,' or the like of a person other than the testator will refer, for the determination of the class, to the death of such other, in the absence of a clearly manifested intent to the contrary in the will; the rule applies whether the gift is immediate or is one taking effect in the future.

"The same general rule as applies to a gift to the testator's own heirs, next of kin, or the like has been said to be applicable where the heirs or next of kin are of another than the testator, in which case the rule is that the gift refers, for determination of the class, to the death of such other unless the context of the will clearly manifests a different intent."

There is a divergence in the authorities, as might be expected. See, 57 Am.Jur. § 1290, p. 854; § 1369, p. 908; 75 A.L.R. 800; 33 A.L.R.2d 244, 256-261. But the rule stated in § 309 of the Restatement seems sound in principle and it is consistent with *In re Estate of Newman*, supra, 68 Cal.App. 420, 229 P. 898, above quoted.

Professor Ferrier, discussing "Gifts to 'Heirs' in California," in 26 Cal.Law Review 413, says at page 429: "Again, where the gift is that of a remainder to the heirs of a living person immediately following a life estate to such person himself, the heirs will usually be ascertained at the death of the ancestor. This is so because at the testator's death there are no 'heirs' (in the primary sense) of the living life tenant; and the date of their ascertainment at the latter's death coincides with the date when they are entitled to possession. Where the

two dates do not coincide, however, are the heirs to be determined as of their ancestor's death or as of the time of distribution? No California case has apparently presented the precise problem. In a Massachusetts case it was held that the heirs should be determined at the ancestor's death, although the possession was postponed until the termination of an intermediate life estate. The result accords with the primary meaning of the term and the particular situation seems to have called for no departure from that meaning." Commenting upon *In re Estate of Easter*, 24 Cal.2d 191, 148 P.2d 601, (which was distinguished in *In re Estate of Stanford*, supra, 49 Cal.2d at page 130, 315 P.2d at page 686, upon the ground that it interpreted the decree of distribution and not the will) the same author says, in 32 Cal.Law Review, at page 322: "[T]he problem is thrown back to an interpretation of the will. Here the widely recognized rule of construction in favor of vesting, codified by Probate Code section 28, together with the provision of Probate Code section 108, regarding the effect of a testamentary disposition to 'heirs,' leaves no reasonable alternative than to conclude that the gift to the heirs vested in interest at the testator's death and that their identity must therefore be determined at the same time."

[6] We conclude that it was error to hold that the Byrne claimants were the heirs at law of Edward I. Coffey. Upon the record before us it appears as matter of law (see *In re Estate of Norris*, 78 Cal. App.2d 152, 159, 177 P.2d 299; *In re Estate of Platt*, 21 Cal.2d 343, 352, 131 P.2d 825) that Mrs. Kathleen Coffey had an indefeasible fee interest in said remainder upon the death of her husband. This she took under the terms of the Liddle trust, not by inheritance from Mr. Coffey or by virtue of any proceedings in his estate. As her interest in the stock was unconditional and indefeasible, it passed when she died intestate to her own heirs-at-law, passed through inheritance of her estate, not as part of that of Mrs. Liddle or that of Mr. Coffey. Exclusive jurisdiction over her

estate, including the determination of her heirs and distribution of the property, resides in the probate court having charge of her estate (see, 20 Cal.Jur.2d § 28, p. 61; *Colden v. Costello*, 50 Cal.App.2d 363, 370, 122 P.2d 959).

Appellant James W. Harvey is the qualified and acting administrator of the estate of Mrs. Coffey, and it follows that her share of the stock must go to her administrator subject to administration for the benefit of her creditors and ultimate distribution to her heirs in the probate proceeding pertaining to her estate. Hence, it does not go directly to the Keating claimants other than Harvey.

Considerable discussion has centered upon an alleged agreement of compromise between Harvey as administrator of the estates of Edward I. Coffey and Kathleen Ann Coffey, on the one hand, and the Byrne claimants on the other. The record shows that Harvey as administrator of the Kathleen Coffey estate procured in the San Francisco probate proceeding covering that estate an order authorizing him to make a compromise of the claims of the Kathleen Coffey estate to the said trust remainder for the sum of \$20,000, to be paid him by the Byrne claimants. The individuals named herein as Keating claimants did not join therein or consent thereto. Later he obtained an order from the same court, which recited that the former order "neither enlarged nor abrogated the regular powers of the Administrator of said Estates, but merely afforded him additional protection from liability in the event he should effect the compromise," and "it now appearing that it is not to the best interests of the two above-entitled Estates and the persons interested therein that the Administrator should effect the said proposed compromise"; it authorized the administrator to exercise his own discretion and, if so advised, to prosecute the proceedings filed by him in the Liddle estate. Appeal was taken by the Byrne claimants and others from that order and it was affirmed in an

opinion of Division Two of the District Court of Appeal, First Appellate District, *In re Estate of Coffey*, 161 Cal.App.2d 259, 326 P.2d 511. Time for action upon a petition for hearing in the Supreme Court has not expired. The trial court in the proceeding at bar included in its decree a conditional approval of the compromise agreement, but the conditions were not fulfilled and therefore the following portion of the decree becomes applicable: "The Court expressly refrains from making any decree concerning the rights or obligations of the parties with respect to that certain agreement of March 28, 1955, more fully described in said findings between the Byrne petitioners and said Harvey as administrator of both said estates of Edward I. Coffey, deceased and Kathleen Ann Coffey deceased, in the event the conditions set forth above are not fulfilled, leaving to all parties without prejudice by this decree their right to pursue in any way they see fit their respective remedies for the enforcement of said agreement, or their rights to appeal from the decree of this court." The matter should remain open so far as we are concerned. It is conceivable that a reversal of the said decision of the First District Court of Appeal may legitimately affect the ultimate disposition of the cause now before us, but there is no occasion now to make any direction concerning the matter.

Other arguments presented in the briefs require no specific discussion.

[7] When deciding this case the trial judge first made a minute order and then signed formal findings and decree. Appellants have appealed from both the minute order and the decree. That minute order concluded with these words: "Messrs. O' Gara and O'Gara, counsel for Petitioner Byrne, et al, to prepare findings and order, serving same on other parties," thus calling for an "attorney order"; and hence it is not appealable. *Herrscher v. Herrscher*, 41 Cal.2d 300, 304, 259 P.2d 901.

The appeals from the minute order are dismissed. The decree is reversed with

instructions to the lower court to take such further proceedings herein as may be necessary or proper but not inconsistent with the views herein expressed.

FOX, P. J., and HERNDON, J., concur.



162 Cal.App.2d 336

**Raymond Arthur KITE, Plaintiff and
Respondent,**

v.

**COASTAL OIL COMPANY, C. L. Donovan,
Doe I, Doe II, and Roe Company, a cor-
poration, Defendants,**

Coastal Oil Company, Appellant.
Civ. 22716.

District Court of Appeal, Second District,
Division 3, California.

July 25, 1958.

Rehearing Denied Aug. 19, 1958.

Hearing Denied Sept. 17, 1958.

Action against owner of an oil well for personal injuries sustained by plaintiff, when while working as a member of a repair crew for an independent contractor called to make repairs on the well, a part of the pumping mechanism fell on him. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Nourse, J. pro tem., held that where, after jury was returned to the courtroom and a verdict signed by the foreman was handed to the court, jury was polled as to whether or not the verdict as read was their verdict, and upon such poll four jurors replied in the negative, and court polled the jury as to whether they found against defendant upon issue of liability, and three of such four jurors answered in the negative, and then jury was polled as to amount, and two of such four jurors voted in the negative, including a juror who answered in the affirmative on issue of liability, under such circumstances,

only eight jurors agreed upon the verdict signed by the foreman, and therefore there was no true verdict.

Judgment reversed.

1. Trial $\Rightarrow$ 325(3)

Where, in personal injury action, after jury was returned to the courtroom and a verdict signed by the foreman was handed to the court, jury was polled as to whether or not the verdict as read was their verdict, and upon such poll four jurors replied in the negative, and court polled the jury as to whether they found against defendant upon issue of liability, and three of such four jurors answered in the negative, and then jury was polled as to amount, and two of such four jurors voted in the negative, including a juror who answered in the affirmative on issue of liability, under such circumstances, only eight jurors agreed upon the verdict signed by the foreman, and therefore there was no true verdict.

2. Bailment $\Rightarrow$ 21

Negligence $\Rightarrow$ 20

Where a repair company was hired to repair a broken pumping rod on defendant's oil well, and it was not necessary for the repair crew to use defendant's engine or machinery in connection with such repair work, the law of invitor or invitee did not apply as to condition of defendant's machinery, but rather the law of bailor and bailee applied, and the rights of a member of the repair crew, and obligations of oil well owner, in regard to condition of such machinery, were governed by the laws applicable to bailments, and not by those governing invitor and invitee.

3. Bailment $\Rightarrow$ 21

Where it was not necessary for a repair crew engaged to fix a broken pumping rod to use actuating machinery on owner's well to accomplish the work, when the crew chose to use the machinery for that purpose, repair company became the bailee of such equipment and if the use of such machinery was solely for repair company's benefit, oil well owner was obliged to reveal any defects in the equipment known at the time

of the borrowing, but if it was for the mutual benefit of oil well owner and repair company, it was the duty of oil well owner to use reasonable care to ascertain equipment was safe and suitable for the purpose for which it permitted its use by repair company. West's Ann.Civ.Code, § 1893.

4. Mines and Minerals ⇨118

In action against owner of an oil well for personal injuries sustained by plaintiff when, while working as a member of a repair crew for an independent contractor called to make repairs on the well, a part of the pumping mechanism fell on him, since plaintiff proved that piece of machinery was caused to fall by breaking of an assembly, and there was evidence of a defect in that assembly which existed prior to its use by repair crew, plaintiff was entitled to a proper instruction on *res ipsa loquitur*.

5. Negligence ⇨121(2)

In order that an inference that a defendant was negligent and that his negligence was the proximate cause of an accident may be drawn from evidence of the occurrence of an accident, three conditions must exist, namely, that the accident was of a kind which ordinarily does not occur in the absence of someone's negligence, that it was caused by an agency or instrumentality within the exclusive control of the defendant, and that it was not due to any voluntary action or contribution on the part of the plaintiff.

6. Negligence ⇨136(6)

It is only where there is no issue of fact as to the existence of any of the three conditions necessary in order to apply doctrine of *res ipsa loquitur* that the court may direct a jury to draw inference of negligence, and if the existence of any of such three conditions is one of fact it is the province of the jury to determine whether the inference of negligence should be drawn from the facts proved. West's Ann.Code Civ.Proc. § 1958.

7. Mines and Minerals ⇨118

In action against owner of an oil well for personal injuries sustained by plaintiff

when while working as a member of a repair crew for an independent contractor called to make repairs on the well a part of the pumping mechanism fell on him, instruction directing jury to draw an inference of negligence due to the falling of the piece of machinery was improper, since evidence presented questions for the jury as to whether accident was one which might ordinarily occur in operation in which repair crew was engaged, without negligence on the part of the defendant, and as to whether voluntary action on the part of plaintiff contributed to the accident.

8. Trial ⇨194(16)

In action against owner of an oil well for personal injuries sustained by plaintiff when, while working as a member of a repair crew for an independent contractor called to make repairs on the well, a part of the pumping mechanism fell on him, instruction on a regulation of industrial safety dealing with maintenance of oil pumping machinery was improper in view of fact that under any view of the evidence highest duty that could have been placed upon defendant was to use ordinary care to keep equipment in repair and to discover any defect in it and to warn repair crew of that defect, and it was for the jury to determine from all the evidence whether defendant had breached such duty, and mere fact that a certain assembly was out of repair did not in and of itself establish a breach of that duty.

9. Negligence ⇨138(2)

Where plaintiff in a negligence action was not entitled to an instruction on *res ipsa loquitur*, unless jury found existence of three conditions which give rise to that inference, defendant was entitled to an instruction to the effect that mere fact that an accident happened would not show that anyone was negligent.

10. Negligence ⇨105, 138(3)

A person assumes a risk when he knows that a danger exists in a condition, use or operation of property and voluntarily places himself in an area of danger, having had the opportunity to do the work from

a safe place or to do it in a manner which would avoid the risk, and where there is evidence from which a jury can find the existence of all of these elements, defendant is entitled to have the jury instructed upon the legal principles of assumption of risk.

11. Mines and Minerals ☞118

Where, in personal injury action, there was evidence from which jury could find that plaintiff, who was injured by a piece of machinery which fell from defendant's oil well which he was repairing, was an experienced oil well worker, and he knew that the process he was engaged in of "rocking" the well was a dangerous operation, and he knew that the place in which he chose to do his work was one where if piece of machinery in question fell he would be in its path, oil well owner was entitled to instructions on assumption of risk.

12. Mines and Minerals ☞118

In action against owner of an oil well for personal injuries sustained by plaintiff when while working as a member of a repair crew for an independent contractor called to make repairs on the well a part of the pumping mechanism fell on him, instruction that plaintiff did not assume risk of any injury that could have come to him only through negligence of defendant or of defendant's agents or employees was erroneous in view of testimony that plaintiff assumed risk in question although fully informed of the dangers of the operation in which he was engaged.

Spray, Gould & Bowers, Los Angeles, for appellant.

Earl A. Barnes, Long Beach, for respondent.

NOURSE, Justice pro tem.

This is an action to recover damages for personal injuries. Defendant appeals from a judgment based upon the verdict of the jury awarding plaintiff the sum of \$58,000.

The facts:

Defendant is owner of an oil well in the city of Signal Hill. The day of the accident in question a pumping or sucker rod in the well casing had broken. Upon discovering the break, defendant's vice president and production superintendent called Oil Well Service Company (hereinafter called Oil Well) requesting that they repair or replace the broken rod. Oil Well responded by sending a repair crew of four men to defendant's premises.¹ The plaintiff was one of the members of this crew. The foreman of the crew was one Miller. Oil Well had been employed by defendant to service the well in question on a number of occasions over a period of several years and Miller had been instructed not to "rock" the well.

In order to do the repair work, it was necessary that the service crew detach the upper end of the pumping rod from the outer end of the walking beam which activated it. This walking beam was pivoted near its center on a vertical pole called the Simpson pole and the inner end was attached by means of a rod called the "Pittman arm" to an activating device which consisted of certain gears and a counterweight, which were in turn activated through a belt by a gasoline motor. The upper end of the Pittman arm rested in what is termed "the tail bearing assembly." This assembly consisted of a bearing on which the stirrup of the Pittman arm (a shaft connecting the two ends of the bridle which the upper portion of the arm consisted of), rested and over which was a cast iron cap which was designed to be secured by four bolts. When the Oil Well crew arrived at the well, the inner end of the walking beam was at its greatest height from the ground and the counterbalance was at the top of its cycle. In order that the broken pumping rod might be pulled from the well casing, it was necessary to have the walking beam disconnected from

1. It is conceded that Oil Well acted as an independent contractor and that the re-

pair crew were its employees and not the employees of defendant.

both the upper end of the pumping rod and from the activating machinery. In order to disconnect the walking beam from the activating machinery, the plaintiff caused the counterbalance, while still connected to the Pittman arm, to be lowered so that it was at the point nearest the ground in its cycle.² After the broken pumping rod had been repaired, the service crew proceeded to attempt to put the well back in operation. In order to do this it was necessary to reconnect the pumping rod and the Pittman arm to the walking beam. This could be done in one of two manners. First, by connecting the Pittman arm to the counterbalance at its lower position and then by the use of certain tackle, pulling the pumping rod to a height where it could be connected to the walking beam. This operation would not require the use of the gasoline engine or any movement of the walking beam or the Pittman arm. The second method was to lower the outer end of the walking beam to where it could be connected with the pumping rods and then by rocking the counterbalance raise it to its vertical position where it could be connected with the Pittman arm. The service crew chose the second method.

This rocking operation was performed substantially as follows: By the use of the engine, the counterbalance was raised as high as possible and then allowed to drop free and swing in a pendulum fashion and when it started to swing back, power was again applied so as to raise it farther at the top of its swing, the purpose being to gradually bring it to a vertical position. While attempting this operation the cap on the upper half of the tail assembly broke; the Pittman arm was thus caused to fall and strike the plaintiff, causing him serious injury. Defendant's production manager witnessed the rocking operation and voiced no objection to it.

2. There was a conflict in the evidence as to whether he performed this operation against the orders of his foreman or as to whether it was necessary to lower the counterbalance in order to disconnect the Pittman arm. But it was undisputed

The evidence showed without conflict that no force was applied to the cast iron cap during the normal pumping operation of the well but that upon the breaking of the pumping rod, a heavy blow would be struck against the cap by the stirrup. The evidence was in conflict as to what force was applied to the cap through the rocking operation, but there was evidence that if the rocking operation were properly performed the stirrup would not be caused to strike against the cap and that the operation could be performed with the cap off without causing the Pittman arm to be disconnected from the walking beam and fall.

There was substantial evidence to prove that one of the four bolts that secured the cap at the tail assembly and which held the Pittman arm in place on the upward thrust of the arm, was missing and had been for some time; that one bolt was not secured by a nut and that another permitted about $\frac{3}{8}$ of an inch play; that if three bolts on the cap had been secured, it would have withstood any upward thrust placed upon it by the rocking motion.

There was evidence that the cap was visibly loose and that this condition was noticed by certain of the crew although the plaintiff denied noticing it; that the rocking operation was known to be dangerous and that plaintiff, who at the time of the accident was operating the clutch, stood in a position known to be dangerous although he might have stood in a safe position. To the contrary, there was evidence that less than 30 days prior to the accident, the entire pumping equipment had been overhauled and inspected and at that time there were no loose or missing bolts in the tail assembly and that it was the duty of the employees of the defendant to each day inspect all bolts and tighten all loose ones.

[1] The evidence was in conflict as to whether plaintiff was the one who per-

that if the counterbalance had been left in the position at which it was found by the repair crew, it would have been unnecessary to have performed the rocking operation herein described.

formed the rocking operation and as to whether or not he had been instructed by his foreman not to do so. It is undisputed that at the time of the accident plaintiff was standing on the ground directly in line with the Pittman arm and operating the clutch on the engine so as to give impetus to the swing of the counterweight in its pendulum movement. The issues submitted to the jury were negligence of the defendant, contributory negligence of the plaintiff and damages.

During the deliberations of the jury, the trial judge advised counsel that the bailiff had informed him that the jury was ready to return a verdict but they were not agreed upon the amount of the verdict and that he intended to poll the jury on two separate questions: a. the question of liability and b. the question of damages. Thereupon counsel for the defendant objected to that procedure and the trial judge stated that he would first poll the jury on the general verdict and that if the required number did not respond to that verdict, he would poll the jury separately upon the questions above noted. To this procedure, counsel for the defendant again objected. Thereupon the jury was returned to the courtroom and a verdict signed by the foreman was handed to the clerk. After this was read to the jury, the jury was polled as to whether or not the verdict as read was their verdict. Upon this poll, jurors 1, 2, 5 and 12 replied in the negative. The remaining jurors replied in the affirmative. The court then polled the jury as to whether they found against the defendant upon the issue of liability. Upon this poll, jurors 1, 2 and 5 answered in the negative. After this poll was taken the court stated:

"Now will you poll them as to amount.

"Regardless of how you may have voted on the issue of liability we want to know if this is your verdict as to amount."

Upon this poll, jurors 5 and 12 voted in the negative. It is evident from the facts we have just recited that the jury did not reach a verdict.

Under section 7 of article I of the Constitution of this State, a verdict may not be rendered in a civil action by less than three-fourths of the jury. Section 618 of the Code of Civil Procedure provides in part as follows: "* * * Either party may require the jury to be polled, * * * *If upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, * * **". When in the present case, four of the jurors upon the poll taken on the general verdict, declared that it was not their verdict, it was clearly the duty of the trial court to send them back for further deliberations and we know of no procedure which authorized him to, in open court, take what amounted to special verdicts upon the issues submitted to the jury. However, in the present case, the result of the second two polls merely confirmed the first. Jurors 1, 2 and 5 stated that they did not find the defendant liable. Necessarily this included a finding by them that the plaintiff was not entitled to any damages. Upon the poll of the jury as to the issue of damages, juror no. 12 joined with jurors 1, 2 and 5 and stated that the verdict as read was not his verdict. The result is that under any view of the matter, only eight jurors had agreed upon the verdict as signed by the foreman and hence there was no true verdict.

[2] Throughout the briefs here and apparently in the trial court, defendants have taken the position that the service crew were called upon to repair the entire pumping apparatus of the well in question and that as the tail assembly, the breaking of which permitted the Pittman arm to fall and strike the plaintiff, was part of that equipment, the rule that an owner must furnish an independent contractor a safe place to work does not apply. This contention is unsound. In the first place, Oil Well was not employed and did not undertake to repair any part of the pumping equipment except the broken pumping rod. They were not called upon to do any repair work upon any other part of the equipment. In the second place, under the facts here, there is no question as to the safe condition of the

premises. It was not necessary for the repair crew to use defendant's engine or machinery and unless it was used, the premises were safe. The decision relied upon by defendant that holds that an invitee who enters premises under construction or repair, accepts those premises in the condition they then are, has no application for it is not the law of invitor or invitee that applies here, but that of bailor and bailee, and the rights of the plaintiff and the obligations of the defendant are governed by the laws applicable to bailments and not by those governing invitor and invitee.

[3] As we have heretofore pointed out, it was not necessary for the repair crew to use defendant's actuating machinery to accomplish the work. When they chose to use the actuating machinery for the purpose, Oil Well became the bailee of this equipment. If the use of the machinery was solely for their benefit, the transaction was a loan and the defendant's duties were fixed by section 1893 of the Civil Code (see also 8 C.J.S. Bailments § 25; 6 Am.Jur. page 308, § 193), and he was obligated to reveal any defects or devices in the equipment which were known at the time of the borrowing. If it was for the mutual benefit of defendant and plaintiff, it was the duty of the defendant to use reasonable care to ascertain that the equipment was safe and suitable for the purposes for which it permitted its use by Oil Well. Civil Code, § 1955; McNeal v. Greenberg, 40 Cal.2d 740, 742, 255 P.2d 810; 6 Am.Jur. 310, § 195.

The evidence here was subject to two interpretations under one of which the bailment would have been a gratuitous one for the sole benefit of Oil Well and under the

other of which it would have been a bailment for the mutual benefit of both Oil Well and defendant. If the jury believed that the rocking procedure was used by Oil Well solely as a short-cut in performing its work of putting the well back in operation, then it was a gratuitous loan or bailment for its sole benefit. If the jury believed that the well was rocked without the consent and contrary to the directions of defendant, as testified to by the foreman of Oil Well repair crew, then, of course, defendant owed no duty to Oil Well or the members of its crew. If however, the rocking procedure was with the consent of the defendant and was for the benefit of both defendant and Oil Well, then the bailment was one of mutual benefit.

[4-6] Plaintiff, having proved that the Pittman arm was caused to fall by the breaking of the tail assembly, and there being evidence that there was a defect in that assembly which existed prior to its use by the repair crew, the plaintiff was entitled to a proper instruction on *res ipsa loquitur*, for if the defect existed prior to the repair crew taking possession of the machinery and putting it to use, the assembly was then in the exclusive possession of defendant. *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 247 P.2d 344. The instruction³ given by the court, however, was erroneous. In order that an inference that defendant was negligent and that his negligence was the proximate cause of an accident, may be drawn from evidence of the occurrence of an accident, three conditions must exist. "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defend-

3. "From the happening of the accident involved in this case as established by the evidence, an inference arises that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference itself is a form of evidence, and if none other exists tending to overthrow it, or if the inference, either alone or with any other evidence supporting it, preponderates over

contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part."

ant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." *Ybarra v. Spangard*, 25 Cal.2d 486, at page 489, 154 P.2d 687, 689, 162 A.L.R. 1258; *Salgo v. Leland Stanford etc. Bd. Trustees*, 154 Cal.App.2d 560, 571-572, 317 P.2d 170. It is only where there is no issue of fact as to the existence of any of these conditions that the court may, as the court did here, direct the jury to draw the inference. *Seneris v. Haas*, 45 Cal.2d 811, at page 823, 291 P.2d 915, 53 A.L.R.2d 124; *Roberts v. Bank of America*, 97 Cal.App.2d 133, at page 137, 217 P.2d 129; *Salgo v. Leland Stanford etc. Bd. Trustees*, supra; *Rodin v. American Can Co.*, 133 Cal.App.2d 524, 284 P.2d 530. If the existence of any condition is one of fact it is the province of the jury to determine whether the inference of negligence should be drawn from the facts proved. Code Civ.Proc. § 1958.

[7] The existence of the first and of the third of the conditions mentioned above, was in the present case a question of fact to be determined by the jury. There was evidence that on other occasions tail assemblies of the kind used by the defendant had broken even though firmly bolted in place, and by reason of the exertion of unusual force against the casting. There was evidence that in a rocking operation unusual force is always exerted against the cap although there was also evidence that this unusual force was only exerted against the cap when the rocking operation was improperly performed; and the evidence was undisputed that the plaintiff was handling the clutch on the engine and was thus in control of the rocking operation. From this evidence the jury might have found either that the accident was one which might ordinarily occur in a rocking operation, without negligence on the part of the defendant, or that there was voluntary action on the part of the plaintiff con-

tributing to the accident, or found that neither of the first or third conditions existed. Under the instruction given by the court, all of these matters of fact were taken from the jury and they were instructed to draw the inference.

The error we have just pointed out in the instruction, was not cured by the instruction given by the court in the form of B.A.J.I. 206-C. That instruction does not permit the jury to determine the issues of fact that we have mentioned, but merely explains to the jury the reason for the court's instructing them to draw the inference.

The instruction given is erroneous in a further particular, for by it the jury were told that if the inference alone, or with other evidence preponderated over evidence to the contrary, it warranted a verdict for the plaintiff. It thus ignored the defense of contributory negligence and there was ample evidence to support this defense. By the instruction the jury should have been told that if the inference alone or with other evidence preponderated over evidence to the contrary it warranted a finding that the defendant was negligent.

[8] The court in instructing the jury, read to them section 6630 of the Administrative Code, which contains a regulation adopted by the Division of Industrial Safety dealing with the construction, installation and maintenance of oil well pumping machinery.⁴ It instructed the jury that if any party to the action conducted himself in violation of the provisions of this section of the Administrative Code, such conduct constituted negligence as a matter of law. The court erred in giving this instruction. In the first place, there was no evidence to which any portion of the code section read to the jury was applicable, except the portion thereof which required that oil pumping machinery be kept in repair. In the second place, the instruction placed a

4. "Construction, Installation and Maintenance (a) Oil well pumping machinery shall be substantially constructed to conform to good engineering practice and shall be kept in good repair. (b) The

machinery shall be so installed and secured in place to withstand the stresses imposed under normal operating conditions."

duty upon defendant as to the plaintiff, greater than any which was imposed under the facts in the present case. Under any view of the evidence, the highest duty that could have been placed upon the defendant was to use ordinary care to keep its equipment in repair and to discover any defect in it and to warn the repair crew of that defect.

The instruction given made it the absolute duty of defendant to keep its machinery in repair and made it liable even though it used ordinary care in performing its duty to repair. It was for the jury to determine from all of the evidence whether the defendant had breached its duty, and the mere fact that the tail assembly was out of repair, did not in and of itself, establish a breach of that duty. This case is to be distinguished from *Armenta v. Churchill*, 42 Cal.2d 448, 267 P.2d 303. In that case the safety order involved required the performance of a specific act, the sounding of a horn by the defendant while backing his truck. In the present case the order does not require the doing of any specific act and the duty that was cast upon

defendant, as has been pointed out, was to use reasonable care to discover the defect and to repair it. Unless the defendant breached this duty, it was not negligent. *Copfer v. Golden*, 135 Cal.App.2d 623, at page 634, 288 P.2d 90.

[9] The defendant requested, but the court refused to give an instruction to the effect that the mere fact that the accident happened, would not show that anyone was negligent. Inasmuch as the plaintiff was not entitled to an instruction on *res ipsa loquitur*, unless the jury found the existence of the conditions which give rise to that inference, the defendant was entitled to the instruction refused. *Barrera v. De La Torre*, 48 Cal.2d 166, at pages 170-172, 308 P.2d 724.

The defendant requested, but the court refused to give instructions in the form of B.A.J.I. 207, 207-C and 207-D⁵ dealing with legal principles of assumption of risk. To the contrary, the court instructed the jury that the plaintiff did not assume the risk of any injury that could have come to him only through the negligence of the defendant.⁶ The court erred in denying

5. "We have a legal principle commonly referred to by the term 'assumption of risk.' It now will be explained to you: A person is said to assume a risk when he freely, voluntarily and knowingly manifests his assent to dangerous conduct or to the creation or maintenance of a dangerous condition, and voluntarily exposes himself to that danger, or when he knows that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself, or remains, within the area of danger. A person who thus assumed a risk is not entitled to recover for damage [caused him without intention and] which resulted from the dangerous condition or conduct to which he thus exposed himself.

"Your attention is called to a distinction between contributory negligence and assumption of risk. As said elsewhere in these instructions, an essential factor in contributory negligence is that it be a proximate cause of the injury of which a person thereafter complains. But assumption of risk, if it meets with the requirements of the law as stated to you,

will bar recovery for damage although it plays no part in causing the accident except merely to expose the person to the danger.

"In determining whether or not a person had knowledge of a dangerous situation and whether, with such knowledge, he assented to or assumed a risk so as to bar recovery by him of damages for injury, you may consider his age, experience and capacity along with all the other surrounding circumstances as shown by the evidence. When we are concerned with a question as to the possible knowledge that may have existed in the mind of another person at a certain time, we must, of necessity, look to the indirect evidence, unless he has admitted having such knowledge, and we may draw from that evidence whatever inferences our judgment directs to be reasonable."

6. "I instructed you that the plaintiff Raymond Arthur Kite did not assume the risk of any injury that could have come to him only through the negligence of the defendant Coastal Oil Company or said defendant's agents or employees." B.A.J.I. 207-E.

the requested instructions and in giving the instruction above noted.

[10] A person assumes a risk when he knows that a danger exists in the condition, use or operation of property and voluntarily places himself in an area of danger, having had the opportunity to do the work from a safe place or to do it in a manner which would avoid the risk. Where there is evidence from which the jury can find the existence of all of these elements, the defendant is entitled to have the jury instructed upon the legal principles we have set forth.

[11] In the present case, there was evidence from which the jury could find that: Plaintiff was an experienced oil well worker; he knew that rocking a well was a dangerous operation; he knew that the place at which he chose to do his work was one where, if the Pittman arm fell, he would be in its path; he could have done his work from a safe position upon the platform; the operation of rocking the well placed extraordinary strain upon the cap of the tail assembly; the tail assembly was "sloppy and loose"; this condition was seen by another member of the repair crew; plaintiff at times during the operation, stood in a position where he had a full view of the tail assembly and if he had looked, would have seen its condition as observed by his coworker. From this evidence the jury could have found that plaintiff, despite his testimony that he did not look at the tail assembly, did look at it; that he observed its defective condition and that he voluntarily chose to stand in a position of known danger rather than in a safe position upon the platform, and that he thus assumed the risk of the tail assembly giving way during the rocking operation. Defendant was therefore entitled to instructions on the assumption of risk which it requested.

[12] The instruction given (B.A.J.I. 207-E) while proper under some facts, was erroneous under the facts here. In *Prescott v. Ralphs Grocery Co.*, 42 Cal.2d 158, at page 162, 265 P.2d 904, 906, the Supreme Court in holding that the trial court properly refused an instruction which was substantially in the form of that given here, said: "We cannot agree, however, that the court erred in refusing any of the instructions requested by plaintiff. In the first of these instructions the court was asked to tell the jury that 'You are instructed as to the doctrine of assumption of risk that the law is, that while a person assumes the perils which are naturally incident to the position he has taken, *he does not assume dangers which come only from the negligent act of another.*' (Italics added.) As we have seen, the elements of the defense of assumption of risk are a person's knowledge and appreciation of the danger involved and his voluntary acceptance of the risk. It follows that a person, if he is fully informed, may assume a risk even though the dangerous condition is caused by the negligence of others. (Citations.) Indeed, the cases in which this defense is applied usually involve dangerous conditions created by the negligence of another. The requested instruction was erroneous, and the trial court was not under a duty to revise it to state the law accurately."⁷

The judgment is reversed.

SHINN, P. J., concurs.

PARKER WOOD, Justice.

I concur in the judgment and in the part of the opinion which is to the effect that the jury did not return a verdict. That part of the opinion was a sufficient disposition of the appeal.

In my opinion, the declarations of this court regarding various additional ques-

7. The Supreme Court, in the cited case, expressly overruled *Jones v. Hedges*, 123 Cal.App. 742, 12 P.2d 111, which is relied upon by the editor of B.A.J.I. as authority for the instruction here given

by the court. *Ostertag v. Bethlehem etc. Corp.*, 65 Cal.App.2d 795, 151 P.2d 647, which was also cited by the editor, is based upon *Jones v. Hedges*, supra.

tions as to bailment, assumption of risk, res ipsa loquitur, and certain instructions are not necessary or appropriate on this appeal and will tend to restrict the trial judge, upon the retrial, in declaring the law. It might well be that the evidence upon the retrial will be substantially different from the present evidence. In any event, it is reasonable to believe that the retrial judge will be confronted with conflicting claims regarding the applicability of the doctrine of "law of the case"; and that he will have the additional burden of comparing the evidence in the first trial and in the retrial for the purpose of determining whether the doctrine is applicable. Under the circumstances of this case, the retrial judge should be free to declare the law, in the light of the most recent decisions available at the time of trial, without being required to compare the evidence in the two trials to determine whether he is bound by the several declarations of law as stated on this appeal.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



162 Cal.App.2d 381

Claude SHARPENSTEEN, Plaintiff and Respondent,
v.

Herbert HUGHES, Individually and as Sheriff of Imperial County, Defendant and Appellant.
Civ. 5833.

District Court of Appeal, Fourth District,
California.

July 28, 1958.

Rehearing Denied Aug. 22, 1958.

Hearing Denied Sept. 24, 1958.

Claim and delivery action filed by owner of pinball machines against county sheriff for return of machines. The Superior Court, Imperial County, L. J., Mouser, J., rendered judgment for machine owner and sheriff appealed. The District Court of Appeal, Griffin, J., held that pinball machines,

which were predominantly games of skill and which afforded opportunity of free plays, were within exception to statute prohibiting possession of slot machines and possession of such pinball machines was not prohibited.

Affirmed.

1. Gaming ☞74(6)

Pinball machines, which were predominantly games of skill and which afforded opportunity of free plays, were within exception to statute prohibiting possession of slot machines and possession of such pinball machines was not prohibited. West's Ann. Pen.Code, §§ 330b(1-4), 330.1 to 330.5.

2. Gaming ☞63(2)

Intent of Legislature in enacting gambling laws should be considered if legislative act can be reasonably construed in accordance therewith.

3. Criminal Law ☞13 Statutes ☞241(1)

A statute setting forth certain acts as constituting a criminal offense and providing for confiscation of property for its violation should be specific and not open to doubt, and when language which is reasonably susceptible of two constructions is within Penal Law, ordinarily that construction which is more favorable to offender will be adopted.

4. Gaming ☞63(1)

Statute prohibiting possession of slot machines but exempting pinball machines from its provisions is constitutional. West's Ann.Pen.Code, §§ 330b(1-4), 330.1 to 330.5.

Arthur L. Lockie, Dist. Atty., El Centro, by Frank Traviss and Rigmor B. Cope, Deputy Dist. Attys., El Centro, for appellant.

M. M. Cline, El Centro, and Archibald M. Mull, Jr., Sacramento, for respondent.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Richard S. L. Roddis, Deputy Atty. Gen., amicus curiae for appellant.

Walter C. Fox, Jr., W. Burleigh Pattee, Bruce M. Casey, Jr., and Chickering & Gregory, San Francisco, amicus curiae for respondent.

GRIFFIN, Justice.

As a result of a claim and delivery action filed by plaintiff-respondent against defendant-appellant Herbert Hughes, individually and as sheriff of Imperial County, the trial court ordered the return to plaintiff of four so-called coin-operated pinball machines (Exhibits G, H, K and L) and their contents, gave judgment for damages for retention for \$576, and ordered defendant to pay his costs of suit. From this portion of the judgment and order defendant appeals. It was further ordered that four other machines (Exhibits E, F, I and J) be confiscated and destroyed under sections 330b and 330.1 of the Penal Code, together with the money therein contained. There is no appeal from this latter portion of the judgment.

By court order, R. F. Jones & Company, a corporation, a manufacturer of so-called amusement devices known as pinball machines, through its attorneys was, as amicus curiae, allowed to file a brief in this action predicated upon its interest in an action pending wherein the State Franchise Tax Board assessed certain additional taxes against it, contending such owner was, by the mere possession and sale of such machines, engaged in an "illegal activity", and that the decision in this case would accordingly affect the decision in that action. A similar request by the Attorney General, who appeared in that case, was granted. The defendant thereafter, by answer, admitted seizing nine pinball machines found in the possession of plaintiff on April 19, 1956. He alleged they were slot machines or devices prohibited by sections 330b and 330.1 of the Penal Code and that their seizure was lawful under sections 330.4 and 335a of the Penal Code. It was stipulated that one machine, "Williams Race the Clock", was only a game of skill and it was returned to plaintiff. The remaining eight were the subject of the trial.

The court found that these were all of a general type commonly known as pinball machines, indicating "free games" when certain scores were obtained and it found that each was predominantly a game of chance. The specific finding was that "All of the machines in question are of the *general type commonly known as pinball machines*, consisting of a table on legs, the table being in the shape of a rectangular box with a glass top, slightly elevated at the back. Inside the box is a surface studded with pins, plugs, springs, buffers, and holes. Upon the insertion of a coin, a specified number of balls are released which can be projected onto this surface by means of a plunger, after which the ball wends its way from the top toward the bottom. In its journey it may fall into any one of a number of holes or find its way out through the bottom hole for replay. It may likewise hit one or more of the springs, pins, or plugs, thereby on occasion lighting up certain figures and registering various scores on a perpendicular board at the head of the machine. When certain scores are obtained 'free games' are indicated." (Italics ours.) It then found that four of these machines were actually used in gambling, prior to their seizure by the sheriff, and that he had a right to seize and claim their contents, and no argument is presented in this respect. It found the other four were so constructed as to award "free games", and although predominantly games of chance, were not being used for gambling. They were ordered returned to plaintiff and damages were awarded for their detention.

The court's judgment in respect to these last four machines was based on the following conclusions of law: (1) "The possession of the pinball machines involved in these cases, although predominantly games of chance, is not prohibited by the provisions of Section 330b(1) and (2) or of Sections 330.1 and 330.4 of the California Penal Code. (2) The Legislature did not intend by its enactment of the above sections to prohibit the mere possession of what is commonly known as pinball machines in the absence of their use for

gambling. (3) Section 330b(4) of the Penal Code exempts pinball machines from the prohibition of Penal Code, Sections 330b(1), (2) and (3); and Section 330.5 of the Penal Code exempts pinball machines from the prohibition of Sections 330.1-4 of this Code."

The provisions of the sections applicable are Section 330b:

Subdivision (1): "It is unlawful for any person to * * * own * * * possess, * * * any slot machine or device as hereinafter defined, * * *"

Subdivision (2) "*Definition of slot machine.* Any machine, apparatus or device is a slot machine or device within the provisions of this section if it is one that is adapted * * * for use in such a way that, as a result of the insertion of any piece of money or coin or some other object * * * such machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive any piece of money * * * or additional chance or right to use such slot machine or device. * * *"

Subdivision (4): "*Games of skill.* It is expressly provided that with respect to the provisions of Section 330b only of this code (re possession), pinball, and other amusement machines or devices which are predominantly games of skill, whether affording the opportunity of additional chances or free plays or not, are not intended to be and are not included within the term slot machine or device as defined in said Section 330b of this code."

Section 330.1 provides in part: "Every person who * * * possesses * * * any slot machine or device as hereinafter defined * * * is guilty of a misdemeanor." That section also redefines a slot machine as a device within the meaning of sections 330.1 to 330.5, inclusive.

Section 330.4 reads in part: "*Slot Machines and Devices; Possession or Control; * * **"

"It is specifically declared that the mere possession or control, * * * of any slot machine or device, as defined in Section 330.1 of this code, is prohibited * * *."

That section makes the machine subject to confiscation, and the offense punishable as a misdemeanor.

Section 330.5 provides: "It is further expressly provided that Sections 330.1 to 330.4, inclusive, of this code shall not apply to music machines, weighing machines and machines which vend cigarettes, * * * in which there is deposited an exact consideration and from which in every case the customer obtains that which he purchases * * * it is further expressly provided that with respect to the provisions of Sections 330.1 to 330.4, inclusive, only, of this code, pinball, and other amusement machines or devices which are predominantly games of skill, whether affording the opportunity of additional chances or free plays or not, are not intended to be and are not included within the term slot machine or device as defined within Sections 330.1 to 330.4, inclusive, of this code."

In support of the court's conclusions and judgment, plaintiff cites a statement in the Assembly Daily Journal dated April 4, 1950, signed by Assemblymen Ralph M. Brown and Thomas W. Caldecott, as follows:

"With respect to Assembly Bill No. 1 and Assembly Bill No. 34, for the purpose of establishing legislative intent and to guide the Members of the Legislature in acting on them, we desire to state that the intent of these bills is to make illegal the possession of the so-called slot machines in their various forms and we do not intend to prohibit possession of what is commonly known as a pinball machine."

See also, Legislative History, Assembly Daily Journal, April 4, 1950, page 760; and Senate Journal, 1st Ex.Sess. pp. 129-130.

Plaintiff concedes, as he must, that the machines in question are included within the definition of "slot machine or device" set forth in sections 330b and 330.1, *supra*. The point at issue is whether they are excepted from the effect of these sections by the provisions of section 330b, subdivision (4) and section 330.5, *supra*. The exception provisions are "pin ball, and other amusement machines or devices which are predominantly games of skill, whether affording the opportunity of additional chances or free plays or not".

It is plaintiff's and amicus curiae Jones Company's claim that by the use of the comma after the words "pin ball", it excepted all pinball machines from its application, regardless of whether they are games of skill or games of chance, as long as games of chance are not used for gambling; that as a matter of correct grammar, the legislature should have used the term "pinballs" rather than "pin ball" to conform to the plural verb "are" used in the statute, and that this omission was but an inadvertence. It is then claimed that to give it the construction advanced by the Attorney General, it would be necessary to strike out the words "~~pinball and other~~ amusement machines or devices which are predominantly games of skill", or that by striking out the comma after the words "pin ball" the exception would cover pinball machines and other amusement machines or devices which are predominantly games of skill. Under any claim, it must be conceded that no suggested construction is wholly convincing. If plaintiff's interpretation is correct, and it is not unreasonable under the language used, then the exception applies to the possession of *all* pinball machines not otherwise prohibited by law, whether or not free plays are provided. Under this interpretation the order of the trial court, in respect to these four machines here involved, would be authorized. Apparent-

ly, these machines were found to be games of chance by reason of the fact that they afforded the opportunity of additional chances or free plays. It would therefore appear, as applied to mere possession, under sections 330.1 to 330.4 inclusive, that where such devices or pinball machines are predominantly games of skill, whether or not they afford the opportunity of additional chances of free play, are not included in the term "slot machine or device" as defined in those sections. This construction is in keeping with the declared legislative intent of the authors of said legislation, approved by the Assembly for publication in the Assembly Daily Journal to the effect that it was intended thereby to make illegal the possession of the slot machines but did not intend to *prohibit possession of what is commonly known as a pinball machine*.

[1] It has been held that expressions of the legislative intent of the legislature is an aid to proper statutory interpretation. Sec. 1859, Code Civ.Proc.; *City and County of San Francisco v. Industrial Accident Commission*, 183 Cal. 273, 279, 191 P. 26; *People v. Earl*, 19 Cal.App. 69, 71, 124 P. 887; *Old Homestead Bakery, Inc., v. Marsh*, 75 Cal.App. 247, 242 P. 749; *Sato v. Hall*, 191 Cal. 510, 519, 217 P. 520; 70 A.L.R. 19; 70 A.L.R. 5, 36-37. It appears to us that the more reasonable construction of the exception would be that it was intended thereby that the mere possession of pinball machines and *other* amusement machines or devices (indicating pinball machines, as such, are designed for amusement) which are predominantly games of skill, whether affording the opportunity of additional chances or free play, come within the exception.

While the trial court did find that these particular machines were predominantly games of chance due to the fact that the users could secure additional chances or rights to use such machines, it also found they were "*of the general type commonly known as pin ball machines*", and so described them.

Apparently one such machine, which did not provide for a free game or additional chances, was returned because it was stipulated it was a game of skill. Four of the others which were confiscated were, as found by the court, used in gambling. No appeal was taken from these orders.

We conclude, in support of the trial court's order returning these machines, after applying the exceptions, such machines were predominantly games of skill, and the exception, insofar as mere possession alone is concerned, would be applicable.

[2,3] Appellant's counsel and counsel amicus curiae have given us the benefit of an exhaustive search of authorities in respect to the evils of gambling in general and the possible interpretations of the sections notwithstanding the declaration of legislative intent. We feel that the intent of the legislature in enacting such laws should be considered if the legislative act can be reasonably construed in accordance therewith. A statute setting forth certain acts as constituting a criminal offense and providing for confiscation of property for its violation should be specific and not open to doubt, and when language which is reasonably susceptible of two constructions is within a penal law, ordinarily that construction which is more favorable to the offender will be adopted. *People v. Ralph*, 24 Cal.2d 575, 581, 150 P.2d 401.

[4] As thus interpreted, the constitutionality of the act is supported by competent authorities and the judgment of the trial court returning the four machines in question, rendering judgment for their detention, and that defendant bear his own costs, was authorized. *Atlas Finance Corporation v. Kenny*, 68 Cal.App.2d 504, 157 P.2d 401; *Chapman v. Aggeler*, 47 Cal. App.2d 848, 119 P.2d 204; *Bacon Service Corp. v. Huss*, 199 Cal. 21, 33, 248 P. 235; *County of Los Angeles v. Eikenberry*, 131 Cal. 461, 468, 63 P. 766; *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 468, 55 P.2d

177; *People v. Busick*, 32 Cal.App.2d 315, 320, 89 P.2d 657.

The portion of the judgment from which this appeal has been perfected is affirmed.

MUSSELL, Acting P. J., and McCABE, J. pro tem., concur.



162 Cal.App.2d 414

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

C. E. OWEN, Defendant and Appellant.
Cr. 1235.

District Court of Appeal, Fourth District,
California.

July 29, 1958.

Hearing Denied Sept. 24, 1958.

Motion in the nature of writ of error coram nobis to vacate judgment of conviction and sentence for forgery. The Superior Court of Tulare County, Frederick E. Stone, J., entered an order sustaining demurrer to the motion without leave to amend, and movant appealed. The District Court of Appeal, Griffin, J., held that demurrer to the motion was properly sustained without leave to amend.

Order affirmed.

I. Criminal Law ⇨997(11)

Demurrer to motion in the nature of writ of error coram nobis to vacate judgment of conviction and sentence for forgery on ground that statute defining forgery was unconstitutional, that defendant had been denied due process of law and effective assistance of counsel, and that original complaint in justice's court was void and improperly amended was properly sustained without leave to amend. West's Ann.Pen.Code, § 470.

2. Criminal Law §997(1)

Coram nobis is not a catch-all by which the propriety of convictions may be litigated and relitigated *ad infinitum*.

Frank E. Wyland, Jr., Fresno, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant-appellant filed in the Superior Court, where he previously was represented by counsel and pleaded guilty to the crime of Forgery, a "Motion (in the nature of writ of error *coram nobis*) to Vacate Judgment of Conviction and Sentence of Imprisonment." Apparently, at the trial of the main action, upon defendant's request his attorney was dismissed by him and defendant was permitted to represent himself in *propria persona*. About the time judgment was to be pronounced, defendant moved to set aside his plea of guilty. Subsequently, after hearing, the motion was denied and he was arraigned for judgment and was, on July 6, 1956, ordered confined in the State's prison. He filed in *propria persona* a notice of appeal from the judgment and sentence and subsequently filed a notice purportedly appealing from the judgment and "order denying new trial." No motion for a new trial was made. At defendant's request, counsel was appointed to represent defendant on this appeal. This counsel was permitted to withdraw from said case and another was appointed. He filed a brief on behalf of appellant and respondent replied thereto. The case was calendared for January 8, 1957. Appellant's counsel filed an abandonment of defendant's appeal, feeling that a writ of *habeas corpus* was a proper remedy to test the questions raised and apparently defendant acquiesced in this abandonment.

On December 21, 1956, the appeal was dismissed. On October 14, 1957, defendant, in *propria persona*, filed a motion in this court to recall the remittitur for writ of mandate and error *coram nobis* and his motion was denied. Defendant then filed in the Superior Court of Tulare county a so-called motion, as above entitled, setting forth, in the main, the points he attempted to raise on the appeal, claiming section 470 of the Penal Code was unconstitutional; denial of due process of the law; that he was deprived of effective assistance of counsel; and that the original complaint in the Justice's Court was void and improperly amended. The trial court sustained respondent's demurrer to the so-called motion and after consideration, it was sustained without leave to amend. Defendant has appealed from this order.

[1] Defendant's counsel, on appeal, after thoroughly investigating the merits of defendant's points on appeal, both of fact and of law, concluded there was no meritorious ground for reversal of the order made. He filed a lengthy and well prepared report in this connection, in lieu of a brief and in accordance with the practice suggested in *People v. Dodd*, 113 Cal.App.2d 682, 248 P. 2d 965 and *People v. Bennett*, 120 Cal.App. 2d 835, 262 P.2d 59. We have examined the entire file and agree with the conclusion reached by defendant's counsel.

[2] *Coram nobis* is not a "catch-all" by which those convicted of crime can litigate and relitigate the propriety of their convictions *ad infinitum*. *People v. Ayala*, 138 Cal. App.2d 243-246, 291 P.2d 517; *People v. Tuthill*, 32 Cal.2d 819, 821, 198 P.2d 505; *People v. Martinez*, 88 Cal.App.2d 767, 771, 199 P.2d 375; *People v. Cardwell*, 153 Cal. App.2d 377, 379, 314 P.2d 484; *People v. James*, 99 Cal.App.2d 476, 479, 222 P.2d 117.

Order affirmed.

MUSSELL, Acting P. J., and McCABE, J. pro tem., concur.

50 Cal.2d 631

Everett T. PLUMER, Petitioner,

v.

The SUPERIOR COURT of the State of
California, IN AND FOR COUNTY OF
LOS ANGELES, Respondent,

and

Margaret L. Plumer, Real Party in Interest.

L. A. 24880.

Supreme Court of California,
In Bank.

July 17, 1958.

Divorce action. The Superior Court, Los Angeles County, Louis H. Burke, J., entered an order vacating suspension of a sentence for contempt, and ordered sentence imposed upon husband for failure to make certain support payments for his former wife and child into effect, and husband appealed. The Supreme Court, Spence, J., held that where provision in divorce decree for monthly support payments for both wife and child could be reduced by court order but only because the parties had expressly so provided in an agreement, and such agreement further provided that the court could not consider an increase in the wife's income as a changed condition warranting a change in amount of support unless her income exceeded a monthly average of \$250, husband's obligations, whether as originally agreed by the parties, or as they might be subsequently modified by court order pursuant to terms of the partys' agreement, were contractual and negotiated as distinguished from marital and law-imposed, and therefore, enforcement of such payments by contempt proceedings was precluded by constitutional prohibition against imprisonment for debt.

Order adjudging petitioner in contempt, and order vacating suspension of sentence thereon annulled.

Traynor, J., dissented.

Opinion, 317 P.2d 995, vacated.

I. Constitutional Law §83(3)

Where provision in divorce decree for monthly support payments for both wife

and child could be reduced by court order but only because the parties had expressly so provided in an agreement, and such agreement further provided that the court could not consider an increase in the wife's income as a changed condition warranting a change in amount of support unless her income exceeded a monthly average of \$250, husband's obligations, whether as originally agreed by the parties, or as they might be subsequently modified by court order pursuant to terms of the parties' agreement, were contractual and negotiated as distinguished from marital and law-imposed, and therefore enforcement of such payments by contempt proceedings was precluded by constitutional prohibition against imprisonment for debt. West's Ann.Const. art. 1, § 15.

2. Divorce §309

Although the law imposes an obligation on a father to furnish child support following a divorce, and such law-imposed obligation cannot be contracted away by the parents, where the obligation to pay an agreed amount is made an integral part of a property settlement agreement, the payments ordinarily are not subject to reduction, but they might be increased by the Court if the child's welfare requires it, and that may be done without regard to what the liabilities of the parties may be and without regard to their rights inter se under the agreement.

James E. West, Jr., and Steven Edmondson, Santa Monica, for petitioner.

No appearance for respondent.

Hahn, Ross & Saunders and E. Loyd Saunders, Los Angeles, for real party in interest.

SPENCE, Justice.

Petitioner seeks annulment of an order of the respondent court vacating the suspension of a sentence for contempt and ordering the sentence "into effect forthwith." Said sentence had been imposed upon petitioner for his failure to make certain payments for the support of his former

wife and his child as provided in the spouses' agreement and decree of divorce. He contends that enforcement of his obligations thereunder through contempt proceedings constitutes a violation of the constitutional prohibition against imprisonment for debt. Cal.Const. art. I, § 15. Our review of the record leads us to the conclusion that petitioner's contention must be sustained.

On September 22, 1954, petitioner and his then wife entered into an agreement "to effect a final and complete settlement of their respective property rights, support, alimony and custody of their child with reference to their marital status and to each other." The agreement obligated petitioner to pay to his wife \$200 a month as alimony and an additional \$200 a month for the support of their child until the age of majority. The obligation for alimony payments was to cease upon the wife's "death or remarriage," except that in the case of the wife's remarriage such payments should "be continued until five (5) years from September 25, 1954," though she "may have remarried within said period of time." It was further provided that so long as the wife's earnings or other income did not exceed the monthly average of \$250, any increase in her income would not be considered a "changed condition" in connection with any attempt by petitioner to obtain a reduction in the monthly support payments for the wife or child. Each party released the other from all present and future claims and rights to support, separate maintenance, alimony, court costs, attorneys' fees, and all property rights of any kind except as the agreement provided.

On November 1, 1954, an interlocutory decree of divorce was entered, approving the agreement and ordering petitioner to pay the specified sums. On September 28, 1955, after finding that petitioner had the ability to comply, the court adjudged him guilty of contempt in failing to make the payments as ordered and sentenced him to five days in the county jail. The sentence was ordered suspended on condition that he make the subsequently accruing pay-

ments and also an additional payment of \$10 a month to apply on the arrearages.

On December 21, 1955, petitioner obtained an order directing the wife to show cause why the payments for support of the wife and child should not be reduced on the ground that his income had materially decreased. At the hearing the wife moved to dismiss on the ground that the support payments had been ordered pursuant to an integrated property settlement agreement and could be reduced only in conformity with the provisions of the agreement relating to modification, and that these did not encompass a decrease in petitioner's income as a basis for modification. The trial court thereafter dismissed the order to show cause. Petitioner appealed, contending that the agreement was not integrated but that even if it was, a material reduction in his income was a ground for modification within the express provisions of the agreement. This court reversed the order dismissing petitioner's application for modification, holding that although the decree was based upon an integrated agreement, the monthly payments specified in the decree were subject to modification by the court since the parties had "expressly so provided" in the agreement. *Plumer v. Plumer*, 48 Cal.2d 820, 825-826, 313 P.2d 549, 553.

During the pendency of the appeal, petitioner appeared in the trial court several times for the purpose of determining his compliance with the terms of suspension of the contempt order. At the various hearings petitioner produced, over objection, evidence as to his financial circumstances seeking to show that although he was not making the support payments in accordance with the terms of the order of suspension, he was complying to the best of his ability. On May 13, 1957, following the commissioner's findings and recommendations, the court made its order continuing the suspension of sentence. The former wife filed exceptions thereto, primarily premised upon the record of payments, showing that petitioner had failed to comply with the terms of said suspension. The

matter was submitted and on June 13, 1957, the court vacated its May 13 order and ordered the contempt sentence "into effect forthwith."

The determinative question is whether the constitutional provision against imprisonment for debt (Cal.Const. art. I, § 15) precludes the use of contempt proceedings to enforce petitioner's obligations under the divorce decree and property settlement agreement. As above noted, this agreement was held to be "clearly integrated." *Plumer v. Plumer*, supra, 48 Cal.2d 820, 313 P.2d 549. "It deals both with rights to marital property and rights to support. The parties have set forth their purpose 'to effect a final and complete settlement of their * * * rights * * * with reference to their marital status and to each other.' They have released each other from all claims arising out of the marital relationship except as provided in the agreement." *Ibid.*, 48 Cal.2d at page 825, 313 P.2d at page 553.

In *Bradley v. Superior Court*, 48 Cal.2d 509, 310 P.2d 634, the remedy of contempt was denied where payments to a former wife were deemed "an inseverable part of an integrated adjustment of all property relations of the parties and not * * * a severable provision for alimony." 48 Cal.2d at page 518, 310 P.2d at page 639. This court said at page 521 of 48 Cal.2d, at page 641 of 310 P.2d: "[W]here the parties bargain with each other and agree that the terms of their contract shall thereupon and thenceforth grant, delimit and exclusively define their respective rights and obligations *inter se*, then it is to the contract alone, and to conventional civil proceedings for the enforcement of contract rights, that they must look for a remedy in the event of breach. Inclusion of such a contract in a judgment of divorce may furnish a basis for subsequent proceedings leading to issuance of a writ of execution but cannot support a commitment to imprisonment for failure to pay the judgment debt." And 48 Cal.2d at page 522, 310 P.2d at page 642, it is declared to be "the better view" that "pay-

ments provided in a property settlement agreement which are found to constitute an adjustment of property interests, rather than a severable provision for alimony, should be held to fall within the constitutional proscription against imprisonment for debt. That is, if the obligation sought to be enforced is contractual and negotiated, as distinguished from marital and imposed by law, even though the contract relates to marriage obligations, the remedy must be appropriate to the right asserted. Payments which fall into the category of law-imposed alimony or separate maintenance are based upon the statutory obligation of marital support, may be modified by the court upon a proper showing, ordinarily terminate with the death of either party, and may properly be held not to constitute a 'debt' within the meaning of the constitutional provision."

[1] In the present case, the provision for monthly support payments for both the wife and the child could be reduced by court order, but only because the parties had "expressly so provided," and therefore any limitations embodied in their agreement constituted limitations upon the court's power to equate the support provisions of the decree with the law-imposed obligations as distinguished from the parties' contractual obligations. *Plumer v. Plumer*, supra, 48 Cal.2d 820, 825, 313 P.2d 549, 553. While the "plain language" of their agreement indicated that "the parties contemplated modification upon an adequate showing of changed circumstances," there was the express limitation to the effect that the court could not consider an increase in the wife's income as "a changed condition" unless her income exceeded "the monthly average of \$250." *Ibid.*, 48 Cal.2d at page 826, 313 P.2d at page 553. If the provisions of the agreement and decree for monthly payments had been severable provisions for alimony and child support, unencumbered by any such contractual limitation, the court might have considered any change in the wife's income as a changed circumstance. Accordingly, petitioner's obligations, whether

as originally agreed upon by the parties or as they might be subsequently modified by court order pursuant to the terms of the parties' agreement, are contractual and negotiated as distinguished from marital and law-imposed, and therefore the enforcement of such payments by contempt proceedings is precluded by the constitutional prohibition against imprisonment for debt.

With respect to the monthly payments for the wife, the parties' express provision for the duration of such payments further shows that such payments represented "the result of a bargain negotiated by [them] in adjustment of their respective interests" in their property settlement rather than the mere recognition of a law-imposed obligation. *Bradley v. Superior Court*, supra, 48 Cal.2d 509, 522, 310 P.2d 634, 642. Thus it appears that the parties' agreement and decree provided for monthly payments for the wife which were to continue for a fixed period of five years regardless of the wife's remarriage at any time within that period. Furthermore, the court could not terminate but could only modify, subject to the contractual limitation, such monthly payments. *Plumer v. Plumer*, supra, 48 Cal.2d 820, 826, 313 P.2d 549. Here again, if the provisions of the agreement and decree for monthly payments for support of the wife had been severable provisions for alimony, the court could not have continued such payments beyond the time of the wife's remarriage and could have terminated such payments at any time upon a proper showing.

[2] With reference to child support, there can be no doubt that the law imposes an obligation on a father to furnish such support, and the law-imposed obligation cannot be contracted away by the parents. *Rosher v. Superior Court*, 9 Cal.2d 556, 559-560, 71 P.2d 918. And where the obligation to pay an agreed amount is made an integral part of a property settlement agreement, the payments ordinarily "are not subject to reduction, but they might be increased by the court

if the child's welfare requires it, and that without regard to what the liabilities of the parties may be, and their rights *inter se* under the agreement." *Puckett v. Puckett*, 21 Cal.2d 833, 843, 136 P.2d 1, 6. These rules merely recognize the court's power to provide adequate support for the protection of the interests of the child. *Van Dyke v. Van Dyke*, 126 Cal.App.2d 238, 244, 271 P.2d 910; *Streeter v. Streeter*, 67 Cal.App.2d 138, 144, 153 P.2d 441. While in the present case, the child support obligation could have been reduced by virtue of the agreement of the parties, the above-mentioned contractual limitation upon the court's power to make any such reduction clearly stamps the obligation for such child support payments as a contractual obligation rather than a law-imposed obligation.

We therefore conclude that under the circumstances before us, none of petitioner's contractual obligations can be enforced by contempt proceedings in view of the constitutional prohibition against imprisonment for debt. *Bradley v. Superior Court*, supra, 48 Cal.2d 509, 522, 310 P.2d 634. The foregoing conclusion makes it unnecessary to consider the propriety of the court's order reinstating the contempt sentence in the absence of a concurrent finding of petitioner's then ability to comply with the terms of payment.

The order dated September 28, 1955, adjudging petitioner in contempt, and the order dated June 13, 1957, vacating the suspension of sentence thereon, are annulled.

GIBSON, C. J., and SHENK, SCHAUER, and McCOMB, JJ., concur.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion annulling the orders which adjudge petitioner in contempt of court for his failure to pay amounts provided for in an integrated property settlement agreement. It will be recalled that when this case was previously before this court (*Plumer v. Plumer*, 48 Cal.2d 820, 313 P.2d 549) I

pointed out in my dissenting opinion (48 Cal.2d at page 826 et seq., 313 P.2d at page 554 et seq.) that the agreement in question was clearly an integrated property settlement agreement and not subject to modification except as provided in said agreement and that since the only condition upon which said agreement could be modified had not occurred, the trial court was justified in dismissing defendant's application for modification of said agreement. It seems to me to be clearly inconsistent for this court to hold, as it did in its prior decision (48 Cal.2d 820, 313 P.2d 549) that a property settlement agreement is subject to modification with respect to payments to the wife, and yet the trial court has no power to enforce such modified payments in a contempt proceeding. This is the effect of the two decisions of this court involving the property settlement agreement which is the subject of this action. In other words, it was held by the majority in its former decision (48 Cal.2d 820, 313 P.2d 549) that the property settlement agreement here involved was subject to modification upon a showing of changed conditions. Such holding led to the inevitable conclusion that the payments constituted payments for support and maintenance which the trial court had the power to exact from the husband and likewise had the power to force him to make such payments by resort to the extraordinary power of contempt. To now hold that the payments were subject to modification and that the court has no power to enforce the same by a contempt proceeding, is, in my opinion, in direct conflict with the former holding of this court (48 Cal.2d 820, 313 P.2d 549). If, however, the payments constituted an integral part of an integrated property settlement agreement, they clearly fell within the rule announced by this court in *Bradley v. Superior Court*, 48 Cal.2d 509, 310 P.2d 634, and could not be enforced by a contempt proceeding. There seems to be no end to the intricacies which have emerged from the unsound pronouncements of this court during the past four years since the majority of this court has undertaken the extra-

judicial function of rewriting property settlement agreements (*Dexter v. Dexter*, 42 Cal.2d 36, 265 P.2d 873; *Fox v. Fox*, 42 Cal.2d 49, 265 P.2d 881; *Flynn v. Flynn*, 42 Cal.2d 55, 265 P.2d 865; *Messenger v. Messenger*, 46 Cal.2d 619, 626, 297 P.2d 988; *Anderson v. Mart*, 47 Cal.2d 274, 303 P.2d 539; *Herda v. Herda*, 48 Cal.2d 228, 308 P.2d 705; *Plumer v. Plumer*, 48 Cal.2d 820, 313 P.2d 549).

TRAYNOR, Justice.

I dissent.

My views with respect to the enforcement of integrated bargains by contempt proceedings are set forth in a dissenting opinion in *Bradley v. Superior Court*, 48 Cal.2d 509, 523, 310 P.2d 634. Although these views remain unchanged, I would concur in the judgment herein under the compulsion of that case if it necessarily controlled the present one.

The present case, however, differs from the *Bradley* case in that plaintiff has not remarried and the payments are partly for child support. Accordingly, the payments are partly in lieu of the statutory obligation to support. In integrated bargains the monthly payments will ordinarily have a dual character. "To the extent that they are designed to discharge the obligation of support and maintenance they will ordinarily reflect the characteristics of that obligation and thus have the indicia of alimony. [Citations.] On the other hand, to the extent that they represent a division of the community property itself, or constitute an inseparable part of the consideration for the property settlement, they are not alimony, and accordingly cannot be modified without changing the terms of the property settlement agreement of the parties." *Dexter v. Dexter*, 42 Cal.2d 36, 41-42, 265 P.2d 873, 876. So long as the wife has not remarried or there is a continuing obligation of child support, the characteristics of the obligation to support remain and alone justify enforcement by contempt. Such a rule is implicit in *Miller v. Superior Court*, 9 Cal.2d 733, 740, 72 P.2d 868, where the court took care to point out that the pay-

ments were ordered pursuant to a property settlement and could not be changed without the consent of the parties. Although the majority rejected this reasoning in the Bradley case, it had only to decide in that case whether contempt would lie to enforce an integrated bargain after the wife had remarried and the characteristics of the support and maintenance obligation were no longer present.

A rule that the wife's right to enforce the agreement by contempt terminates only on her remarriage would permit the parties to make a final settlement of all their marital rights without compelling the wife to give up contempt enforcement while she is still dependent on her former husband for support. So long as the Bradley decision remains law, I would adopt such a rule instead of following the Bradley rationale to its logical extreme.



50 Cal.2d 654

Anthony J. COMUNALE, Plaintiff and Appellant,

v.

TRADERS & GENERAL INSURANCE COMPANY, a corporation, Defendant and Respondent.

L. A. 24975.

**Supreme Court of California,
In Bank.**

July 22, 1958.

Rehearing Denied Aug. 21, 1958.

Action by pedestrian to recover truck driver's insurer portion of his judgment against driver which was in excess of policy limits. From a judgment of the Superior Court, Los Angeles County, J. F. Moroney, J., for insurer, notwithstanding verdict for the pedestrian, the pedestrian appealed. The Supreme Court, Gibson, C. J., held that where insurer wrongfully refused to defend insured and refused reasonable settlement within limits of policy, breach by in-

surer of its express obligation to defend did not release it from its implied duty to consider insured's interest in settlement, and insurer was liable for entire judgment rendered against insured even though judgment exceeded policy limits.

Reversed with directions.

Opinion, 321 P.2d 768, vacated.

1. Insurance ⇨514

Where insurer wrongfully refused to defend insured and refused reasonable settlement within limits of policy, breach by insurer of its express obligation to defend did not release it from its implied duty to consider insured's interest in settlement, and insurer was liable for entire judgment rendered against insured even though judgment exceeded policy limits. West's Ann. Insurance Code, § 11580(b) (2); West's Ann.Civ.Code, §§ 3300, 3358.

2. Contracts ⇨168

There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive benefits of agreement.

3. Insurance ⇨146(1)

Principle that there is an implied covenant of good faith and fair dealing in every contract and that neither party will do anything which will injure the right of other to receive benefits of agreement is applicable to insurance policies.

4. Evidence ⇨5(2)

It is a matter of common knowledge that a large percentage of claims covered by insurance are settled without litigation and that settlement is one of usual methods by which insured receives protection.

5. Insurance ⇨514

Implied obligation of good faith and fair dealing requires insurer to settle, in an appropriate case, although express terms of policy do not impose such a duty.

6. Insurance ⇨514

Insurer, in deciding whether a claim should be compromised, must take into ac-

count interest of insured and give it at least as much consideration as it does to its own interest.

7. Insurance Ⓒ514

When there is great risk of a recovery beyond policy limits so that most reasonable manner of disposing of claim is a settlement which can be made within those limits, a consideration in good faith of insured's interest requires insurer to settle claim, and its unwarranted refusal to do so constitutes a breach of implied covenant of good faith and fair dealing.

8. Insurance Ⓒ514

Policy limits restrict only amount insurer may have to pay in the performance of contract as compensation to a third person for personal injuries caused by insured, and limits do not restrict damages recoverable by insured for a breach of contract by insurer.

9. Insurance Ⓒ514, 514½

Where there is no opportunity to compromise claim and only wrongful act of insurer is refusal to defend, liability of insurer is ordinarily limited to amount of policy plus attorney's fees and costs, but such rule does not apply where insurer wrongfully refuses to accept a reasonable settlement within policy limits.

10. Insurance Ⓒ514

Generally, since insurer reserves control over litigation and settlement, it is liable for entire amount of judgment against insured, including any portion in excess of policy limits, if in exercise of such control it is guilty of bad faith in refusing a settlement.

11. Insurance Ⓒ666

Insurer who denies coverage does so at its own risk, and, although its position may not have been entirely groundless, if denial is found to be wrongful it is liable for full amount which will compensate insured for all detriment caused by insurer's breach of the express and implied obligations of the contract. West's Ann.Civ.Code, §§ 3300, 3358.

12. Assignments Ⓒ22

An action for damages in excess of policy limits based on an insurer's wrongful failure to settle is assignable whether the action is considered as sounding in tort or in contract.

13. Assignments Ⓒ58

Provision in policy that assignment of an interest under policy shall be binding only if insurer consents thereto does not preclude transfer of a cause of action for damages for breach of contract.

14. Assignments Ⓒ22

Insured's cause of action against insurer for wrongfully refusing to make a reasonable settlement within limits of policy was assignable to party injured by insured.

15. Limitation of Actions Ⓒ24(2)

Implied covenant of good faith and fair dealing was as much a part of insurance policy as if it were written out in policy and insured's cause of action for insurer's breach of such implied covenant by wrongfully refusing to accept a reasonable settlement within policy limits was an action arising out of the written instrument and was within the four year and not the two year statute of limitations. West's Ann. Code Civ.Proc. §§ 337, subd. 1, 339, subd. 1.

16. Contracts Ⓒ168

Promise which law implies as an element of contract is as much a part of instrument as if it were written out.

17. Insurance Ⓒ514

Wrongful refusal of insurer to settle claim against insured has generally been treated as a tort.

18. Action Ⓒ27(1)

Where a case sounds both in contract and tort, plaintiff will ordinarily have freedom of election between an action of tort and one of contract, except in suits for personal injury caused by negligence where tort character of action is considered to prevail.

Newlin, Tackabury & Johnston and Frank R. Johnston, Los Angeles, for appellant.

W. P. Smith and Henry F. Walker, Los Angeles, for respondent.

H. Thomas Ellerby, Los Angeles, amicus curiæ on behalf of respondent.

GIBSON, Chief Justice.

[1] Mr. and Mrs. Comunale were struck in a marked pedestrian crosswalk by a truck driven by Percy Sloan. Mr. Comunale was seriously injured, and his wife suffered minor injuries. Sloan was insured by defendant Traders & General Insurance Company under a policy that contained limits of liability in the sum of \$10,000 for each person injured and \$20,000 for each accident. He notified Traders of the accident and was told that the policy did not provide coverage because he was driving a truck that did not belong to him. When the Comunales filed suit against Sloan, Traders refused to defend the action, and Sloan employed competent counsel to represent him. On the second day of the trial Sloan informed Traders that the Comunales would compromise the case for \$4,000, that he did not have enough money to effect the settlement, and that it was highly probable the jury would return a verdict in excess of the policy limits. Traders was obligated to defend any personal injury suit covered by the policy, but it was given the right to make such settlement as it might deem expedient. Sloan demanded that Traders assume the defense and settlement of the case. Traders refused, and the trial proceeded to judgment in favor of Mr. Comunale for \$25,000 and Mrs. Comunale for \$1,250.

Sloan did not pay the judgment, and the Comunales sued Traders under a provision in the policy that permitted an injured party to maintain an action after obtaining judgment against the insured. See Ins. Code, § 11580, subd. (b) (2). In that suit judgment was rendered in favor of Mr. Comunale for \$10,000 and in favor of Mrs. Comunale for \$1,250. This judgment was satisfied by Traders after it was affirmed in *Comunale v. Traders & General Ins. Co.*, 116 Cal.App.2d 198, 253 P.2d 495.

Comunale obtained an assignment of all of Sloan's rights against Traders and then commenced the present action to recover from Traders the portion of his judgment against Sloan which was in excess of the policy limits. The jury returned a verdict in Comunale's favor, but the trial court entered a judgment for Traders notwithstanding the verdict.

The following questions are presented on Comunale's appeal from the judgment: (1) Did Sloan have a cause of action against Traders for the amount of the judgment in excess of the policy limits? (2) Was Sloan's cause of action against Traders assignable? (3) Was the cause of action barred by the statute of limitations?

Liability in Excess of the Policy Limits

In determining whether Traders is liable for the portion of the judgment against Sloan in excess of the policy limits, we must take into consideration the fact that Traders not only wrongfully refused to defend the action against Sloan but also refused to accept an offer of settlement within the policy limits. It is not claimed the settlement offer was unreasonable in view of the extent of the injuries and the probability that Sloan would be found liable, and Traders' only reason for refusing to settle was its claim that the accident was not covered by the policy. Because of its wrongful denial of coverage, Traders failed to consider Sloan's interest in having the suit against him compromised by a settlement within the policy limits.

[2-5] There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. *Brown v. Superior Court*, 34 Cal.2d 559, 564, 212 P.2d 878. This principle is applicable to policies of insurance. *Hilker v. Western Automobile Ins. Co.*, 204 Wis. 1, 231 N.W. 257, 258 (affirmed on rehearing, 235 N.W. 413). In the *Hilker* case it is pointed out that the rights of the insured "go deeper than the mere surface of the

contract written for him by the defendant" and that implied obligations are imposed "based upon those principles of fair dealing which enter into every contract." 231 N.W. at page 258. It is common knowledge that a large percentage of the claims covered by insurance are settled without litigation and that this is one of the usual methods by which the insured receives protection. See *Douglas v. United States Fidelity & Guaranty Co.*, 81 N.H. 371, 127 A. 708, 712, 37 A.L.R. 1477; *Hilker v. Western Automobile Ins. Co.*, supra. Under these circumstances the implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty.

[6, 7] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. See *Ivy v. Pacific Automobile Ins. Co.*, 156 Cal.App.2d 652, 320 P.2d 140. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim. Its unwarranted refusal to do so constitutes a breach of the implied covenant of good faith and fair dealing.

[8] There is an important difference between the liability of an insurer who performs its obligations and that of an insurer who breaches its contract. The policy limits restrict only the amount the insurer may have to pay in the performance of the contract as compensation to a third person for personal injuries caused by the insured; they do not restrict the damages recoverable by the insured for a breach of contract by the insurer.

[9] The decisive factor in fixing the extent of Traders' liability is not the refusal to defend; it is the refusal to accept an offer of settlement within the policy limits. Where there is no opportunity to compro-

mise the claim and the only wrongful act of the insurer is the refusal to defend, the liability of the insurer is ordinarily limited to the amount of the policy plus attorneys' fees and costs. *Mannheimer Bros. v. Kansas Casualty & Surety Co.*, 149 Minn. 482, 184 N.W. 189, 191. In such a case it is reasoned that, if the insured has employed competent counsel to represent him, there is no ground for concluding that the judgment would have been for a lesser sum had the defense been conducted by insurer's counsel, and therefore it cannot be said that the detriment suffered by the insured as the result of a judgment in excess of the policy limits was proximately caused by the insurer's refusal to defend. Cf. *Lane v. Storke*, 10 Cal.App. 347, 350, 101 P. 937. This reasoning, however, does not apply where the insurer wrongfully refuses to accept a reasonable settlement within the policy limits.

[10] Most of the cases dealing with the insurer's failure to settle involve an insurer who had assumed the defense of the action against the insured. It is generally held that since the insurer has reserved control over the litigation and settlement it is liable for the entire amount of a judgment against the insured, including any portion in excess of the policy limits, if in the exercise of such control it is guilty of bad faith in refusing a settlement. *Brown v. Guarantee Ins. Co.*, 155 Cal.App.2d 679, 682, 319 P.2d 69; *Ivy v. Pacific Automobile Ins. Co.*, 156 Cal.App.2d 652, 320 P.2d 140; see Annotation, Duty of Liability Insurer to Settle or Compromise, 40 A.L.R.2d 168, 178; Roos, A Note on the Excess Problem, 26 Cal. State Bar J. 355, 356. Those cases are, of course, factually distinguishable from the present one since Traders never assumed control over the defense. However, the reason Traders was not in control of the litigation is that it wrongfully refused to defend Sloan, and the breach of its express obligation to defend did not release it from its implied duty to consider Sloan's interest in the settlement.

[11] We do not agree with the cases that hold there is no liability in excess of

the policy limits where the insurer, believing there is no coverage, wrongfully refuses to defend and without justification refuses to settle the claim. See *State Farm Mut. Auto. Ins. Co. v. Skaggs*, 10 Cir., 251 F.2d 356, 359, and *Fidelity & Casualty Co. of New York v. Gault*, 5 Cir., 196 F.2d 329, 330. An insurer who denies coverage does so at its own risk, and, although its position may not have been entirely groundless, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract. Certainly an insurer who not only rejected a reasonable offer of settlement but also wrongfully refused to defend should be in no better position than if it had assumed the defense and then declined to settle. The insurer should not be permitted to profit by its own wrong.

A breach which prevents the making of an advantageous settlement when there is a great risk of liability in excess of the policy limits will, in the ordinary course of things, result in a judgment against the insured in excess of those limits. Section 3300 of the Civil Code provides that the measure of damages for a breach of contract is the amount which will compensate the party aggrieved for all the detriment proximately caused by the breach, or which, in the ordinary course of things, would be likely to result from it. (For cases holding Civil Code section 3300 applicable to liability insurance contracts, see *Henkel v. Pacific Employers Ins. Co.*, 140 Cal.App.2d 301, 305-306, 295 P.2d 80; *Venturi v. Zurich General Acc. & Liab. Co.*, 14 Cal.App.2d 89, 57 P.2d 1002.)

It is clear that section 3300 of the Civil Code authorizes a recovery in excess of the policy limits, and in our opinion there is no merit in Traders' contention that section 3358 of the Civil Code so qualifies section 3300 as to prevent such a recovery. Section 3358 provides that a person cannot recover a greater amount in damages for the breach of an obligation than he could have gained by full performance. The

question is what would Sloan have gained from the full performance of the policy contract with Traders. Cf. *Henderson v. Oakes-Waterman, Builders*, 44 Cal.App.2d 615, 618, 112 P.2d 662. If Traders had performed its contract, it would have settled the action against Sloan, thereby protecting him from all liability. The allowance of a recovery in excess of the policy limits will not give the insured any additional advantage but merely place him in the same position as if the contract had been performed.

It follows from what we have said that an insurer, who wrongfully declines to defend and who refuses to accept a reasonable settlement within the policy limits in violation of its duty to consider in good faith the interest of the insured in the settlement, is liable for the entire judgment against the insured even if it exceeds the policy limits.

Assignability of the Cause of Action

[12-14] An action for damages in excess of the policy limits based on an insurer's wrongful failure to settle is assignable whether the action is considered as sounding in tort or in contract. See Civ. Code, § 954; *Brown v. Guarantee Ins. Co.*, 155 Cal.App.2d 679, 693-695, 319 P.2d 69. Traders relies on a clause in the policy which provides that an assignment of an interest under the policy shall be binding only if Traders consents thereto. However, it is well settled that such a provision does not preclude the transfer of a cause of action for damages for breach of a contract. *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 339-340, 182 P.2d 182. This rule has been applied to provisions against assignability in insurance policies similar to the provision involved here. *Vierneisel v. Rhode Island Ins. Co.*, 77 Cal.App.2d 229, 232, 175 P.2d 63; *Pietrantonio v. Travelers Ins. Co.*, 282 Mich. 111, 275 N.W. 786, 788; see 7 Appleman, *Insurance Law and Practice*, § 4269, pp. 45-46. Accordingly, Sloan could assign his cause of action to Comunale.

Statute of Limitations

[15,16] Sloan's cause of action against the insurer arose on August 13, 1950, when the judgment in the bodily injury action became final. The complaint in the present action was filed on May 28, 1954, less than four years but more than two years after the cause of action arose. Traders contends that an action on an implied obligation arising out of contract is not on the written instrument and that therefore the four year term prescribed in section 337, subdivision 1, of the Code of Civil Procedure is not applicable.¹ We do not agree. The promise which the law implies as an element of the contract is as much a part of the instrument as if it were written out. *O'Brien v. King*, 174 Cal. 769, 774-775, 164 P. 631; *Tanzola v. De Rita*, 45 Cal.2d 1, 9, 285 P.2d 897; *Gardner v. Basich Bros. Construction Co.*, 44 Cal.2d 191, 194, 281 P.2d 521; *Lawrence Barker, Inc., v. Briggs*, 39 Cal.2d 654, 661, 248 P.2d 897. Traders relies on a statement in *Scrivner v. Woodward*, 139 Cal. 314, 316, 73 P. 863, that "Promises merely implied by law, and not supported by any express promise or stipulation in the written instrument, do not fall within the provision of section 337, relating to contracts in writing." This statement is too broad, and it was limited in *O'Brien v. King*, 174 Cal. 769, 774, 164 P. 631, as applying only to a quasi contractual liability. The cases of *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 P. 899, and *Sunset Pacific Oil Co. v. Los Angeles etc. R. Co.*, 110 Cal.App.Supp. 773, 290 P. 434, which involved restitution, are explainable on the same ground.

[17,18] Although a wrongful refusal to settle has generally been treated as a tort (see *Keeton, Liability Insurance and Responsibility for Settlement*, 67 Harv.L. Rev. 1136, 1138; Annotation, 131 A.L.R. 1499, 1500), it is the rule that where a

case sounds both in contract and tort the plaintiff will ordinarily have freedom of election between an action of tort and one of contract. *Eads v. Marks*, 39 Cal.2d 807, 811, 249 P.2d 257. An exception to this rule is made in suits for personal injury caused by negligence, where the tort character of the action is considered to prevail (*Huysman v. Kirsch*, 6 Cal.2d 302, 306, 57 P.2d 908; *Krebenios v. Lindauer*, 175 Cal. 431, 166 P. 17), but no such exception is applied in cases, like the present one, which relate to financial damage (cf. *County of Santa Clara v. Hayes Co.*, 43 Cal.2d 615, 619, 275 P.2d 456; *Jones v. Kelly*, 208 Cal. 251, 255, 280 P. 942).

The judgment is reversed with directions to the superior court to enter judgment on the verdict.

SHENK, CARTER, TRAYNOR,
SCHAUER, SPENCE, and McCOMB, JJ.,
concur.



MILICA P. WATENPAUGH, Plaintiff and
Respondent,
v.

STATE TEACHERS' RETIREMENT
SYSTEM et al., Defendants.

Frank Marlon Watenpauqh, Jr., et al.,
Defendants and Appellants. *
Civ. 5858.

District Court of Appeal, Fourth District,
California.
July 30, 1958.

Rehearing Denied Aug. 22, 1958.

Hearing Granted Sept. 24, 1958.

Action by widow for a declaratory judgment determining her right to death benefits accruing under State Teachers' Retirement System, as a beneficiary duly

1. Code of Civil Procedure, section 337, subdivision 1, provides in part that the four years' period of limitation applies to an action "upon any contract, obligation or liability founded upon an instrument in writing, * * *."

Code of Civil Procedure, section 339, subdivision 1, provides in part that the two years' period of limitation applies to an action "upon a contract, obligation or liability not founded upon an instrument of writing, * * *."

* Opinion vacated 336 P.2d 165.

designated by her husband. The Superior Court, San Diego County, L. N. Turrentine, J., entered judgment in favor of widow, and decedent's children appealed. The District Court of Appeal, Griffin, J., held that although evidence was insufficient to support finding that decedent intended to make a presently effective designation of a beneficiary in favor of his widow, rather than previously designated beneficiaries in view of court's exclusion of certain evidence offered by widow bearing on question of delivery of the form nominating her as beneficiary, upon reversal of judgment in her favor case would be remanded for a new trial so that court could hear evidence on such question as might be introduced by both parties.

Judgment reversed.

1. Statutes ⚖219

Administrative interpretation or construction of portion of the Education Code which is administered by the State Teachers' Retirement Board is entitled to be considered in applying such act. West's Ann. Education Code, § 14575.

2. Schools and School Districts ⚖146

Where widow of a teacher who was a member of the State Teachers' Retirement System presented a form to the system revoking a previous beneficiary nominated by decedent, and nominating widow as beneficiary, together with first proof of decedent's death, and widow made first claim to the proceeds by virtue of such revocation and nomination within a reasonable time, in accordance with provisions of law and regulations of the system, such revocation and nomination was "duly filed" within meaning of such term as used in statute providing that upon receipt of proof of a member's death which occurred before effective date of retirement, benefits shall be paid to such beneficiary as he nominated by written designation duly filed with the retirement board. West's Ann. Education Code, § 14575.

3. Schools and School Districts ⚖146

Neither the law, nor regulations of the State Teachers' Retirement System, as a condition precedent to payment of death benefits, require that a change of beneficiary form executed by a member of the system be filed by the member with the system, prior to the member's death, in order for such change of beneficiary to be effective. West's Ann. Education Code, § 14575.

4. Declaratory Judgment ⚖395

In action by widow for a declaratory judgment determining her right to death benefits accruing under State Teachers' Retirement System, as a beneficiary duly designated by her husband, although evidence was insufficient to support finding that decedent intended to make a presently effective designation of a beneficiary in favor of widow rather than previously designated beneficiaries, in view of court's exclusion of certain evidence offered by widow bearing on question of delivery of the form nominating her as beneficiary, upon reversal of judgment in favor of widow, case would be remanded with directions for a new trial so that court could hear evidence on such question as might be introduced by both parties. West's Ann. Education Code, § 14575.

Walter Wencke and Robert G. Carlson,
San Diego, for appellants.

Vincent Whelan, San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff-respondent filed a declaratory relief action alleging she was entitled to receive, as a beneficiary duly designated by her husband, Frank M. Watenpaugh, the death benefits accruing under the State Teachers' Retirement System as a result of her husband's death on March 23rd, 1956. Defendants, State Teachers' Retirement System and the Teachers' Retirement Board of California (hereinafter referred to as the "System"), filed an answer claim-

ing, as do defendants Frank Marion Watenpaugh, Jr., and Nancy V. Watenpaugh Bosley, children of deceased (hereinafter referred to as defendant children), that they were entitled to such death benefits. Frank M. Watenpaugh, Sr., was a teacher in San Diego State College for more than 20 years and was a member of the "System" and had paid contributions to it since its inception.

The claim of defendant children to the death benefits is based on a membership statement executed and filed by him with the System in 1944. Therein he designated his then wife (subsequently deceased) as primary beneficiary, and the defendant children as contingent beneficiaries. There was no subsequent change in beneficiaries filed by deceased prior to his death. He married his present wife, plaintiff herein, about March 12, 1955.

About June 9, 1955, prior to his death, Mr. Watenpaugh apparently obtained printed blank forms entitled "Designation of Beneficiary", and they were filled out, witnessed and signed by him on that date. They revoked any previous nomination and nominated his present wife, plaintiff herein, as principal beneficiary and the defendant children as contingent beneficiaries. Apparently this executed form (unknown to plaintiff) was placed in a cardboard folder by him in a desk located in the home occupied by them and in which folder was contained certain school matters and two unexecuted blank forms of change of beneficiary of a certain life insurance company.

On January 11, 1956, Mr. Watenpaugh suffered a heart attack and was confined in a hospital or bed at home and was cared for by his wife for some time. He recovered to the extent he took rides in the country, walked around his property and did some accounting work.

About two or three weeks after his death, in going over his books and papers, plaintiff discovered this executed form in the folder. She had no prior knowledge of it nor was she aware of its contents. She was never directed by her husband or any one to file

it. Upon its discovery she contacted her attorney, who then filed it together with a certificate of death by enclosing it in a letter directed to the System. It was mailed on April 18, 1956. About April 27, plaintiff's attorney received a letter from the System's executive officer informing him of the receipt of his letter and enclosure and he was informed:

"* * * In view of the fact this designation was not filed with the Retirement Office before death occurred, and that a long period elapsed between the execution of the form and the date of filing, I am not able to say that we can act on this delayed designation.

"Before we attempt to make any determination in this respect, we would appreciate it if you would advise us as to where the designation was found, and if Mr. Watenpaugh had made any indication that he desired to file this form with the Retirement System. It might be in the form of a letter enclosure * * * It is possible that the witness may recall some statement made by Mr. Watenpaugh, which would explain his reason for not filing the designation at the time it was executed."

On May 16, plaintiff's attorney also received another letter to the effect that the System had reviewed the matter with the Attorney General and they came to the conclusion:

"that this designation does not meet the requirements of Section 14575 of the Education Code. This section briefly states that

"Upon receipt of proof of a member's death * * * there shall be paid to such beneficiary as he has nominated by written designation duly filed with the Retirement Board:'

"This designation was not filed with the Board by Mr. Watenpaugh, and the fact that it was completed almost eight months before Mr. Watenpaugh's death, but not filed by the member, could almost be taken as evidence that

Mr. Watenpaugh did not intend to change his designation with respect to these beneficiaries.

"Milica Watenpaugh will have the right to file for her community property interest in the portion of the benefit arising from community earnings, and if she wishes to file this application she should furnish us with a certified copy of her marriage license. Upon receipt of such document we shall prepare the proper affidavits which must be signed by Milica and the two children, who were designated as contingent beneficiaries on the designation filed with the office on October 13, 1944."

On November 7, 1956, plaintiff's attorney received another such letter in reply to one of October 25th regarding action being taken against the System, stating in part:

"While there has never been any court case involving this same question, it has always been our contention, based on the opinion of the State Attorney General, that a designation is not valid unless it is filed in the retirement office by the member.

"Probably there are many members who have changed their beneficiaries under the retirement system, either due to sudden changes in temper, but who have not filed the designation after what might be termed a cooling off period. Likewise there are probably cases where members have changed designations under pressure, but who have also intentionally withheld the change in designation from our files.

"Section 14661 of the Education Code provides that any designation may be revoked at the pleasure of the member or beneficiary making the nomination, and a different beneficiary nominated by a written instrument duly executed and filed with the board. Based on this our contention has been that the instrument must be filed with the board before it will have any validity. As you know Mr. Watenpaugh's designa-

tion was certainly not filed with the board by him, and there is some doubt as to whether he ever intended that it be filed."

The original membership statement and instructions on the printed forms pertaining to designation and revocation of previous nominations provides in part:

"Should I survive the above named beneficiaries, I understand that such Death Benefit will be paid to my estate or to such other beneficiary or beneficiaries as I may hereafter nominate by written designation duly filed with the State Teachers' Retirement System, all in accordance with the provisions of said statutes."

As to the latter printed form the instructions are in part:

"The School Code of California provides, in effect, that, upon the death, before retirement, of a person subject to the retirement law, the contributions, without interest, standing to such person's credit in the teachers' permanent fund * * * be paid to his estate or such person as he shall have nominated by written designation duly filed with the Retirement Salary Board * *

"The designation of a beneficiary may be revoked and a new designation made, at the option of designator, the form on the reverse side hereof being used for both the original and changing designations. * * *

"Acknowledgment of receipt of the first beneficiary designation will not be made, because every person will be followed until a form has been filed in the retirement office. Revocations and designations of new beneficiaries will be acknowledged, to avoid the loss of completed forms in transit, which might not come to light until after death."

After trial of this action the court found generally in accord with the evidence stated and specifically found that by the actions of Mr. Watenpaugh, prior to his death, in obtaining and filling out the form indicated and leaving it in the desk mentioned,

he placed said change of beneficiary designation under the control of plaintiff and intended to make a present effective designation of beneficiary in favor of his present wife, and to do whatever might be necessary to carry out his intentions, including the filing of it with said System either during his life or after his death; that upon its filing with the System it vacated the previous designation of beneficiary; that plaintiff was not aware of the designation or its contents until after the death of her husband; that the System, at the time of his death, held benefits valued at \$8,000.18; that \$972.94 of said sum was community property of said plaintiff and her husband, and \$7,027.24 was his separate property, plus accrued interest on said sums. It then concluded that plaintiff was entitled to the total sum of \$8,115.01, and entered judgment accordingly.

Defendant children appealed and claim that there is no substantial evidence to support the findings of the court to the effect that Frank M. Watenpaugh intended to make a presently effective designation of beneficiary in favor of plaintiff or that he permitted or authorized plaintiff to file a designation of beneficiary statement with the California State Teachers' Retirement System, or that he placed said written designation in the possession or under the control of plaintiff, or that he intended to effectively revoke the previous nomination of beneficiaries made by him; that the law contemplates the execution and filing with the System by the member thereof, prior to his death, of any change in beneficiary previously executed and filed; and that the problems here presented relating to change of beneficiaries of such benefits are governed by principles applicable to life insurance contracts, citing such authorities as *Wicktor v. County of Los Angeles*, 141 Cal.App.2d 592, 297 P.2d 115, and *Johnston v. Kearns*, 107 Cal.App. 557, 290 P. 640. Further, it is claimed that strict compliance was not waived by the System since it appeared, as alleged and that the change of beneficiary was *not* filed with it in the manner contemplated by law, citing

19 A.L.R. 115, and *Cook v. Cook*, 17 Cal.2d 639, 111 P.2d 322. It is therefore argued that the trial court's finding that the defendant System did not have a "real interest" and was merely a stockholder in the proceedings could not be supported and the System, as a governmental agency had a right to insist on strict compliance regarding change of beneficiary requirements; that even if it be assumed that the System waived its right of strict compliance, the first beneficiaries had the right to insist on strict compliance; that in the instant case there were no equitable exceptions to the strict compliance rule; and that such rule does apply if the insured has neither filed the change of beneficiary statement nor expressly directed some one else to file it on behalf of the insured, citing such authority as *Supreme Lodge v. Price*, 27 Cal.App. 607, 150 P. 803; *Pacific Mutual Life Ins. Co. v. Rotondo, D.C.*, 96 F.Supp. 197; *Cook v. Cook*, 17 Cal.2d 639, 111 P.2d 322; and cases cited in 19 A.L.R.2d 14 and 56.

It is understandable that the System should be desirous of having some fixed date on which it could safely pay the retirement benefits to the authorized beneficiary and avoid possible claim in the same amount by a beneficiary subsequently nominated by the member prior to his death, but not filed with said System until some future date. *Gerstenlauer v. United States, D.C.*, 108 F.Supp. 654, 657. Had the legislature intended that such subsequent nomination be filed *by the member and prior to his death* as a condition precedent to the payment of such funds to the new beneficiary it should have been definite in so providing.

[1] As we construe the law in this respect, it only provides that the nomination of a beneficiary under the Retirement System may be revoked at the pleasure of the member or beneficiary making the nomination and a different beneficiary nominated by a written instrument duly executed and duly filed with the board. That such filing must be before death, or that it must be filed by the member before the mem-

ber's death is not indicated. There is nothing stated therein which would preclude an authorized agent to file it after his death. Section 14575, *supra*, provides generally that "Upon receipt of proof of a member's death which occurred before the effective date of his retirement * * * there shall be paid to such beneficiary as he has nominated by written designation *duly* filed with the Retirement Board * * *". In the instant case he did nominate plaintiff by written designation, which was duly filed with the Retirement Board, but subsequent to his death. Again it is not indicated that such filing must be by the member prior to his death. The term "duly filed" appears to have some significance. It has been interpreted as meaning more than the mere act of filing, i. e. "seasonably", "regularly" and "properly" filed in compliance with the requirement of law. *Citizens' State Bank v. Morse*, 60 Kan. 526, 57 P. 115; *Dunning v. Coleman*, 27 La. Ann. 47, 48; *Elbee Chocolate Co. v. United States*, 2 Cir., 63 F.2d 773, 775; 13 Words and Phrases, *Duly Filed*, p. 618. It is true that the administrative interpretation or construction of the act which is administered by the State Teachers' Retirement Board is entitled to be considered. *Riley v. Thompson*, 193 Cal. 773, 227 P. 772; *Bodinson Mfg. Co. v. California E. Comm.*, 17 Cal.2d 321, 109 P.2d 935. There are exceptions to this rule. *County of Los Angeles v. State Dept. of Public Health*, 158 Cal.App.2d 425, 322 P.2d 968. It was there held that an administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment. In the instant case, while it is indicated the System and the Attorney General concluded that the member did not comply with section 14575, *supra*, in respect to the filing of the nomination, it also appears from the System's letter of April 27th that if plaintiff's attorney could furnish a statement of the witness to the execution of the nomination and an explanation for not filing the designation at the time it was executed, such showing would be received in making its determination as

to whether it could act upon the designation which was delayed in its filing, and that there was some doubt as to whether the member ever intended that it be filed.

[2] Since plaintiff did present the revocation and her nomination, together with the first proof of death, and made first claim to the proceeds by virtue of such revocation and nomination within a reasonable time and in accordance with the provisions of laws and the regulations, it must be held that it was "duly filed" within the meaning of that term. *Smith v. Metropolitan Life Insurance Company*, D.C., 142 F.Supp. 320; *Schwerdtfeger v. American United Life Ins. Co.*, 6 Cir., 165 F.2d 928; *Mildren v. Mildren*, 9 Cir., 239 F.2d 515; *Kit v. Stecker*, 3 Cir., 109 F.2d 281; *John Hancock Mut. Life Ins. Co. v. Douglass*, 7 Cir., 156 F.2d 367; *Aetna Life Insurance Company v. Parker*, D.C., 130 F.Supp. 97; *Moore v. United States*, D.C., 129 F.Supp. 456; *Kendig v. Kendig*, 9 Cir., 170 F.2d 750. The case of *Pimentel v. Conselho Supremo*, 6 Cal.2d 182, 57 P.2d 131, is somewhat factually similar to the instant case. There, there was a change of beneficiary form on the policy. The rules of the society require that this be signed, endorsed and surrendered to the society for verification by the signature of the secretary, and the seal. This form was signed by the decedent, notarized and delivered to an attorney who delivered it to the person named as the new beneficiary, and he put it in a safety deposit box. The decedent, prior to signing, stated to a friend that he wanted his brother to be made beneficiary, and after he had signed and turned the policy over to the attorney for decedent, he inquired if the necessary steps had been taken to change the beneficiary. The court, on appeal, ruled in favor of the brother, the newly designated beneficiary. It cited *Johnston v. Kearns*, 107 Cal.App. 557, at pages 563-564, 290 P. 640, at page 643, where the notice was mailed after the death of the insured, and this court said that "depends, not merely upon the records in the office of the company at the moment of the death of the insured, but also upon what

steps have been taken by the insured prior to his death" and, that "[The] right depends upon the acts of the insured himself, as measured by equitable rules."

[3] The Supreme Court, in the Pimentel case, *supra*, in citing *Johnston v. Kearns*, *supra*, said it is settled in this jurisdiction that interpleader and payment in court did not operate as a waiver of the insured's failure to comply with the policy provisions concerning change of beneficiary, and that such filing can only be construed as a recognition of liability to the rightful claimant and as a measure taken to protect the insurer against a double liability; that such payment into court does, however, relax the rule since the insurer waived its own right to insist upon a rigid adherence to the regulations. But the more liberal rule does not obtain where the insurer is disputing the rights of the second beneficiary (Citing cases). At first the System expressed some doubt as to whether it could recognize the change of beneficiary filed after the death of the member unless the delayed filing was sufficiently explained. It did appear in the action and claimed the necessity of such prior filing by the member himself. It submitted to the finding and judgment of the trial court that the delay in filing the change of beneficiary was immaterial and did not appeal from this judgment. Whether its action, under the circumstances, could be considered a waiver of strict performance as to the second beneficiary may be questioned. Under either theory, we are convinced that neither the law nor the regulations, as a condition precedent to the payment of the funds claimed, required that such change of beneficiary be *filed by the member* with the system, and *prior to his death*. Accordingly, the determination that a waiver of strict compliance resulted under the facts related is not necessary.

[4] A more serious question arises as to the sufficiency of the evidence to support the court's finding that the member *intended* to make a *presently* effective designation of beneficiary in favor of

plaintiff; that he permitted or authorized her to *file* a designation of change of beneficiary with the System; that he placed said designation in the possession and under the control of plaintiff; or that he intended to effectively revoke the previous nomination of the beneficiary made by him.

It must be conceded that he did, about one month after their marriage, obtain, fill out and sign, in the presence of a witness, a proper form which, if then filed by him or his authorized agent, would have effected the change indicated. There was no evidence that plaintiff knew of the execution of such a document until she discovered it, as indicated, after the member's death. There is no evidence that the member intended, at the time it was signed, that it was to then or subsequently effectively operate as a change of beneficiary or that he authorized plaintiff to file it with the System either then or after his death, to accomplish the purpose of such a change. It appears that he was an educated man and should have known, from the law and printed instructions on the form, that it would be necessary for him or his authorized agent to file it with the System at sometime before the change in beneficiary could be accomplished. Instead of mailing it, he brought it home and placed it in a folder with the other papers indicated, where it would not likely come to plaintiff's attention, and never told her about it. Had he intended her to file it, either before or after his death, it would seem only natural that he would have shown it to her or have told her about it at the time, or prior to his death. He had a warning of death in January, 1956, but recovered sufficiently to attend to its filing himself. Even assuming he originally had the intention of making the change, his lack of action thereafter might well negate the continuance of that intention.

Plaintiff claims in her brief that the defendant System's attorney stipulated that the designation of beneficiary had been delivered to the plaintiff. The full effect of the record does not support this conclu-

sion. The court asked its counsel if he was willing to take the position that the designation of change of beneficiary was just as valid, whether or not it was delivered to her. In reply he said: "I am willing to stipulate then * * * I guess I would have to * * * that it was delivered to her." In reviewing the stipulation the court remarked: "As I remember, it has been stipulated that this document of June 9, 1955, was executed and delivered; right?" Mr. Workman: "We did not stipulate it was delivered * * * I have no knowledge as to what Mrs. Watenpugh did with it. All I am willing to stipulate to is that he executed the document and that it was found after his death in an accordian-type paper folder by the plaintiff, because that is the only information we have." The Court: "With that limitation, I think oral evidence as to the delivery of the document to her, if it was delivered, would be admissible. I will sustain the objection but permit you to put on oral evidence as to whether or not it was in fact delivered to her." Counsel for defendants refused to make any stipulation in reference to delivery to plaintiff.

In this connection, plaintiff had just offered to prove, by her own testimony, that her husband, in March or April, 1955, told her that in the event of his death she would be the beneficiary of the State Teachers' Retirement Fund, and told her that he had no pension but that there was a State Teachers' Retirement Fund; that several months later, in September or October, the deceased told her that in the event of his death she would have to sell the house because she could not keep up the payments; but that if she were careful she would be able to get along with the Teachers' Retirement Fund. Both the attorneys for the System and for defendants objected to this offer of proof and the court said it was inclined to sustain the objection; that as he remembered, it had

been stipulated that the document was *executed and delivered*, to which counsel for the System replied: "We do not stipulate it was delivered."

The proffered testimony of plaintiff, to which the court sustained the objection, might have had some bearing on the question of the delivery of the revocation and nomination of a new beneficiary, and the husband's intention or authorization for plaintiff to file it. *Whitlow v. Durst*, 20 Cal.2d 523, 525, 127 P.2d 530. In respect to the delivery or nondelivery of a deed, it has been uniformly held that it is a question of fact to be determined by the circumstances of the transaction and the sufficiency of the facts relied on to establish delivery. Accordingly, it is recognized that until the instrument is delivered, the grantor may do as he pleases with it. He has not only the right to change the character of the delivery originally contemplated by him, but also the right to destroy the instrument itself. 15 Cal.Jur. 2d 477, Sec. 79 et seq. Proper evidence in support of these intentions is admissible. 15 Cal.Jur.2d 499, Sec. 99, and cases cited. At least the court should hear such evidence as plaintiff or defendants may properly offer, which would bear on the subject. This court could not, at this time, consider the offer of proof in support of the finding since, as defendants rightfully contend, the witness would be subject to cross-examination, and defendants would be entitled to produce other evidence in this respect. After hearing all the evidence the court will then be authorized to make proper findings based thereon. Accordingly, the judgment should be reversed and the respective parties be afforded the opportunity to present further evidence.

Judgment reversed.

MUSSELL, Acting P. J., and McCABE, Justice pro tem., concur.

Thelma E. BAUM, Plaintiff and Appellant,
v.

**Ernest M. BAUM, Defendant and
Respondent.***

Civ. 23076.

District Court of Appeal, Second District,
Division 1, California.

July 28, 1958.

Rehearing Denied Aug. 11, 1958.

Hearing Granted Sept. 24, 1958.

Proceeding on motion by defendant to dismiss an appeal from an order of the Superior Court, Los Angeles County, Elmer D. Doyle, J., denying plaintiff's motion to appoint a receiver. The District Court of Appeal, Fourth, J., held that where effect of order denying appointment of a receiver was to stay execution of judgment and there was no other property of defendant from which judgment could be collected, order denying plaintiff's motion to appoint a receiver was appealable.

Motion to dismiss appeal denied.

1. Appeal and Error ⇐101(1)

Where effect of order denying appointment of a receiver was to stay execution of judgment and there was no other property of defendant from which judgment could be collected, order denying plaintiff's motion to appoint a receiver was appealable. West's Ann.Code Civ.Proc. § 963.

2. Appeal and Error ⇐82(1)

In order for a special order made after final judgment to be appealable, such order must affect judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. West's Ann.Code Civ.Proc. § 963.

Ray Howard, Los Angeles, for appellant.

Benjamin P. Riskin, Los Angeles, for respondent.

FOURTH, Justice.

[1] This motion is to dismiss an appeal from an order denying "plaintiff's motion to

* Opinion vacated 335 P.2d 481.

appoint a receiver and/or order a sale of defendant's partnership interest" in a business.

The primary ground urged in support of the motion is that such an order is not appealable. Counsel has not referred us to any case which has determined the precise issue in this matter, namely the appealability of an order denying the appointment of a receiver.

Section 963 of the Code of Civil Procedure specifically provides for an appeal from an order appointing a receiver, however there is no correlative provision for an appeal from an order *denying* the appointment of a receiver; but provision is made for an appeal "from any special order made after final judgment."

[2] The rule with reference to the test of appealability of a special order after final judgment is set forth in *Hixson v. Hixson*, 146 Cal.App.2d 204, 303 P.2d 607. It is stated in *Mendelsohn v. Miller*, 152 Cal.App.2d 281, 283, 313 P.2d 109, 110, as follows: "Both sides rely upon *Hixson v. Hixson*, 146 Cal.App.2d 204, 303 P.2d 607, wherein the authorities are reviewed. They uniformly apply the test stated in *Lake v. Harris*, 198 Cal. 85, 89, 243 P. 417, 419: 'In order that a special order made after final judgment, as contemplated by subdivision 2 of section 963 of the Code of Civil Procedure, be appealable, such order must affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution.'"

Under the circumstances of this case, the effect of the order denying the appointment of a receiver is to stay the execution of the judgment. The wife asserts, and it would appear from the record, that apparently there is no other property of the husband from which the judgment can be collected. In effect, therefore, a stay of the execution of the judgment in this case is tantamount to making the judgment uncollectable.

The other grounds for the motion to dismiss the appeal, namely that no relief can be given to the appellant, that the appellant's contentions are unsubstantial and that there

was no showing of an abuse of discretion by the trial judge, have received our consideration. We are of the belief, under the circumstances of this case, that such matters should be determined upon their merits.

The motion to dismiss the appeal is denied.

WHITE, P. J., and LILLIE, J., concur.



162 Cal.App.2d 568

Harold J. TIBBITTS and Paul C. Tibbitts,
Plaintiffs,

v.

Robert G. FIFE, Individually and as Executor of the Estate of Martha B. Fife, aka Myrtle B. Fife and Margaret Rainbolt,
Defendants and Respondents,

Harold J. Tibbitts, Appellant.

Civ. 23019.

District Court of Appeal, Second District,
Division 2, California.

Aug. 4, 1958.

Hearing Denied Oct. 1, 1958.

Action to obtain imposition of constructive trust on realty, an accounting, and an order compelling conveyance of the realty by defendants to plaintiffs. The Superior Court, Los Angeles County, Fred Miller, J., refused plaintiffs' demands for jury trial and rendered judgment for defendants, and one plaintiff appealed. The District Court of Appeal, Herndon, J., held that the complaint stated an equitable action, and, therefore, a jury trial was not a matter of right.

Judgment affirmed.

1. Jury ⇐10

Constitutional guaranty of right to trial by jury extends only to cases in which right to jury trial existed at common law, and,

therefore, question whether party is entitled to jury trial as matter of right is a historical one and must be approached in context of 1850 common-law pleading. West's Ann.Const. art. 1, § 7.

2. Jury ⇐13(3)

If gist of an action as framed by pleadings is such that issues were cognizable at law in 1850, trial by jury is to be had as a matter of right. West's Ann.Const. art. 1, § 7.

3. Jury ⇐13(3)

In determining whether an action is legal or equitable and, consequently, whether a jury trial may be demanded, consideration must be given to nature of rights involved and remedies invoked as disclosed by the pleadings. West's Ann.Const. art. 1, § 7.

4. Jury ⇐13(1)

Where remedies invoked are purely and exclusively equitable, right to jury trial does not exist. West's Ann.Const. art. 1, § 7.

5. Trial ⇐10

If action is addressed to court's equity powers, matter is one for trial court alone or court sitting with an advisory jury. West's Ann.Const. art. 1, § 7.

6. Trusts ⇐359(2)

Equity retains exclusive jurisdiction of actions to establish and enforce trusts, such as constructive trusts on realty.

7. Trusts ⇐359(2)

At common law, remedies of a beneficiary against the trustee are exclusively equitable, except that beneficiary may maintain an action at law to enforce trustee's immediate and unconditional duty to pay money or to deliver chattel.

8. Fraud ⇐31

In proper cases, both equitable and law courts have jurisdiction over actions for fraud.

9. Jury ⇐13(3)

Where facts constituting fraud charged and relief sought are cognizable in court of law, parties are entitled to a jury trial,

but, if case, as made by the pleadings, involves application of equitable doctrine and granting of relief obtainable only in court of equity, parties are not entitled to a jury trial. West's Ann.Const. art. 1, § 7.

10. Jury ⇨14(5)

Complaint, which alleged that decedent had orally agreed to receive realty conveyed to her by her sister and to hold the realty until directed by sister to convey it during sister's lifetime or to convey it to plaintiff upon sister's death, and which further alleged that both decedent and decedent's heirs and representatives refused to convey to plaintiff following sister's death, and which sought imposition of a constructive trust, an accounting, and an order compelling conveyance of the realty to plaintiff, stated an equitable action, and, therefore, a jury trial was not to be had as a matter of right.

Patrick B. Phelan, Long Beach, for appellant.

Hosmer & Eagleson, David N. Eagleson, Harwood Stump, Long Beach, for respondents.

HERNDON, Justice.

The sole question presented on this appeal is whether the trial court erred in refusing plaintiffs' demand for a jury trial in a suit to establish a constructive trust with respect to certain real property.

Harold and Paul Tibbitts joined as plaintiffs in filing a pleading entitled "First amended complaint to establish a constructive trust and for an accounting of rents, issues and profits." The named defendants were Margaret Rainbolt and Robert G. Fife. The latter was sued both as an individual and in his capacity as executor of the will of Myrtle B. Fife, deceased. The first amended complaint contained two "counts". In the first count, it was alleged in substance: (1) that on a certain date specifically described parcels of real property were owned by one Marie B. Kendall; (2) that Marie B. Kendall and Myrtle B.

Fife were sisters, and that a confidential relationship existed between them; (3) that by various conveyances and without consideration, Marie B. Kendall caused said real property to be conveyed to Myrtle B. Fife and herself as joint tenants; (4) that the conveyances were made "upon promises and inducements" of Myrtle B. Fife "that she would, if requested, by the said Marie B. Kendall, deceased, convey the said real property to the said Marie B. Kendall, deceased, as her sole and separate property, and that if the said Marie B. Kendall, deceased, died prior to her death, she would convey the said property to herself and to the plaintiffs, Harold J. Tibbitts and Paul C. Tibbitts, as joint tenants;" (5) that Marie B. Kendall predeceased Myrtle B. Fife and that the latter refused to convey to plaintiffs as promised; (6) that legal title to the property had vested in defendants as beneficiaries under the will of Myrtle B. Fife; and (7) that defendants had refused to recognize plaintiffs' beneficial interest in the property.

The second count of the complaint realigned all of the facts above recited, and, in addition, alleged that the said "promises and inducements" made by Myrtle B. Fife "were made with the intent to defraud the said Marie B. Kendall, in that said promises and inducements were made with the fraudulent intent on the part of the said Myrtle B. Fife, aka Martha B. Fife, deceased, not to keep said promises, but to deceive the said Marie B. Kendall, deceased."

The prayer of the complaint was as follows: (1) "That the court enter its decree that the defendants hold the real property described herein as trustees for the plaintiffs;" (2) "That the court order the defendants to execute good and sufficient deeds to the real property described herein conveying said real property to the plaintiffs herein;" (3) "That the court order the defendants to account to the plaintiffs for the rents, issues and profits from the real property described herein from the date of the death of Myrtle B. Fife, aka Martha B. Fife, deceased to the

date of the execution of said deeds, and to award plaintiffs judgment of said rents, issues and profits;" (4) "For costs of suit incurred herein, and for such other and further relief as to the court seems just and proper."

On the basis of plaintiffs' memorandum for setting, the cause was originally set for a jury trial. Subsequently, on defendants' motion, it was reset for trial without a jury. At the time of trial, plaintiffs renewed their request for a jury, but it was denied by the trial judge. The trial terminated with findings of fact, conclusions of law, and judgment favorable to defendants. Plaintiff Harold J. Tibbitts alone appeals, urging as his sole contention that plaintiffs were entitled to a jury trial as a matter of right.

Appellant's contention is based upon misconceptions of the essential character of the instant action and of the test by which it is to be determined whether a jury trial is a matter of right.

[1] The right to trial by jury is guaranteed in section 7 of article I of the California Constitution. However, this guaranty extends only to those cases wherein the right to a jury trial existed at common law. *Sonleitner v. Superior Court*, 158 Cal.App.2d 258, 322 P.2d 496; *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d 283, 286-287, 231 P.2d 832; *Phyle v. Duffy*, 34 Cal.2d 144, 148, 208 P.2d 668. The question presented is an historical one and must be approached in the context of 1850 common law pleading. *Ripling v. Superior Court*, 112 Cal.App.2d 399, 402, 247 P.2d 117; *Bank of America v. Lamb Finance Co.*, 145 Cal.App.2d 702, 706-707, 303 P.2d 86.

[2, 3] If the gist of an action as framed by the pleadings is such that the issues were cognizable at law in 1850, trial by jury is a matter of right. *Bank of America v. Lamb Finance Co.*, supra, 145 Cal.App.2d 702, 303 P.2d 86; *Ripling v. Superior Court*, supra, 112 Cal.App.2d 399, 247 P.2d 117. In determining whether an action is legal or equitable, and, consequently, whether a jury may be demanded, consideration

must be given to the nature of the rights involved and the remedies invoked as disclosed by the pleadings. *Bettencourt v. Bank of Italy*, 216 Cal. 174, 179, 13 P.2d 659; *Dills v. Delira Corp.*, 145 Cal.App.2d 124, 128, 302 P.2d 397; Cf. *Grossblatt v. Wright*, 108 Cal.App.2d 475, 484, 239 P.2d 19.

[4, 5] Where the remedies invoked are purely and exclusively equitable, the right to a jury trial does not exist. *Dills v. Delira Corp.*, supra, 145 Cal.App.2d 124, 128, 302 P.2d 397; *Cutter Laboratories v. R. W. Ogle & Co.*, 151 Cal.App.2d 410, 418, 311 P.2d 627; *Sorci v. Crisci*, 150 Cal. App.2d 90, 95, 309 P.2d 937; *Bettencourt v. Bank of Italy*, 216 Cal. 174, 179, 13 P.2d 659; *Proctor v. Arakelian*, 208 Cal. 82, 98, 280 P. 368. "The constitutional guaranty of the right to a jury trial does not apply to actions involving the application of equitable doctrines and the granting of relief that is obtainable only in courts of equity. Accordingly, a jury cannot be demanded as of right in such actions." (29 Cal.Jur.2d 485, § 7.) "If the action is addressed to equity powers of the court, the matter is one for the trial court alone or sitting with an advisory jury." *Dills v. Delira Corp.*, supra, 145 Cal.App.2d at page 128, 302 P.2d at page 400.

Stripped of legal conclusions and reduced to ultimate facts, the appellant's complaint alleges that Myrtle B. Fife orally agreed to receive certain real property conveyed to her by her sister, Marie B. Kendall, and to hold the property until directed to convey it during Marie B. Kendall's lifetime or to convey it to plaintiffs on Marie's death. The complaint alleges Myrtle's, and defendants' refusal to convey to plaintiffs, and prays for the imposition of a trust, an accounting, and an order compelling the conveyance of the specified realty to plaintiffs.

[6, 7] It is clear that at common law suits of the character here presented were cognizable only in equity. Equity retains exclusive jurisdiction of actions to establish and enforce trusts. *Lane v. Whitaker*,

50 Cal.App.2d 327, 331, 123 P.2d 53; Woolsey v. Woolsey, 121 Cal.App. 576, 581, 9 P.2d 605; Schooler v. Williamson, 192 Cal. 472, 478-479, 221 P. 195; Cauhape v. Security Savings Bank, 127 Cal. 197, 201, 59 P. 589. The common law rule is reflected in the Restatement, Trusts, sections 197-198, to the effect that the remedies of a beneficiary against the trustee are exclusively equitable, except that the beneficiary may maintain an action at law to enforce the trustee's immediate and unconditional duty to (a) pay money or (b) deliver a chattel. A suit to impose a constructive trust *on land* was not within the class of cases in which the beneficiary could sue the trustee in an action at law; it was within the exclusive province of equity. (1, 4 Pomeroy, Equity Jurisprudence, (5th ed. 1941) §§ 155 and 1044; see, also, Rest., Restitution, § 166, comment b.)

[8, 9] Appellant argues that "since fraud is cognizable in a court of law, these issues should have been tried by a jury." This argument may be answered in the language in Holt v. Parmer, 106 Cal.App. 2d 329, 332, 235 P.2d 43, 45: "Both courts of law and of equity, in proper cases, have jurisdiction in cases of fraud; and, when the facts constituting the fraud and the relief sought are such as are cognizable in a court of law, the parties are entitled to a jury trial; but where the case, as made by the pleadings, involves the application of the doctrines of equity, *and the granting of relief, which can be obtained in a court of equity, and not elsewhere*, the parties are not entitled to a jury trial." (Emphasis added.)

The following from Angus v. Craven, 132 Cal. 691, 698, 64 P. 1091, 1094, is to the same effect: "It is said that a court of law can try questions of fraud * * * as well as a court of equity. Of course, this is true, and it is true of any question of fact, considered independently of the circumstances under which it arises. Either a court of equity or a court of law can hear and determine any issue of fact which is presented for adjudication in a proceeding properly before the court; otherwise, there

could scarcely be any equitable remedies. But the circumstance that either kind of court may try a question of fact has no weight in determining whether *upon a particular state of facts* the remedy is legal or equitable." (Emphasis added.)

[10] Since the action is purely equitable in that all of the relief sought is addressed to the equity powers of the court, a jury trial was not a matter of right.

The judgment is affirmed.

We concur.

FOX, P. J., and ASHBURN, J., concur.



162 Cal.App.2d 594

Orlin VAN DYKE, Plaintiff and Respondent,
v.

Gordon MacMILLAN, Defendant and
Appellant.
Civ. 9398.

District Court of Appeal, Third District,
California.

Aug. 4, 1958.

Action to recover a balance due from defendant. From an order of the Superior Court, Sutter County, Arthur Coats, J., denying defendant's motion to vacate the judgment the defendant appealed. The District Court of Appeal, Warne, J. pro tem., held, inter alia, that where trial court had been advised that defendant's attorney's illness, which required treatment by a physician, precluded attorney from attending trial, and that attorney would be engaged in further trial of unfinished case in another county, his health permitting, on date set for trial involved, and although affidavit in support of motion for continuance was not mailed in time to reach trial judge on morning of trial it was received at 1:30 P. M. on the same day, and affidavit in support of motion for continuance

amply supported the motion, and delay was due to attorney's not knowing that mail deposited in post office in Los Angeles would take more than one day to be delivered to addressee in Yuba City, where trial was to take place, trial court abused its discretion in denying defendant's motion to set aside default judgment.

Reversed.

1. Appeal and Error ☞957(1)

Judgment ☞139

An application to set aside default judgment was largely within discretion of trial court and would not be disturbed on appeal in absence of a clear showing of abuse of such discretion. West's Ann. Code Civ.Proc. § 473.

2. Judgment ☞139

It is the policy of the law that every case should be heard on its merits and discretion of trial court in passing upon application for relief from default is to be exercised in conformity with the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. West's Ann.Code Civ.Proc. § 473.

3. Judgment ☞162(2)

Even in a case where showing under statute providing for opening of default is not strong, or where there is any doubt as to setting aside of default, such doubt should be resolved in favor of the application. West's Ann.Code Civ.Proc. § 473.

4. Judgment ☞143(10)

Negligence on part of attorney in permitting entry of default judgment will, under some circumstances, justify trial court in granting relief. West's Ann.Code Civ.Proc. § 473.

5. Judgment ☞143(15)

The illness of a party's counsel, so severe as to prevent him from appearing and trying a case, is ground for vacating judgment, provided such party did not know of it in time to retain other counsel or was prevented in some other way from doing so. West's Ann.Code Civ.Proc. § 473.

6. Judgment ☞143(15)

Where trial court had been advised that defendant's attorney's illness, which required treatment by a physician, precluded attorney from attending trial, and that attorney would be engaged in further trial of unfinished case in another county, his health permitting, on date set for trial involved, and although affidavit in support of motion for continuance was not mailed in time to reach trial judge on morning of trial it was received at 1:30 p.m. on the same day, and affidavit in support of motion for continuance amply supported the motion, and delay was due to attorney's not knowing that mail deposited in post office in Los Angeles would take more than one day to be delivered to addressee in Yuba City, where trial was to take place, trial court abused its discretion in denying defendant's motion to set aside default judgment. West's Ann.Code Civ.Proc. § 473.

Guy Richards Crump, Los Angeles, for appellant.

Hewitt & McBride, Yuba City, for respondent.

WARNE, Justice pro tem.

Defendant has appealed from an order denying his motion under section 473 of the Code of Civil Procedure to vacate a money judgment entered against him after he failed to appear for trial through the excusable neglect or inadvertence of his attorney.

Plaintiff brought this action to recover a balance of \$950 allegedly unpaid for hay sold by plaintiff to defendant.

The answer admits the contract; avers that by it defendant purchased 150 tons of hay baled for shipping at \$13 per ton, delivery to be made at plaintiff's ranch where the hay was stacked; and avers that the defendant paid plaintiff \$1,000 on account and received delivery of 63.685 net tons.

The answer further avers that defendant was unable to receive delivery of any more

of the hay because it was so "loosely, carelessly, negligently and improperly" baled and wired as to be unfit for trucking; that the hay was, as plaintiff knew, required for use on defendant's cattle ranch in Sierra County; that by paying a premium hauling charge defendant was able to obtain trucking for the hay to the extent of 68.685 net tons, but no more.

By way of further answer and counterclaim it is averred that defendant was damaged in the sum of \$172.10 by reason of a premium hauling price of \$12 per ton which he had to pay by reason of the inadequate and improper baling and wiring of the hay by plaintiff. Further, defendant averred that the hay remaining undelivered on plaintiff's ranch was ruined by rain because of the failure and refusal of plaintiff to protect it.

Plaintiff filed an answer to the counterclaim and the case was set for trial for January 30, 1957, at 10 a. m., and notice of time and place of trial, with affidavit of mailing of said notice to defendant's attorney attached thereto, was filed on November 28, 1956.

On January 24, 1957, appellant's attorney sent the following telegram to the Judge of the Superior Court:

"Because of protracted illness and partially tried case Superior Court Los Angeles which will be on trial January thirty and for some time thereafter if my health permits will be unable to try case January thirty Van Dyke v. MacMillan Sutter County number eighty nine eighty five. Copy this telegram to attorneys for plaintiffs. Will forward affidavit for continuance."

On January 28, 1957, appellant's counsel, by certified mail, mailed his affidavit to the Judge of the Superior Court of Sutter County in Yuba City in support of an application thereby made for continuance of the trial to some available date after April 15, 1957. This affidavit was not received by the trial judge until 1:30 p. m. on January 30th.

In the meantime the case was called for trial pursuant to notice of trial, the trial judge stating that since the affidavit mentioned in the telegram had not been received they would proceed with the trial. The case was then tried. Judgment was entered for plaintiff for \$950 and costs, on February 7, 1957. It appears that defendant's attorney did not learn of the trial having taken place or of the entry of judgment against defendant until about April 1, 1957.

On June 14, 1957, appellant served and filed a notice of motion to set aside the judgment. In support of the motion affidavits of appellant and his attorney were filed. The affidavit of appellant's attorney states, among other things, that on the 30th day of January, 1957, he was actually engaged in the trial of an unfinished case in the superior court of Los Angeles County, which case he had anticipated would be finished before January 30th; that on the 24th day of January, 1957, he sent to Honorable Arthur Coats, Judge of the Superior Court of Sutter County the telegram which we have hereinbefore quoted and at the same time mailed a copy thereof to plaintiff's attorneys, and that on January 28, 1957, he mailed to the trial court an affidavit in support of an application for continuance of trial and at the same time mailed a copy to plaintiff's attorneys; that at the time he did not know that it would take more than one day for mail deposited in the post office at Los Angeles to be delivered to the addressee at Yuba City; that receipts thereof were acknowledged by Judge Coats on January 30, 1957, at 1:30 p. m., and by one of plaintiff's attorneys on January 31, 1957; that on or about the 23rd day of January, 1957, affiant was for the first time informed by his physician that the condition of affiant's health and the necessity for frequent treatments by said physician for his sickness would "preclude" his absenting himself from the County of Los Angeles and thereupon affiant sent the telegram aforesaid; that affiant advised defendant by long distance telephone from Los Angeles

to Sierra County, where defendant resided, that because of his illness and also because, if well enough, he would actually be engaged in trial in Los Angeles County on the 30th day of January, it would be impossible for him to be present at the trial on January 30, 1957; that he would arrange for a continuance; that he was (in said conversation) advised by defendant that it was then or had been recently snowing heavily in Sierra County and by reason thereof he (defendant) was unable to do anything about obtaining other counsel; that he did not know that continuance had not been granted or that judgment had been rendered against defendant until he received a letter from the attorneys for plaintiff on or about the 1st day of April, 1957. Affiant also alleges that defendant had stated the facts in the case to him and that he believes that defendant has a good and meritorious defense to said action as shown by the answer and he so advised defendant.

Defendant in his affidavit alleges that on or about the 23rd day of January, 1957, his attorney telephoned him, advised him of his illness and that he would actually be engaged in the trial of a partially finished case in the Superior Court of the County of Los Angeles on the 30th of January; that it would be impossible for him to be present on January 30th and that he would arrange for a continuance; that affiant heard nothing further with reference to the case until he arrived in Los Angeles from an extended business trip in Texas during the first week of May, 1957, at which time he was advised that no continuance had been granted and that judgment had been entered against him; that prior to the filing of affiant's answer he had fully and fairly informed his attorney of the facts in said case and was advised, and he verily believed, and now believes he has a good and meritorious defense to said action. The plaintiff failed to file an affidavit or other pleading in opposition to the motion, and the statements in the defendant's affidavit and that of his attorney are not denied.

The trial court denied defendant's motion to set aside the judgment and defendant appeals from the order denying it on the ground that the trial court abused its discretion in denying the motion.

[1-3] The application to set aside the judgment, having been made under the provisions of Section 473, Code of Civil Procedure, was largely within the discretion of the trial court and will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion. *Beard v. Beard*, 16 Cal.2d 645, 107 P.2d 385; *De Mello v. De Mello*, 124 Cal.App. 2d 135, 139, 268 P.2d 26, 28. However, "It is the policy of the law that every case should be heard on its merits and the discretion of the trial court is to be exercised in conformity with the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." *De Mello v. De Mello*, supra. Section 473 of the Code of Civil Procedure is a remedial provision and is to be liberally construed so as to dispose of cases upon their substantial merits. *Miller v. Republic Grocery, Inc.*, 110 Cal.App.2d 187, 194, 242 P.2d 396. As stated in *Hambrick v. Hambrick*, 77 Cal.App.2d 372, 377, 175 P.2d 269, 272: "Even in a case where the showing under section 473 is not strong, or where there is any doubt as to the setting aside of a default, such doubt should be resolved in favor of the application 14 Cal.Jur., p. 1076." We see no reason why the rule should not apply to the facts of the instant case.

[4] Appellant relies on the inability of his attorney to appear on the trial date on two grounds, (1) his attorney's physical condition and illness, which required treatment by a physician and precluded his attorney from absenting himself from Los Angeles County, and (2) the fact that his attorney would be engaged in the further trial of an unfinished case in Los Angeles County, his health permitting, on the date set for the trial in the instant case. The trial court was advised of these conditions on January 24th, and although the affidavit

in support of the motion for a continuance was not mailed in time to reach the trial judge on the morning of the trial, it, nevertheless, was received at 1:30 p. m. of the same day. The affidavit in support of the motion for continuance amply supported the motion. The delay was due to appellant's attorney not knowing that mail deposited in the post office in Los Angeles would take more than one day to be delivered to the addressee in Yuba City, California. Assuming that the attorney was negligent in not informing himself of the time necessary for a letter mailed in Los Angeles to be delivered to an addressee in Yuba City and that appellant is chargeable with the neglect of his attorney, there are exceptions to the rule. Negligence on the part of the attorney will, under some circumstances, justify the trial court in granting relief. In *Stub v. Harrison*, 35 Cal. App.2d 685, 96 P.2d 979, a default was set aside by the trial court, and the order affirmed on appeal in a case where an attorney failed to file an answer because he was required to leave his office for a time because of an accident to his son, and, when he returned, forgot the case because of accumulated work. It was held that this was excusable neglect on the part of the attorney and sufficient to justify the trial court in setting aside the default.

[5] Aside from the attorney's negligence the undisputed facts remain that appellant's attorney was engaged in a trial which would not be completed on the date set for the trial of the instant case. That in itself would have precluded his counsel's presence on the trial date. As to counsel's illness, he was not advised by his physician that his condition was such that it would prevent him from leaving Los Angeles County until January 23, 1957 (one week prior to the date of trial), and he on the same day telephoned the appellant by long distance of his illness, and also of his inability to appear for trial on January 30th. Counsel was advised by appellant that "it was then or had been recently snowing heavily in Sierra County and by reason thereof he [appellant] was unable

to do anything about obtaining other counsel." The inference was that appellant was snowed in. The illness of a party's counsel, so severe as to prevent him from appearing and trying a case, is good ground for vacating the judgment, provided such party did not know of it in time to retain other counsel or was prevented in some other way from doing so. 49 C.J.S. Judgments § 280, p. 510.

[6] Under the undisputed facts and circumstances we conclude that the trial court abused its discretion in denying the motion to set aside the judgment.

The order denying appellant's motion to set aside the judgment is reversed.

PEEK, Acting P. J., and SCHOTTKY, J., concur.



162 Cal.App.2d 308

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

William M. RAY, Defendant and Appellant.
Cr. 1370.

District Court of Appeal, Fourth District,
California.

July 22, 1958.

Defendant was convicted of the unlawful taking and driving of a motor vehicle and from a judgment of the Superior Court of San Diego County and from an order denying a motion for new trial, William A. Glenn, J., defendant appeals. The District Court of Appeal, Mussell, Acting P. J., held that the evidence did not require an instruction on the lesser and included offense of "joy riding".

Judgment and order affirmed.

I. Automobiles 357

In prosecution for the unlawful taking and driving of a motor vehicle, evidence did

not require an instruction as to the statute respecting "joy riding" as a lesser included offense, where the evidence clearly showed that defendants were guilty of the unlawful taking and driving of the vehicle rather than the lesser offense. West's Ann.Vehicle Code, § 503; West's Ann.Pen.Code, § 499b.

2. Criminal Law §795(1)

Generally it is not error to refuse to instruct the jury of their right to convict of lesser offenses included in that charged when the evidence shows that the defendant, if guilty at all, is guilty of the greater offense charged.



Buttermore & Lightner, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and Arthur C. DeGoede, Deputy Attys. Gen., for respondent.

MUSSELL, Acting Presiding Justice.

The information filed against the defendant herein contained two counts. In the first count defendant was accused of the crime of unlawful taking and driving of a vehicle (Veh.Code, Sec. 503) in that on or about October 11, 1957, he did drive a vehicle, to wit, a 1949 Ford sedan, belonging to Leon V. Thompson, without the consent of the owner and with the intent to deprive the owner of his possession of said vehicle. The second count charging the defendant with burglary (Pen.Code, Sec. 459) was dismissed by the trial court and a jury returned a verdict finding the defendant guilty of the offense charged in count one of the information. His motion for a new trial was denied, imposition of sentence was suspended, and defendant was granted three years probation, one of the conditions of which was that he be confined in the county jail for the first six months of said probation period. Defendant appeals from the judgment and from the order denying his motion for new trial, contending that the trial court erred in "refusing to instruct on 'joy riding', the lesser included offense."

On the afternoon of October 11, 1957, the appellant, a young sailor stationed at the Naval Training Center in San Diego, and an acquaintance (Buckingham), left the said training center intending to go to Provo, Utah. They walked a short distance from the entrance gate and broke into a parked and locked 1949 green four-door Ford. Buckingham "hot wired" the car by crossing two terminals of the ignition switch with tinfoil. Appellant and Buckingham then proceeded to highway 101 and north thereon until they approached a "check point" established by the United States Border Patrol, approximately 18 miles north of Oceanside. Appellant and Buckingham then turned left up a steep incline which divides the northbound and southbound lanes of traffic on highway 101 and stopped the car, waiting to get into the southbound traffic lane and thus avoid going through the checking point. The border patrol officers, who were stopping all northbound traffic, approached the Ford and directed the driver to come back and go through the check point. When questioned by the officers, appellant stated he broke the vent glass on the right side of the car to gain entrance and Buckingham, who was driving, stated he had "hot wired" the car; that they had taken it from the Naval Training Center and that they thought it belonged to a friend of theirs, whose name was Ruhs.

Leon V. Thompson, the owner of the Ford car involved, testified that he was in the Navy and stationed at the Naval Training Center and had parked his 1949 Ford near the gate to the center on the afternoon of October 11, 1957; that he turned off the ignition and locked all four doors of the car and that when he returned the following morning, his car was gone; that he next saw it in a garage in Oceanside; that he did not know the appellant or Buckingham and had never given them or either of them permission to use his car.

On October 14, appellant was questioned by a police officer and signed a written statement that on October 11, 1957, he and Buckingham were planning to go to Provo,

Utah; that they left the base about 3:15, went down town, got some clothes and went to the junction of highway 101 and Rosecrans where he (Ray) was "written up" by the shore patrol for hitchhiking and was taken back to the base; that Buckingham was then at the barracks and they later "walked out the gate, went down to the left of gate three. We came to the 1949 Ford. I broke the right wind wing glass and opened the door. Buckingham hot wired the car and drove. We drove until we got on the other side of Oceanside." In this connection the officer testified that Ray did not state when questioned that he had been given permission to take the car involved or any other car of similar description.

At the trial appellant testified that on October 11 he started out for Provo, Utah, to see his fiancée; that he looked for William Ruhs to get permission to use his car, a 1949 green Ford, which Ruhs generally parked near gate three; that he was unable to locate Ruhs and that he and Buckingham then went out gate three and saw a 1949 Ford, which they thought belonged to Ruhs; that he tried to pry the window open and it broke; that they looked for the key and it wasn't there and Buckingham then hot wired the car and they left in it, traveling north on highway 101; that about five miles before they were stopped by the border patrol, he found the registration slip to the car and saw that it was registered to Leon V. Thompson; that "we threw the registration away"; that when he discovered that he had taken the wrong car, he and Buckingham decided that they would drive the car to Los Angeles and leave it there until they returned from Utah and then bring it back.

[1] Appellant contends that the court erred in refusing to instruct the jury as to the provisions of Section 499b of the Penal Code, "joy riding", being a lesser included offense. We are not in accord with this contention. Section 499b of the Penal Code provides that "Any person who shall, without the permission of the owner thereof, take any automobile, bicycle, motorcycle, or

other vehicle, for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor, * * *." Section 503 of the Vehicle Code provides that "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, * * * is guilty of a felony".

[2] In *People v. Ragone*, 84 Cal.App.2d 476, 191 P.2d 126, 129, in a prosecution for taking or driving an automobile without the owner's consent in violation of Vehicle Code, Section 503, the court held that the circumstances of the taking of the automobile involved permitted of no other inference than that of an intent to deprive its owner of his possession at least temporarily and, that "If the jury found, as it did, that appellants took the automobile, their intent to deprive the owner of his possession is so clear as to leave no room, under the facts, for an instruction on Penal Code, section 499b." And that "The general rule is that it is not error to omit or refuse to instruct the jury of their right to convict of lesser offenses included in that charged when the evidence shows, or tends to show, that the defendant, if guilty at all, is guilty of the offense charged. (See 8 Cal.Jur. 378 and authorities cited.)"

In *People v. Tellez*, 32 Cal.App.2d 217, 219-220, 89 P.2d 451, 452, in a prosecution for grand theft of an automobile, the court said:

"The trial judge did not err in refusing to read section 499b of the Penal Code or to give a summary of it to the jury. That section makes it a crime for any person to take any automobile for the purpose of temporarily using or operating it without the permission of the owner. It is clearly intended to prevent unauthorized 'joy riding' in other people's automobiles. It defines a crime separate and distinct from and not necessarily related to theft. Under the facts before us there was no occa-

sion to give any instruction on the provisions of that section."

In *People v. Orona*, 72 Cal.App.2d 478, 484, 164 P.2d 769, 772, the court pointed out that there is a distinction between the offenses prohibited in section 499b of the Penal Code and section 503 of the Vehicle Code, saying:

"The latter has been called the 'Joy-ride' statute. It does not require proof of the *intent* to 'deprive the owner' of either the 'title to or possession of such vehicle.' *People v. Neal*, 40 Cal.App. 2d 115, 118, 104 P.2d 555. The misdemeanor designated by Section 499b of the Penal Code may be accomplished by merely taking the machine for the temporary *use or pleasure* of the accused person for a 'joy-ride.' If it be assumed that the offenses, or the penalties, provided for in Section 503 of the Vehicle Code and Section 499b of the Penal Code, are irreconcilably conflicting, which we do not concede, then, under the well known rule of construction, the Vehicle Code provision must prevail since it was last adopted and amended."

In *People v. Marquis*, 153 Cal.App.2d 553, 556-557, 315 P.2d 57, 60, the court said;

"The latest expression of the Supreme Court as to when a lesser offense is 'necessarily included in that with which he is charged' is *People v. Marshall*, 48 Cal.2d 394, 309 P.2d 456, 457. It was held that a lesser offense is 'necessarily included' if it is within the offense specifically charged in the accusatory pleading, even though its elements are not necessarily within those of the statutory definition of the crime. The court said (48 Cal.2d at page 405, 309 P.2d at page 462):

"Since the decisions as to included offenses, so far as they relate to choice of a standard to measure what offenses are "necessarily included" within the meaning of section 1159 of the Penal Code, have not expressly considered or decided the question of selection as between the language of the accusatory

pleading and the statutory definition, we base our choice of the specific language of the accusatory pleading upon considerations of fairness to both parties.'"

In the instant case the allegations in the information clearly charge a violation of section 503 of the Vehicle Code and, according to appellant's own testimony at the trial, when he and Buckingham were within five miles of the check station they discovered that they had broken into, hot wired, and taken a car belonging to Leon V. Thompson; that they then threw the registration slip away and decided to take the car to Los Angeles and leave it there. Under these and other circumstances shown by the record there was no prejudicial error in refusing to instruct the jury as to the provisions of section 499b of the Penal Code.

Judgment and order affirmed.

GRIFFIN, J., and McCABE, J. pro tem.,
concur.



162 Cal.App.2d 545

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Charles WEATHERS, Jr., Defendant and
Appellant.

Cr. 3521.

District Court of Appeal, First District,
Division 2, California.

Aug. 4, 1958.

Rehearing Denied Sept. 3, 1958.

Hearing Denied Oct. 1, 1958.

Defendant was convicted in the Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., for possession of marijuana, and he appealed. The District Court of Appeal, Draper, J., held that where informants all told identical stories as to defendant's possession of

marijuana and they had no apparent reason or opportunity for fabrication and information of one of informants as to defendant's theft of automobile was confirmed by police records, arresting officer had reasonable cause to believe that felony had been committed by defendant, even though one of informants was a youth authority parolee and the other two informants were admitted violators of the juvenile court law.

Affirmed.

1. Criminal Law Ⓒ394

It is credibility of officer and soundness of his reasons for relying on informant which is primary question, and reliability of informant is not paramount; and weight to be accorded to information upon which arresting officer acted is question of fact for trial court in criminal case wherein it is contended that evidence sought to be introduced was product of an illegal search and seizure.

2. Arrest Ⓒ63(4)

Where informants all told identical stories as to defendant's possession of marijuana and they had no apparent reason or opportunity for fabrication and information of one of informants as to defendant's theft of automobile was confirmed by police records, arresting officer had reasonable cause to believe that felony had been committed by defendant, even though one of informants was a youth authority parolee and the other two informants were admitted violators of the juvenile court law. West's Ann.Welfare & Inst.Code, § 550 et seq.

3. Poisons Ⓒ9

In prosecution for possession of marijuana, both knowledge and possession could be established by circumstantial evidence.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

Defendant, after trial by the court without a jury, was convicted of possession of marijuana and sentenced to prison. He appeals from the judgment and the order denying new trial. His principal contention is that the marijuana was improperly admitted because it was the product of an illegal search and seizure.

In the early evening of October 10, a police officer attached to the Juvenile Bureau interviewed JoAnne, a 14-year old girl who had been a runaway. She told of visiting appellant's apartment the preceding afternoon with one Ellingham, also a juvenile. She said appellant produced marijuana which he and Ellingham smoked, and that they offered her some. She said that the same evening (October 9), she, appellant and Ellingham went to Ellingham's apartment. Appellant took marijuana with him, smoked it, and offered some to JoAnne and her friend, Susan, also 14 and also a runaway. Following this conversation with JoAnne, the police officer separately interviewed Susan, who fully corroborated the portion of JoAnne's conversation involving her. The officer then, in the early morning of October 11, went to the apartment of Ellingham, who was a Youth Authority parolee. Ellingham confirmed the stories of the two girls as to the marijuana. Additionally, he said that appellant and he had stolen a described automobile at a specified location some days before, and had abandoned it near Land's End in San Francisco. The officer checked the stolen car records and found that they bore out Ellingham's story as to the car. With all this information, the investigating officer and another went to appellant's apartment at 4:30 a. m. October 11, demanded entry, seized a can of marijuana standing in plain sight on the dresser next to the bed occupied by appellant, and arrested him.

Edward T. Mancuso, Public Defender of the City & County of San Francisco, San Francisco, for appellant.

[1,2] It would seem difficult to imagine a more convincing case of probable and reasonable cause to believe a felony had been committed by appellant. He, however, argues that the police officer was not justified in relying upon the statements of a Youth Authority parolee and two admitted violators of the Juvenile Court law, Welfare and Institutions Code, § 550 et seq. But it is the credibility of the officer and the soundness of his reasons for relying on the informant which is the primary question. The reliability of the informant is not paramount. *People v. Dean*, 151 Cal.App.2d 165, 167, 311 P.2d 85. Further, the weight to be accorded the information upon which the arresting officer acts is a question of fact for the trial court. *Lorenzen v. Superior Court*, 150 Cal.App.2d 506, 510, 310 P.2d 180; *People v. Gonzales*, 141 Cal.App.2d 604, 607, 297 P.2d 50. Here the three juveniles, all of whom were fully identified at the trial, told identical stories of appellant's possession of marijuana, although they had no apparent reason or opportunity for fabrication. The information of one juvenile as to the stolen car was confirmed by police records. Certainly we have no reason to find any abuse of discretion by the trial court in its finding that there was reasonable cause for the arrest of appellant and the search of his residence. The fact that Ellingham, at trial, denied the statement to the officer and made a number of conflicting statements does not destroy the basis for the trial court's conclusion that the officer, at the time of the arrest and search, had reasonable cause to make them.

[3] Appellant also argues that the evidence is insufficient to show that he possessed the contraband substance knowing it to be a narcotic. He testified that the marijuana was not his but had been left with him by a friend. Some of his testimony seeks to deny that he knew the substance was marijuana. Both knowledge and possession may, however, be established by circumstantial evidence. *People v. Robarge*, 151 Cal.App.2d 660, 668, 312

P.2d 70. Here there was such evidence and, additionally, there was testimony of appellant's extra-judicial admissions that he knew the substance to be marijuana and that he possessed it.

Judgment and order denying new trial affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



162 Cal.App.2d 580

**Ignatius C. AUSTIN, a married man, and
Celeste Austin, a married woman,
Plaintiffs and Respondents,**
v.

Edward A. DUGGAN, Irvukke A. Figgs, otherwise known as Orville A. Figgs, Title Insurance and Trust Company, a California corporation, as Trustee, Doe One to Ten, Inclusive, Defendants,

**Edward A. Duggan, and Orville A. Figgs,
Appellants.**
Civ. 22750.

District Court of Appeal, Second District,
Division 3, California.
Aug. 4, 1958.

Action to rescind purchase of note secured by second deed of trust upon lot on ground that purchase was induced by fraudulent representations of payee of note and owner of property with respect to value of first deed of trust against property, size of lot, size of building thereon, and time when balance became due on second deed of trust. The Superior Court of Los Angeles County, Joseph M. Maltby, J., rendered judgment against both defendants and they appealed. The District Court of Appeal, Patrosso, J. pro tem., held that evidence was sufficient to support finding of fraud on part of payee of note, but was insufficient to sustain finding against lot owner.

Affirmed in part and reversed in part.

1. Mortgages ⚖️270

In action to rescind purchase of promissory note secured by second deed of trust upon lot on ground that purchase was induced by fraudulent representations of payee of note and owner of property with respect to value of first deed of trust against property, size of lot, building thereon, and time when balance became due on second deed of trust, evidence was sufficient to sustain finding of fraud on part of payee of note, but was insufficient to sustain finding against property owner.

2. Mortgages ⚖️270

In action to rescind purchase of note secured by deed of trust upon ground that purchase was induced by fraudulent representations of sellers, purchasers were not required to prove pecuniary loss in order to obtain rescission.

3. Fraud ⚖️62

Award of \$1,500 exemplary damages against sellers of note secured by deed of trust for false representations inducing sale was not excessive even though general damages awarded were only \$740.54. West's Ann.Civ.Code, § 3294.

4. Damages ⚖️94

Although exemplary damages should bear a reasonable relation to actual damages, there is no fixed ratio by which to determine the proper proportion between compensatory and exemplary damages.

Robert E. Krause, Long Beach, for appellants.

Morris Singer, Long Beach, for respondents.

PATROSSO, Justice pro tem.

Plaintiffs instituted this action to rescind the purchase by them of a promissory note secured by a second deed of trust upon a parcel of real property in the city of Paramount, upon the ground that the same was induced by the fraudulent representations of the defendants. The case was tried to a jury which returned special and general verdicts in favor of the plaintiffs and as-

essed damages against the defendants in the sum of \$740.54 general damages and \$1,500 exemplary damages. Defendants appeal, contending that the judgment is not supported by the evidence.

Viewed in the light most favorable to the respondents, the evidence discloses the following: Defendant Figgs was the payee and owner of two promissory notes executed by the defendant Duggan, each dated December 1, 1954; one in the principal sum of \$4,985 with principal and interest payable in monthly installments of \$40 or more and the entire balance being due and payable on January 15, 1960; and the other in the principal sum of \$1,280 with principal and interest payable in monthly installments of \$15 per month and the entire balance being payable January 30, 1960. Each note was secured by a deed of trust upon a single parcel of real property described as 13439 S. Dempster, in the city of Paramount, the deed of trust securing the first mentioned note being a first lien.

Some time prior to December 4, 1954, defendant Figgs listed these promissory notes and the trust deeds securing the same for sale with the Long Beach Trust Deed & Mortgage Exchange which was engaged in the business of selling trust deeds and mortgages at auction. This concern periodically issued a brochure giving notice of forthcoming auctions and describing the various trust deeds and mortgages to be offered for sale upon the date therein specified. The brochure giving notice of the auction to be held on December 4, 1954, listed both of the previously mentioned promissory notes and the trust deeds securing the same, together with a description thereof. The information therein contained with respect to these was furnished to the Exchange by the defendant Figgs. This included the street address of the property, the description of the improvements thereon as consisting of a one bedroom, frame and stucco house, the size of the lot as being 25 feet by 120 feet and the square footage of the building as being approximately 600 square feet. It was also therein set forth that the principal amount of the first trust deed was \$3,985 and the

principal amount of the second trust deed was \$1,280, payable \$15 per month including six percent interest "all due 12/1/58." These statements were untrue in this: The principal amount of the first trust deed was \$4,985, not \$3,985; the size of the lot was not 25 feet by 120 feet but 25.2 feet by 110 feet and the rear 15 feet thereof was subject to a perpetual right-of-way for ingress and egress to and from the property located to the north thereof. Also the total floor area of the house was not approximately 600 square feet as stated, but something less than 500 square feet, and the entire balance upon the second deed of trust did not become due until January 30, 1960, instead of December 1, 1958.

The plaintiffs who had previously purchased trust deeds at auctions conducted by the Exchange, received a copy of this brochure through the mail. They undertook to make an investigation of the property described as securing the notes, but finding no house bearing the number 13439 S. Dempster mistakenly assumed that the house immediately adjacent to the one in question was the house referred to in the brochure. They thereafter attended the auction sale and were the successful bidders for the second deed of trust, paying therefor the sum of \$691.20. The note and trust deed were thereafter duly assigned to them through escrow and they received two monthly payments thereon after which payments ceased. They thereupon discovered the falsity of the statements in the brochure as set forth above and gave notice of rescission, following which this action was instituted.

[1] From the foregoing recital of evidence, it is apparent that there is no basis for defendant Figgs' claim that the evidence is insufficient to support the jury's finding of fraud. While it is true that the defendants adduced evidence to the effect that all of the erroneous statements contained in the brochure were corrected by public announcement at the time of the auction, the plaintiffs denied that any such corrections were made. The jury re-

solved the conflict in favor of the plaintiffs and we are concluded thereby.

A different situation, however, is presented as to the defendant Duggan. There is not a scintilla of evidence that this defendant had any part in listing the trust deeds for sale or in the sale thereof to the plaintiffs, nor that he received any part of the money paid by the plaintiffs for the second deed of trust. The plaintiffs never saw or talked to Duggan until several months after the purchase of the trust deed and then only in an attempt to enforce payment from him. It follows that the judgment as to this defendant is wholly unsupported by the evidence.

[2] Defendants also argue that the judgment may not be sustained because the plaintiffs failed to prove any damage. If the plaintiffs had affirmed the transaction and brought suit for damages, there would be some merit in the claim. Plaintiffs, however, elected to rescind and the rule is well settled that in such situation, proof of pecuniary loss is not required. In *Earl v. Saks & Co.*, 1951, 36 Cal.2d 602, 612, 226 P.2d 340, 346, it is said:

"The representee can rescind where he obtains something substantially different from that which he was led to expect. If one is induced to buy a certain lot of land by misrepresentation that it contains a vineyard, he need not keep it when he learns that it contains instead an apple orchard; even though the lot of land is the identical lot of land and although the orchard may be more valuable than the vineyard which he expected to get, it is obviously unfair to require him to keep what he did not bargain for and did not want."

[3,4] Finally defendants contend that the award of the exemplary damages is improper and in any event that the amount awarded is excessive. As the jury found that the defendant Figgs was guilty of fraud, it was authorized in its discretion to assess exemplary damages (Civil Code, § 3294). While the amount awarded appears large in relation to the amount of

the compensatory damages, "Upon the question of what is an adequate sum to award as a punishment and for an example in cases of fraud the jury has a wider discretion than in the case of compensatory damages." *Hartzell v. Myall*, 1953, 115 Cal.App.2d 670, 677, 252 P.2d 676, 680. And while exemplary damages should bear a reasonable relation to the actual damages, there is no fixed ratio by which to determine the proper proportion between compensatory and exemplary damages. *Finney v. Lockhart*, 1950, 35 Cal.2d 161, 164, 217 P.2d 19, 21; *Sheward v. Magit*, 1951, 106 Cal.App.2d 163, 167, 234 P.2d 708. "The reviewing court's power to declare an award of damages excessive exists only when from the facts the amount appears at first blush to suggest passion or prejudice on the part of the jury. There is no distinction when the review is of an award of exemplary rather than actual damages. * * * After an award has been approved by the trial court [as it was in the instant case] the reviewing court will hesitate to declare the amount excessive unless upon consideration of the entire record including the evidence it must be said that the award was the result of passion or prejudice." *Finney v. Lockhart*, *supra*. This we are not prepared to say is the situation herein.

The judgment against the defendant *Figgs* is affirmed and that against the defendant *Duggan* is reversed with direction to enter judgment in his favor against plaintiffs; respondents to recover costs of appeal against the defendant *Figgs* and the appellant *Duggan* to recover costs of appeal against the respondents.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice (concurring).

I agree with the foregoing opinion. But I cannot understand why the trial judge denied the defendants' motion for a new trial. At the conclusion of defendants' argument for an instructed verdict the judge said: "They [the jurors] are the ones that have to decide it. *Could I, I am not im-*

pressed with the lawsuit, and I would resolve these conflicts in evidence in favor of the defendants. My hands are tied, but I can't do it." The motion for a directed verdict was properly denied since there was evidence that would have supported a verdict for the plaintiff. But if the judge believed that the conflicts in the evidence should be resolved in favor of defendants, it was his duty to grant their motion for a new trial. It has always been the law in this state that if the trial judge in ruling on a motion for a new trial believes that the verdict is contrary to the weight of the evidence, "The court is bound to grant a new trial and has no discretion to refuse it." *Hawkins v. Reichert*, 28 Cal. 534. However, in view of the possibility that the judge had changed his mind I do not see how we can go so far as to say that he neglected to weigh the evidence and to perform the extremely important duty of deciding whether the preponderance lay with the plaintiffs or the defendants.



162 Cal.App.2d 586

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Rose May AHOUSE, Defendant and
Appellant.**

Cr. 6116.

District Court of Appeal, Second District,
Division 3, California.

Aug. 4, 1958.

Defendant was convicted of petty theft with a prior conviction of petty theft. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and an order denying defendant's motion for new trial, and defendant appealed. The District Court of

Appeal, Shinn, P. J., held that where record of former conviction of petty theft of one having same name as defendant was introduced without objection, there was sufficient evidence of former conviction of petty theft.

Judgment and order affirmed.

1. Criminal Law ☞1202(3)

In prosecution for petty theft with prior conviction of petty theft, wherein record of former conviction of petty theft of one having same name as defendant was introduced without objection, there was sufficient evidence of former conviction of petty theft. West's Ann.Code Civ. Proc. § 1963, subd. 25; West's Ann.Pen. Code, § 969b.

2. Criminal Law ☞1202(4)

In prosecution for petty theft with prior conviction of petty theft, wherein defendant did not admit former conviction of petty theft, it was necessary that jury should find whether or not defendant had suffered previous conviction. West's Ann. Pen.Code, §§ 969b, 1158.

3. Criminal Law ☞1202(5)

In prosecution for petty theft with prior conviction of petty theft, verdict providing that jury found defendant guilty of petty theft with prior conviction of petty theft, a felony, as charged in the information, was not defective on ground that it failed to find specifically as to prior conviction of petty theft. West's Ann.Pen.Code, § 969b, 1158.

4. Criminal Law ☞722½

In prosecution for petty theft with prior conviction of petty theft, wherein defendant had testified on re-direct examination that she had been convicted of two felonies, it was proper for prosecutor to elicit fact that convictions were in addition to the petty theft conviction pleaded in the information.

Edmund G. Brown, Atty. Gen., for respondent.

SHINN, Presiding Justice.

Rose May Ahouse was charged with the crime of petty theft with a prior conviction of petty theft in the Municipal Court of Beverly Hills, Los Angeles County. It was alleged in the information that she had previously been convicted of a felony in the Court of Quarter Sessions of the State of New Jersey in and for the County of Passaic and had served a term of imprisonment therefor in a state prison. She admitted the former felony conviction and that she had served a term in the state prison therefor. In a jury trial a verdict was returned, reading "We, the jury in the above entitled action, find the Defendant guilty of Petty theft with prior conviction of petty theft, a felony, as charged in the information." Defendant's application for probation was denied and she was sentenced for the crime of petty theft with the prior conviction of petty theft, having previously suffered the conviction of felony. She appeals from the judgment and from an order denying her motion for a new trial.

Upon the appeal it is contended (1) that the verdict of the jury was defective in that it failed to find specifically as to the prior conviction of petty theft; (2) there was insufficient evidence to establish the prior conviction, and (3) the district attorney was guilty of misconduct.

The evidence pertaining to the former conviction of petty theft consisted of the testimony of Harry Duncan, a deputy sheriff, and of Earl Soverns, an expert in the rolling and comparison of fingerprints. The people introduced a card as their exhibit No. 1 for identification and exhibited it to Duncan. The card contained fingerprints which Duncan testified he had caused the defendant to place upon the card. The People also introduced in evidence as their exhibit No. 2 for identification a certified copy of a commitment from the Municipal Court of Beverly Hills Judicial District, County of Los Angeles,

Arthur Sherman, Los Angeles, for appellant.

State of California, which stated that one Rose May Ahouse was convicted of the crime of petty theft and served a term of imprisonment of 60 days in the county jail. On the reverse side of People's exhibit No. 2 were certain fingerprint impressions. Soverns testified that he had made a comparison of the fingerprint impressions on People's exhibit No. 1 with the impressions appearing on the reverse side of the commitment paper, that in his opinion the two sets of impressions had been made by the same person, and that he found 12 or more points of similarity between the two. The witness was not cross-examined and the two exhibits were received in evidence without objection.

[1] The record of the former conviction of petty theft having been introduced without objection, and in view of the fact that identity of person is presumed from identity of name (Code Civ.Proc. § 1963, subd. 25; *People v. Sberno*, 22 Cal.App.2d 392, 400, 71 P.2d 274), there was sufficient evidence of the former conviction of petty theft (Pen.Code, § 969b). It is true, as defendant contends, that there was no direct evidence that defendant placed on exhibit No. 2 her own fingerprint impressions, but that fact was established by the testimony that they were identical with the impressions which she had placed upon exhibit No. 1.

[2] Since defendant did not admit the former conviction of petty theft it was necessary that the jury find whether she had suffered such previous conviction. The verdict or finding upon the charge of previous conviction may be: "We (or I) find the charge of previous conviction true" or "We (or I) find the charge of previous conviction not true." Pen.Code, § 1158. Defendant cites *People v. Eppinger*, 109 Cal. 294, 41 P. 1037; *People v. Dueber*, 34 Cal.App. 686, 168 P. 578; *In re Hall*, 88 Cal.App. 212, 263 P. 295; *People v. Cordosco*, 77 Cal.App. 780, 246 P. 461, and *In re Daniels*, 119 Cal.App. 350, 6 P.2d 549. The cited cases hold only that where there is no finding whatever by the jury with respect to the alleged

former conviction, the verdict stands only as a conviction of the later offense and an acquittal of the prior conviction. Manifestly the cases do not support the contention of the defendant. In *People v. Wallach*, 8 Cal.App.2d 129, 47 P.2d 1071, 1073, the statement of the court at the time of judgment and sentence that the court had previously "announced its decision finding you [defendant] guilty of the offense, to wit, petty theft, with a prior conviction thereof" was sufficient to show that the trial court did make a decision upon the issue of former conviction. In *People v. Flohr*, 30 Cal.App.2d 576, 86 P.2d 862, defendant and another were charged with robbery under an information which alleged that "they did, while armed with a deadly weapon, to-wit: a gun, rob one W. L. McDonald." The jury returned a verdict reading: "We, the jury in the above entitled action, find the defendant, Ronald Flohr, guilty as charged in the information." Section 1158a required that the jury must find whether or not the defendant was armed as charged in the count to which the plea of not guilty was entered and that the verdict might be "We find the charge of being armed contained in the [blank] count true." In holding that the verdict was sufficient to comply with Section 1158a, Penal Code, the court stated: "The quoted verdict found him guilty 'as charged in the information' which is equivalent to a finding that he was armed with a gun at the time of the commission of the crime."

[3] In view of the allegations of the information and of the evidence pertaining to the prior conviction of petty theft, we can attribute no merit to the contention that there was not a sufficient compliance with Section 1158. There is no requirement in that section that the verdict must name the court in which the former conviction was suffered or the date thereof. The reference in the verdict to the charge laid in the information identifies the prior conviction of petty theft as found by the jury with the conviction alleged in the information.

[4] There is no merit in the contention that the prosecutor was guilty of misconduct. Defendant had testified on re-direct examination that she had been convicted of two felonies and the questioning by the district attorney which is complained of was merely designed to elicit the fact that these convictions were in addition to the petty theft conviction pleaded in the information. The questioning was entirely proper.

The judgment and order are affirmed.

PARKER WOOD, J., NOURSE, J.
pro tem., concur.



162 Cal.App.2d 474

**The PEOPLE of the State of California on
Behalf of Michael Allen FARLEY, Alleged
Ward of the Juvenile Court.**

**SAN DIEGO COUNTY PROBATION DE-
PARTMENT, Petitioner and Respondent,**

v.

**Mrs. Laurel FARLEY, Mother of Subject
Minor, Objector and Appellant.**

Civ. 5848.

**District Court of Appeal, Fourth District,
California.**

July 31, 1958.

Proceeding for adjudication that child should be ward of juvenile court. The Juvenile Department of the Superior Court of San Diego County, Robert B. Burch, J., entered an order adjudicating the child to be ward of court and giving custody of him to probation officer, and the child's mother appealed. The District Court of Appeal, Mussell, Acting P. J., held that evidence supported the determination.

Affirmed.

1. Infants ☞16.8

Evidence supported judgment declaring child to be ward of court on ground

that he had no parent or guardian capable of exercising proper parental control. West's Ann.Welfare & Inst.Code, § 700(b).

2. Infants ☞16.12

Where juvenile court specifically ordered that infant, declared to be ward of court, should be subject to supervision of probation officer and further orders of court, juvenile court retained jurisdiction over child and could change placement order as best interests and welfare of child should require.

3. Courts ☞475(15)

Infants ☞16.4

Juvenile court was not usurping power of divorce court and acting outside of its own jurisdiction by awarding custody of child, in view of showing that child had no parent or guardian capable of exercising proper parental control. West's Ann.Welfare & Inst.Code, § 700(b).

William O. Hogan and Rock Zaitzow, San Diego, for appellant.

James Don Keller, Dist. Atty., and County Counsel, and Donald L. Clark, Deputy Dist. Atty., San Diego, for respondent.

MUSSELL, Acting Presiding Justice.

This is an appeal from an order of the Juvenile Department of the Superior Court of San Diego county adjudging Michael Allen Farley, a minor, a ward of the Juvenile Court of said county under Section 700, subdivision (b), of the Welfare and Institutions Code, and giving said minor's custody to the probation officer of said county. It was further ordered that the child be placed with his father in Naches, Washington, and "that said ward shall be subject to the supervision of the probation officer and the further orders of this court." Larissa Laurel Farley, the mother of said minor appeals from this order, and the principal question here involved is whether the evidence is sufficient to support it.

The report of the probation officer and the testimony adduced at the hearing in this matter shows the following: The proba-

tion officer of San Diego county and the Department of Public Welfare have had frequent dealings with appellant and her child. The matter of the child's custody was first brought to the attention of the probation department in 1953, when the Superior Court ordered the probation officer to conduct an investigation and to report on the fitness of the parents to have the custody of the child. This investigation apparently was made in connection with a divorce action and the custody of the child was then awarded to appellant. Appellant applied for aid to needy children in April, 1956, through the Welfare Department and aid was granted in June, 1956.

On October 19, 1957, appellant placed Michael in the Hillcrest Detention Home and on the evening of October 20th she was found lying on the front porch of the home. When found, she stated she had just been released from the hospital and was too weak to get home by herself. The supervisor of the home then contacted the probation department and reported that appellant was extremely emotionally upset and stated that he doubted her ability to care for her child. The probation department then got in touch with the Department of Public Welfare and learned from a case worker that it was her opinion that appellant was incapable of properly caring for her child due to extreme emotional disturbance. The case worker stated that she felt that it was necessary to refer the child to the probation department. In the referral which followed it was stated that appellant's physical health and emotional condition had so far deteriorated that her health problems were having a serious and unfortunate effect on the child's welfare.

On October 24, 1957, a petition to have the minor declared a ward of the court was filed by the county probation department and it was alleged therein "That said minor has no parent or guardian capable of exercising proper parental control, in that his parents are divorced and his mother, who has legal custody, is suffering from a severe emotional disturbance diagnosed as psycho-neurosis with conversion hysteria

and further that on or about the 19th day of October, 1957, said minor's mother placed him at Hillcrest because she was going to enter County Hospital for treatment, further said minor's mother was released from County Hospital on October 20, but has made no attempt to contact the child or return him to his home." A detention hearing was then held and the court ordered that the child be detained at Hillcrest pending further investigation.

According to the probation officer's report filed herein and considered by the court, appellant has been mentally and physically ill over a period of years. She complained of being emotionally upset during the time she was married to Mr. Farley and was under the care of a psychiatrist in La Jolla for many months, until the summer of 1952. She complained of having a complete nervous breakdown in 1951 and worried a great deal about the possibility of a brain tumor and went to a sanitarium about it. She was under the care of the staff of the county hospital for some time and according to a medical report from this hospital, dated August 23, 1956, she was then attending the Neuro-Psychiatric and Surgical clinic and was under treatment. The diagnosis was psychoneurosis, conversion hysteria (prognosis poor) and attendance at the clinic was recommended. It is further stated in said report that at the present time appellant is under the care of the staff at Mercy hospital and has been diagnosed as having constriction of the arteries and that she suffered for a long time with infectious hepatitis. The probation officer's report also contains the statement that Dr. Baris, who reported to the court on the divorce hearing in 1953, stated therein that appellant was handicapped psychologically, manifesting many profound signs of deep seated hysterical reaction; that many signs of emotional instability and immaturity had been present for many years; that ambivalent attitudes towards her son have frequently been in evidence, ranging from over solicitude and over protectiveness to signs of hostility and resentment towards

her son. The probation officer's report further indicates that appellant was sometimes very difficult to interview in that she "becomes emotional and dwells for an interminable time" on her physical illnesses; that the child is obsessed with health and medical matters and is disturbed by his mother's disturbances; that at Hillcrest he was unable to hold his own with other youngsters; that when at home he had been in the habit of sleeping with his mother, and has suffered physically and emotionally from his associations with his mother. The probation officer concluded that until appellant was able to recover better mental and physical health, the child should be placed in his father's home under the jurisdiction of the juvenile court.

[1,2] The circumstances shown by the record are sufficient to support the judgment and order of the juvenile court declaring Michael to be a ward of the court under the provisions of Section 700, subdivision (b), of the Welfare and Institutions Code. The evidence justifies the conclusion and implied finding that the said minor has no parent or guardian capable of exercising proper parental control and that the best interests of said minor would be served by adjudging him a ward of said court. The record shows that the Department of Public Assistance at Yakima, Washington, and the probation officer of the county of Yakima have recommended placement of said minor in the home of his father at Naches, Washington, and since the court specifically ordered that said ward should be "subject to the supervision of the probation officer and the further orders of this court", it is apparent that the juvenile court retains jurisdiction over said minor and may change the placement order if, as and when the best interests and welfare of said minor require such action.

In *In re Corrigan*, 134 Cal.App.2d 751, 754-755, 286 P.2d 32, 35, it was held:

"In juvenile court proceedings, as in other matters, the findings of the juvenile judge will not be disturbed

on appeal where there is substantial evidence to support them. In re [Adoption of] *Ayers*, 116 Cal.App.2d 55, 58, 253 P.2d 65. In wardship proceedings it is the welfare of the child that is of paramount concern, In re *Halamuda*, 85 Cal.App.2d 219, 226, 192 P.2d 781, and when the court has found, on substantial evidence, that the welfare of the child requires that his custody be taken from his parents, the court may make such an order. *Welf. & Inst. Code*, § 739, subd. (d). In reviewing such findings this court must indulge all reasonable inferences in support thereof."

[3] Appellant claims that the juvenile court was usurping the power of the divorce court and acting outside of its own jurisdiction by awarding custody between parents without a showing that the minor came within the provisions of section 700 of the Welfare and Institutions Code. Section 700, subdivision (b), of said code provides that the jurisdiction of the juvenile court extends to any person under the age of 21 years "(b) Who has no parent or guardian; or who has no parent or guardian willing to exercise or capable of exercising proper parental control; or who has no parent or guardian actually exercising such proper parental control, and who is in need of such control." The evidence herein supports the exercise of such jurisdiction over the minor involved. In *In re Holt*, 121 Cal.App.2d 276, 278, 263 P.2d 50, 51, the court said:

"It is next contended that a juvenile court may not take jurisdiction of a custodial matter when that very question is then pending in a divorce proceeding. In the case of *Dupes v. Superior Court*, 176 Cal. 440, 168 P. 888, 889, a like question was presented. It is true, the court there said, that in a divorce proceeding the superior court has extensive powers relative to the welfare of children of the parties engaged in such a proceeding. However, 'The mere fact that a liti-

gation is pending between the parents, and that an order regarding the custody of the children has been made therein, does not take away the power of the state nor prevent the exercise of that power under the juvenile court law.'"

Judgment and order affirmed.

GRIFFIN, J., and McCABE, J. pro tem,
concur.



162 Cal.App.2d 469

George H. STUART, Plaintiff and Appellant,
v.

Leo MATRANGA, Defendant and
Respondent.

Civ. 5842.

District Court of Appeal, Fourth District,
California.

July 31, 1958.

Rehearing Denied Aug. 11, 1958.

Hearing Denied Sept. 24, 1958.

Action by motorcycle driver for injuries sustained in collision with automobile. The Superior Court, San Diego County, Arthur L. Mundo, J., granted new trial upon verdict in motorcycle driver's favor for \$40,000 and driver appealed. The District Court of Appeal, McCabe, J. pro tem., held that evidence sustained finding that award of \$40,000 for compound and comminuted fractures of leg above and below knee was excessive and that granting of new trial was not an abuse of discretion.

Affirmed.

I. Appeal and Error ⚡977(1) New Trial ⚡6

The granting or refusing to grant a motion for new trial is largely within discretion of trial court, and any abuse of

his discretion must clearly appear before reviewing court can interfere.

2. Damages ⚡127

Question of amount of damages is primarily factual and is not to be decided upon basis of awards made in other cases.

3. Damages ⚡130(2)

In action by motorcycle driver for injuries sustained in collision with automobile, evidence sustained finding of trial court granting new trial, that award of \$40,000 for compound and comminuted fractures of driver's leg above and below knee was excessive.

Curran & Golden, Robert O. Curran, San Diego, for appellant.

McInnis, Focht & Fitzgerald, James L. Focht, Jr., San Diego, for respondent.

McCABE, Justice pro tem.

Plaintiff, a member of the military forces, was injured when the motorcycle he was operating and defendant's automobile were involved in an accident at about 9:30 p. m. on April 3, 1956, at the intersection of El Cajon Boulevard and 60th Street. Plaintiff was traveling west on El Cajon Boulevard and defendant was approaching 60th Street from the west. In approaching this intersection from the west there existed strips of raised concrete, referred to as "hatchers", which divided the northerly portion of El Cajon Boulevard from the southerly portion.

Plaintiff testified there were other vehicles also traveling in a westerly direction, and that he saw defendant's car only momentarily before he hit it. Defendant testified that he was turning onto 60th Street and had given a signal to turn to the left, both by mechanical and manual process, and that his car was either moving very slowly or had stopped at the time of the impact. Plaintiff testified that defendant's vehicle was traveling slowly. Plaintiff's motorcycle hit the right front fender and headlight of defendant's car.

As a result of this accident plaintiff suffered compound and comminuted fractures of his right leg, both above and below his knee. He was taken to the Navy hospital, operated upon, and had metal screws affixed to the bone below his knee. He was put in traction and later a cast was applied to his body. The most complicated and severe fracture was below the knee which extended into the knee area. A sliding bone graft operation was performed on his leg below the knee. At the time of trial there was a conflict in the medical testimony as to whether or not there was any union of the bones at the point where the sliding bone graft operation was performed. Plaintiff was in and out of hospitals from the date of the accident to the date of trial. A short time before the trial date a brace was applied to plaintiff's leg and he was able to walk on crutches.

There is a definite and sharp conflict in the evidence given by the doctors for plaintiff and defendant as to the prognosis. Plaintiff's medical evidence is that he will have a stiff knee without flexibility, an operation will have to be performed on his leg below the knee in order to obtain proper union of the bones, there will be permanent disability, all of which will prevent plaintiff from continuing to operate heavy equipment as he did before and during his military service. Defendant's medical evidence is that there is a partial union of the bones and there may have to be an operation to aid the union; that there is a limitation of motion in the knee but, in part, this will be overcome in time by use; that there will not be a stiff knee; and that plaintiff will be able to operate heavy equipment. Defendant's doctor testified that in view of plaintiff's youth (24 years of age at the time of the trial), and the fracture in the bone between the hip and the knee had healed, there was a medical reason to believe that union of the bones below the knee could be obtained. Apparently all doctors agreed at the trial that the right leg was shorter than the

left, and this condition would continue to exist.

A few weeks after the accident and while plaintiff was in a Navy hospital he was honorably discharged from military service and transferred to a veteran's hospital. There was no evidence before the jury as to any special damages. There was some evidence of the wages heavy equipment operators received.

Upon the case being submitted to it, the jury returned a verdict in plaintiff's favor for \$40,000. Defendant made a motion for a new trial upon all statutory grounds. The trial court granted the motion for new trial on the grounds: (1) irregularity in the proceedings of the adverse parties preventing defendant from having a fair trial; and (2) excessive damages appearing to have been given under the influence of passion and prejudice. From this order granting a new trial plaintiff has appealed.

Plaintiff's principal contention on this appeal is the trial judge's "erroneous conception of applicable legal principles," citing *In re Estate of Baird*, 198 Cal. 490, 246 P. 324; *Conner v. Southern Pacific Co.*, 38 Cal.2d 633, 241 P.2d 535.

We agree with the principle of law which is set forth in these cases, however, they have no application to the instant case. It has been noted herein that one of the grounds upon which the new trial was granted was excessive damages. To this point we will direct our attention.

[1] The granting or refusing to grant a motion for new trial is largely within the discretion of the trial court. *Pirrone v. Nuccio*, 78 Cal.App.2d 864, 868, 179 P.2d 18; *Parks v. Dexter*, 100 Cal.App.2d 521, 527, 224 P.2d 121.

The trial judge had the opportunity to see the witnesses, hear them testify, and therefore had an advantage over the Justices of this court. Any abuse of his discretion must clearly appear before we can interfere. "It is especially so when such discretion is used in awarding a new trial

which does not finally dispose of the matter." *Sherwood v. Kyle*, 125 Cal. 652, 655, 58 P. 270. In discussing the granting of a new trial on the ground of excessive damages the appellate court in *Parks v. Dexter*, supra, said in 100 Cal.App.2d at page 526, 224 P.2d at page 125:

"The order granting the new trial must be affirmed if it is sufficient on this ground alone. It was within the province of the trial court to pass upon the sufficiency of the evidence to sustain the verdict for damages allowed and this court may not reverse the order unless it clearly appears that the trial court abused its discretion. *Leaper v. Gandy*, 22 Cal.App.2d 475, 478, 71 P.2d 303; *Pitt v. Southern Pacific Co.*, 121 Cal.App. 228, 239, 9 P.2d 273; *Gray v. Robinson*, supra, 33 Cal.App.2d [177] 181, 91 P.2d 194. In view of the conflict in the evidence as to the extent of the injuries received by plaintiff and the amount awarded therefor by the jury, we cannot say that an abuse of discretion was shown in granting a new trial on this ground."

[2] Plaintiff has cited several cases wherein plaintiff contends the facts or injuries were similar and the awards of damages were sustained on appeal. Apparently plaintiff contends that these cases are binding upon the trial court. In this assertion plaintiff is incorrect. The question of amount of damages is primarily factual and is, therefore, not to be decided upon the basis of awards made in other cases. *Crane v. Smith*, 23 Cal.2d 288, 302, 144 P.2d 356; *Leming v. Oilfields Trucking Co.*, 44 Cal.2d 343, 356, 282 P.2d 23, 51 A.L.R.2d 107.

[3] There is substantial evidence to support the findings of the trial court that the award of damages was excessive. Therefore, we cannot say as a matter of law that the award is not excessive.

Since we are sustaining the trial court's action in granting a new trial, it is not necessary to consider plaintiff's other contention that the jurors were not biased or

prejudiced by the questions asked them concerning insurance. The trial court stated the issue on liability was a close one and concluded that by the questions propounded by plaintiff's counsel the jurors on *voir dire* examination there was conveyed to them the impression there was an insurance company "mixed up in the case", and this may have had some bearing on the jury's determination of liability and on the size of the verdict. Several cases have set forth certain guides on this question which may be of assistance to the trial court on the new trial.

In *Arnold v. California Portland C. Co.*, 41 Cal.App. 420, 183 P. 171, 172, the following questions were propounded to prospective jurors:

"Now, if you were sworn as a juror, and during the trial of this case, near the end of it, you should learn that the New Amsterdam Casualty Company, one of these surety companies, was a surety at the time of this accident alleged, or an insurer against any injury to employes, would that in any wise affect your verdict in this case?" Also: "And if it came to your knowledge, if you were a juror in this case, and it came to your knowledge from any source whatever, that the New Amsterdam Casualty Company was a surety for any injury to the employes of the defendant company at the time of this alleged injury, would that knowledge of that fact in any wise influence your verdict in the case?" Each of these questions carried with it the implication, if not the direct assertion, that appellant was insured by a casualty insurance company against any financial loss it might sustain by reason of the injury to respondent. * * *

"It is extremely difficult, if not impossible, to lay down a fixed rule that will apply on all occasions and define the restrictive limitations with abso-

lute exactness. It is, however, possible and practicable to define the guiding principles applicable to such cases. Courts do not look with favor upon an attempt to impress the jury with the idea that, not the local defendant in the case, but an insurance company, which often is a foreign corporation, may be called upon to respond to such damages as the jury may assess. The knowledge that the defendant has such protection may have a tendency to make the jurors careless as to the amount of their verdict. * * *

"It is entirely proper for counsel to ask the jurors such questions as may reasonably be necessary to ascertain whether they are free from a bias or interest that may affect their verdict. To this end it is proper for counsel, in good faith, to ask of each juror whether he is interested as an agent or stockholder or otherwise in a specified casualty company. Or he may be asked the broad question whether he is interested in any insurance company insuring against liability for negligence. *Rinklin v. Acker*, 125 App.Div. 244, 109 N.Y.S. 125; *Grant v. National, etc., Co.*, 100 App.Div. 234, 91 N.Y.S. 805. But counsel must take pains to propound such questions in such a manner as not unnecessarily to convey the impression that the defendant is in fact so insured. It is misconduct on the part of counsel for plaintiff in such actions so to frame his question that it goes beyond what is reasonably necessary to serve the legitimate purpose of eliciting the facts he is entitled to adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the question may fairly be said to have the effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds the idea that the defendant is protected by insurance against liability for negligence." See also, *Gladstone v. Fortier*, 22 Cal.App.2d 1, 6, 70 P.2d 255 and cases therein cited; *Elford v.*

Hiltabrand, 63 Cal.App.2d 65, 70, 146 P.2d 510.

Order affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.



162 Cal.App.2d 215

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Thomas Aguiñas CHAMBERS, Defendant
and Appellant.

Cr. 1190.

District Court of Appeal, Fourth District,
California.

July 17, 1958.

Rehearing Denied Aug. 11, 1958.

Hearing Denied Sept. 10, 1958.

Defendant was convicted in Superior Court, Orange County, Karl Lynn Davis, J., of attempted second degree burglary of doctor's office, and defendant appealed. The District Court of Appeal, Griffin, J., held that the evidence, independent of defendant's claimed confession, was sufficient to prove the corpus delicti of the offense.

Judgment affirmed.

1. Criminal Law ⇨535(2)

In prosecution for attempted burglary of doctor's office, evidence, independent of defendant's claimed confession, was sufficient to prove corpus delicti of the offense.

2. Burglary ⇨36

In prosecution for attempted burglary, on Saturday, of doctor's office, doctor could testify that when he arrived at office on the following Monday there was a little debris or dirt on window sill, notwithstanding that doctor also testified that he did not believe the debris was there before Saturday night.

3. Criminal Law ⚖️387

Fact that evidence is not positive goes to its weight and not to its admissibility.

4. Criminal Law ⚖️481, 1153(2)

Generally, a trial court, in passing upon the qualification of a witness offered as an expert, has wide discretion, and an appellate court will not disturb its ruling in the absence of a manifest abuse of such discretion.

5. Criminal Law ⚖️478(1)

Where witness offered by defendant as expert on fingerprinting had successfully completed a college course in criminology requiring three study hours per week for one semester but had never worked in criminology and had had no practical experience with fingerprints after leaving college, although he had read books on subject and had discussed the subject with people in the field and had compared unknown prints with known prints, and where hypothetical question propounded to witness did not include all of the matters considered by the people's expert witness, trial court's determination that defendant's witness was not qualified and that his testimony should be stricken was not abuse of discretion and did not constitute prejudicial error.

6. Criminal Law ⚖️824(5)

Where corpus delicti was sufficiently established without aid of defendant's claimed confession, and a proper foundation was laid for admission of defendant's statement, and defendant did not object to its admission, and defendant failed to offer an instruction on law of confessions, and no different result would have been obtained had such instruction been given, trial court's failure to give on its own motion an instruction on law of confessions and necessity of independent proof of corpus delicti did not constitute prejudicial error. West's Ann. Const. art. 6, § 4½.

7. Criminal Law ⚖️719(2)

In prosecution for attempted burglary of doctor's office, prosecuting attorney's statement in argument to jury that possible motive of defendant was to enter office for purpose of obtaining drugs was proper al-

though there was no evidence that doctor kept drugs in office.

8. Criminal Law ⚖️717

In prosecution for attempted burglary of doctor's office, reference by prosecuting attorney in his argument to jury that law allowed him to question defendant as to his previous convictions of felonies, not to show defendant's propensity for committing crimes but merely to determine likelihood that defendant was telling the truth, was proper.

9. Criminal Law ⚖️720(1)

Prosecuting attorney has a wide range in which to state his views as to what the evidence showed and as to the conclusions to be drawn therefrom.

10. Criminal Law ⚖️720(5)

Prosecuting attorney may comment on defendant's possible veracity for the purpose of impeachment when he admits the commission of a felony. West's Ann.Code Civ.Proc. § 2051.

Odra L. Chandler, Anaheim, and Joseph A. Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Herschel T. Elkins, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant-appellant was convicted by a jury of attempted burglary (second degree) on Saturday, January 4, 1958, of a doctor's office at 526 W. 17th Street, in Santa Ana. The doctor left his office about noon on that day and, as best he could remember, the windows were closed and the screens locked in place. When he returned the following Monday one window was ajar an inch or two, the window crank was not functioning and the screen was lying neatly against the interior wall on the floor. There was a little debris or dirt on the window sill which he did not believe was there previously. A police investigator went to this office on Monday, January 6th and saw particles of dust, grass and twigs inside the window sill, and also found a latent finger print on the

window glass. He dusted it and "lifted it" to a card and turned it over to the fingerprint identification officer who testified, after photographing it and comparing it with defendant's fingerprints, that in his opinion they were the same.

It appears that on January 4, 1958, about 11 p. m. a police officer was on duty in the vicinity of the doctor's office, saw defendant walking near there, and called to him to stop, but defendant failed to do so. He called a second time and defendant slowed down but proceeded onward. After a third time he stopped and returned to the officer. Defendant was asked as to why he was there and he said he had some car trouble and was looking for a telephone. The officer told him he had heard that there were some pry marks on a doctor's office door, that he was looking for a possible burglar, and would like to search defendant for weapons. He did so but found none. About this time two other officers arrived and asked defendant to accompany them to defendant's car. They found on the passenger side of the front seat a "Hallicraft" radio transmitter capable of receiving police calls. When it was turned on it was set for such calls. In the trunk of the car was found an almost complete set of hand tools. Over the visor on the driver's side of the car was found five torn pages from the classified section of a telephone book showing the addresses of Orange County physicians' offices. Two telephone books and a Santa Ana street map were also found. Defendant was questioned about these and he had no explanation regarding them. A small pry bar was found under the driver's side of the seat. Defendant was arrested and on January 5th was interviewed by another officer. This officer said he talked with defendant and all his statements were free and voluntary and without promise of immunity. He testified that defendant told him he had some automobile trouble; that as to the torn pages containing the listing of Orange County physicians and their addresses he (defendant) said he intended to break into a doctor's office but he did not name any specific doctor or his office; that he was

going there for the purpose of obtaining enough "barbituates to commit suicide" but that he made no attempt to enter any building. Another officer found two screwdrivers in the grass near the building where defendant was first seen. Defendant was then questioned about these two screwdrivers without showing them to him. Defendant described in some detail the ones the officer found and told him he had armed himself with the two screwdrivers and proceeded to go up and try to burglarize something; that he did not know why he "made an intention to commit a burglary", but he got down from the car, looked around the area, went to his car, unlocked the trunk, looked in his tool box, and armed himself with the two described screwdrivers.

Defendant, at the trial, testified, however, that he left Los Angeles about 8 in the evening with no special destination in mind; that he came to Santa Ana, had mechanical trouble with his car that night and was walking down the alley when the officer approached him; that the Hallicraft radio found in his car was not a transmitter but a receiver and public address system; that he did not leave the screwdrivers in the lot and did not recall telling the officers they were his; that he did not tell the suicide story to the officer, as related, did not make any confessions, was not near the doctor's office, and did not attempt to burglarize it. He said the torn pages from the classified advertisements were used by him because he was looking for an oral surgeon out in the country somewhere because their charges were too high in the city. He admitted prior convictions of felonies for burglary and violation of the Dyer Act, 18 U.S.C.A. §§ 2311-2313.

[1] Defendant's first claim is that the evidence was insufficient to prove the corpus delicti of the offense of attempted burglary, independent of defendant's claimed confession. We see no merit to this argument. The evidence related, together with the circumstances and inferences which could be reasonably drawn therefrom were sufficient to establish the corpus delicti. *People v. Sheeley*, 151 Cal.App.2d 611, 613,

311 P.2d 883; *People v. Davis*, 24 Cal. App.2d 408, 410, 75 P.2d 80.

[2, 3] Likewise, the claim that the court should have stricken the testimony of the doctor in relation to finding debris and dirt on the window sill because he said he "did not believe" it was there before Saturday night, is without merit. The fact that evidence is not positive goes to its weight and not to its admissibility. *Weingetz v. Cheverton*, 102 Cal.App.2d 67, 73, 226 P.2d 742; *People v. Harlan*, 133 Cal. 16, 22, 65 P. 9.

[4, 5] After the prosecution rested defendant produced a witness whom defendant offered as an expert on fingerprinting. He was examined as to his qualifications and the trial court determined he was not so qualified and on motion struck his testimony on this ground and because the hypothetical question propounded did not involve all of the necessary elements, and no proper foundation was laid. His testimony was to the effect that in examining a latent or partial fingerprint of the left thumb, where the core is missing, and where there are twelve points of similarity and only one or two of dissimilarity, any one point of dissimilarity would almost eliminate the fingerprint identification if it was not a clear print. As to his qualifications to state his opinion, he said he graduated from Fresno State College in 1953; that there he took an elective course in criminology and received a degree therein; that it was a three-unit course requiring three study hours per week for one semester; that he is now an education counsellor with the boys and girls of the Junior High School in the dean's office; that he never worked in criminology and had no practical experience with fingerprints since he left college but did read books on the subject and discussed the subject with other people in the field; and that he did take unknown prints and made comparison with known prints. The court, at defendant's counsel's request, then stated it would allow him to lay a little better foundation the next day. Thereafter, defendant made no further attempt to amplify his qualifications. The people's expert witness on the subject (and there is no claim that he

did not qualify as such) testified and explained in full the characteristics of the comparisons made from the two prints themselves. He felt the 12 points indicated on the chart of them were absolute proof that the two prints were made by the same person. On cross-examination he testified that one point of dissimilarity, because of the presence of a foreign substance, would not indicate it was not the same person; and that from well known authorities, 12 points of similarity is absolute proof. There was evidence of foreign substance in and about the window ledge.

In support of defendant's contention he cites such authority as *Fricke on California Criminal Evidence*, 3rd Ed., pp. 141, 142; *People v. Horowitz*, 70 Cal.App.2d 675, 161 P.2d 833; *People v. Willis*, 70 Cal.App. 465, 233 P. 812; and *People v. Phelan*, 123 Cal. 551, 56 P. 424; to the effect that although a witness has not had any personal experience he may still be qualified to testify on a subject with which he is shown to be familiar as a result of study, reading and education. However, the general rule is that the trial court, in passing upon the qualification of a witness offered as an expert, has wide discretion, and an appellate court will not disturb its ruling in the absence of a manifest abuse of such discretion. *People v. Horowitz*, supra; *People v. Clark*, 117 Cal. App.2d 134, 143, 255 P.2d 79; *People v. Smith*, 142 Cal.App.2d 287, 292, 298 P.2d 540; *Pearce v. Linde*, 113 Cal.App.2d 627, 629, 248 P.2d 506; *Sinz v. Owens*, 33 Cal.2d 749, 753, 205 P.2d 3, 8 A.L.R.2d 757. It does not affirmatively appear that the trial court abused its discretion here, particularly in view of its added ruling that in stating the hypothetical question defendant's counsel did not include all of the matters considered by the people's expert witness, particularly in respect to the presence or absence of foreign matters in connection with the fingerprints. No prejudicial error resulted.

[6] Defendant next argues that the court committed prejudicial error in failing to give on its own motion an instruction on the law of confessions and the necessity of independent proof of the corpus delicti even

though no such instructions were offered by defendant, citing *People v. Holt*, 25 Cal.2d 59, 64, 153 P.2d 21; and *People v. Putnam*, 20 Cal.2d 885, 891, 129 P.2d 367. The court might well have given such instruction on its own motion and it would have been error to refuse such instructions had they been offered. From the evidence here produced, it does not appear to us that it was prejudicial since the corpus delicti seems to have been sufficiently established without the aid of the claimed confession. Defendant admitted making the statement that he told the officer he was going to go into a doctor's office to get some pills and commit suicide but claims it was not made in a serious manner. It appears that a proper foundation was laid for the admission of the statement; that no objection was made at the time; that no instruction on the subject was offered by defendant; and that no different result would have obtained had such instruction been given. Accordingly, no prejudicial error is shown. Art. VI, Sec. 4½ Constitution.

[7-10] Some claim is made that the district attorney wrongfully commented on defendant's prior convictions and commented on facts not in evidence. It involved a statement in the argument that the possible motive of defendant was to enter the office for the purpose of obtaining drugs. Defendant claims since there was no evidence that the doctor kept drugs in his office a reference to such fact was error. It is also claimed that a reference by the prosecutor in his argument to the jury that the law allowed him to question the defendant as to his previous convictions of felonies, although it did not go to his propensity for committing crimes but merely to determine the likelihood that he was telling the truth, was error. We see no merit to these claims. The prosecutor had a wide range in which to state his views as to what the evidence showed and as to the conclusions that could be drawn therefrom; also to comment on defendant's possible veracity for the purpose of impeachment when he admits the commission of a felony. *People v. Burwell*,

44 Cal.2d 16, 39, 279 P.2d 744; *People v. Hickok*, 120 Cal.App.2d 832, 262 P.2d 30; Sec. 2051 Code Civ.Proc.

Judgment affirmed.

MUSSELL, Acting P. J., and McCABE, J. pro tem, concur.



162 Cal.App.2d 500

Martin KUX and Raymond J. Schaecher, co-partners, doing business under the firm name and style of **Schaecher-Kux Lumber Company**, Plaintiffs and Respondents,

v.

CAL-WEST LUMBER CORP., a corporation,
Defendant and Appellant.

Civ. 22991.

District Court of Appeal, Second District,
Division 1, California.

Aug. 1, 1958.

Action by lumber sellers, against buyer, for goods sold and delivered. Buyer cross-complained for damages for breach of a written contract in regard to such goods. The Superior Court, Los Angeles County, Lloyd S. Nix, J., entered judgment in favor of sellers, and buyer appealed. The District Court of Appeal, Fourt, J., held that finding of trial court that on a certain date buyer ordered from sellers in California a certain number of board feet of a certain type of lumber at a certain price, was sufficiently explicit and specific as to the placement of the order, and such finding, together with other findings enumerating various specific sales and deliveries, sufficiently negated existence of a written contract with different terms alleged by buyer to have been executed in Oregon.

Judgment affirmed.

1. Sales ☞365

In action by lumber sellers, against buyer, for goods sold and delivered, finding of trial court that on a certain date buyer ordered from sellers in California a certain number of board feet of a certain type of lumber at a certain price, was sufficiently explicit and specific as to the placement of the order, and such finding, together with other findings enumerating various specific sales and deliveries, sufficiently negated existence of a written contract with different terms alleged by buyer to have been executed in Oregon.

2. Sales ☞359(1)

In action by lumber sellers, against buyer, for goods sold and delivered, evidence sustained findings of trial court as to contract between the parties, delivery of lumber, and balance owed sellers after allowance to buyers for lumber properly rejected by buyer as being of inferior quality.

Irving Glovin, Beverly Hills, for appellant.

Martineau & Martineau, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal from a judgment in favor of plaintiffs, who were co-partners engaged in selling lumber produced in the Pacific Northwest in the states of Oregon, California, and elsewhere (hereinafter referred to as "Sellers"), and against the defendant corporation (hereinafter referred to as "Purchaser").

The action was pleaded in the common counts of goods sold and delivered to Purchaser at Los Angeles, California, open book account and account stated for the total contract price of \$24,283.44 for 300,000 board feet of lumber. Simultaneously with the filing of the complaint, Sellers attached Purchaser's bank account.

Purchaser demurred to the complaint and moved for a discharge of the writ of attachment on the ground that the

controversy involved a written contract made and payable in the State of Oregon. The demurrer was overruled, and the complaint was amended to indicate that the contract sued upon was oral.

The Purchaser denied any oral agreement, alleged payment in excess of all claims, and cross-complained for damages in the sum of \$4,180.96 for breach of a written contract made in Oregon.

By a written pre-trial stipulation, it was clarified that 94,512 board feet of lumber contained in the order were not delivered by Sellers to Los Angeles and made available to Purchaser within the proper time, and that there was a dispute concerning the standards of quality, quantity, proper distribution and delivery time as to the 205,488 board feet of lumber delivered to and received by Purchaser.

It was further stipulated as follows:

"X. That on or about June 4, 1956 or June 5, 1956 defendant ordered 300,000 board feet of 2 x 6 tongue and groove, center matched, green Douglas Fir, utility and better; that on or about June 5, 1956 plaintiffs' agent at Los Angeles, California, D. O. Cook, prepared and mailed to defendant plaintiffs' confirmation, being plaintiffs' No. 1 for identification; that on or about June 11, 1956 plaintiffs at Eugene, Oregon mailed to defendant at Los Angeles, plaintiffs' form of Sales Agreement, being defendant's No. A for identification; that said Sales Agreement was never executed by defendant; that said Sales Agreement sets forth the terms of said order; that on or about June and July, 1956 plaintiffs sold and delivered to defendant at Los Angeles, California, at defendant's special instance and request, 197,084 board feet of 2 x 6 tongue and groove, center matched, green Douglas Fir, at the agreed price of \$79.50 per thousand board feet for lumber shipped by water; \$84.00 per thousand board feet for lumber shipped by mill's truck and trailer, plus the cost of wharfage, handling and taxes, to wit, plaintiffs delivered to defendant the following:

"A. On or about June 12, 1956 and June 13, 1956, 30,536 feet as set forth on Invoice No. 6-1094;

"B. On or about June 12, 1956, 21,164 feet as set forth on Invoice No. 6-1092;

"C. On or about June 14, 1956, 36,540 feet as set forth on Invoice No. 6-1095;

"D. On or about June 17, 1956, 20,082 feet as set forth on Invoice No. 6-1186;

"E. On or about July 3-5-6, 1956, 67,148 feet as set forth on Invoice No. 6-1201; and

"F. On or about July 9, 1956, 21,614 feet as set forth on Invoice No. 7-1354; "that the balance of said order was not taken into the possession of or used by defendant; that defendant delivered to plaintiff defendant's check No. 23821 dated August 9, 1956 in the amount of \$1,765.51 in favor of 'Schaecher-Kux Lumber Co. & Douglas County State Bank', bearing a notation on the face thereof of 'Payment in Full, Invoice No. 6-1092', and defendant's check No. 23822 dated August 9, 1956 in the amount of \$11,910.15 in favor of 'Schaecher-Kux Lumber Co. & 1st National Bank of Portland', bearing notation on the face thereof of 'Payment in Full No. 6-1094, 6-1095, 6-1186, 7-1354 and 6-1201', both of which contained restrictive endorsements and both of which plaintiffs did not cash."

Findings of Fact made by the trial court include the following:

"5. D. O. Cook was at all times pertinent to this action the Southern California agent of plaintiffs Martin Kux and Raymond J. Schaecher, doing business as 'Schaecher-Kux Lumber Company, and, as such, said D. O. Cook had authority at Los Angeles to contract for the sale of and sell the lumber which is the subject of the herein litigation;

"6. The grades of lumber used in residential construction are as follows:

"No. 1 Construction

"No. 2 Standard

"No. 3 Utility

"No. 4 Economy

"of which No. 1 Construction is the best quality of those mentioned, and the grade 'Utility and Better' is an intermediate grade better than No. 3 Utility but not as good as No. 2 Standard;

* * * * *

"8. On June 5, 1956, defendant Cal-West Lumber Corp. ordered from plaintiffs at Los Angeles, California 300,000 board feet of 2 x 6 green Douglas Fir S2S Center Matched, grade No. 3 Utility and Better without white speck, dry rot or grub holes, of specified lengths, delivery to be completed by July 9, 1956, at a price of Seventy-nine and 50/100 Dollars (\$79.50) per thousand board feet AST Los Angeles Harbor, California, shipment by water, and a price of Eighty-four Dollars (\$84.00) per thousand board feet, shipment by truck and trailer loads;

* * * * *

"11. On June 12, 1956 and June 13, 1956, pursuant to said order and as a part thereof, plaintiffs sold and delivered to defendant Cal-West Lumber Corp. at Los Angeles, California, 35,760 board feet of 2x6 Douglas Fir at the agreed price * * * but said defendant failed to pick up, at the dock, 8,404 board feet of Douglas Fir, and plaintiffs now hold this merchandise for said defendant;

* * * * *

"16. The total amount of said invoices is \$16,713.04;

"17. Defendant Cal-West Lumber Corp., upon inspection of the lumber covered by invoice 6-1094, rejected as below quality 7,534 board feet thereof with respect to which the credit due defendant is Six Hundred Sixteen and 06/100 Dollars (\$16.06) for lumber at Seventy-nine and 50/100 Dollars (\$79.50) per thousand board feet, wharfage and handling Two and 50/100 Dollars (\$2.50) per thousand board feet, and drayage Two Dollars (\$2.00) per thousand board feet; and said defendant now holds for plaintiffs said 7,534 board feet of 2x6 Douglas Fir obtained by it from merchandise shipped under invoice 6-1094;

"18. Defendant Cal-West Lumber Corp., upon inspection of the lumber covered by invoice 6-1201, rejected as below quality 9,690 board feet with respect to which the credit due defendant is Eight Hundred Thirteen and 96/100 Dollars (\$813.96) made up of lumber at Seventy-nine and 50/100 Dollars (\$79.50) per thousand, wharfage and handling Two and 50/100 Dollars (\$2.50) per thousand board feet, and drayage Two Dollars (\$2.00) per thousand board feet; and said defendant now holds for plaintiffs said 9,690 board feet of 2x6 Douglas Fir obtained by it from merchandise shipped under invoice 6-1201;

"19. The total amount of credits due defendant Cal-West Lumber Corp. amounts to One Thousand Four Hundred Thirty and 02/100 Dollars (\$1,430.02);

"20. Except for lumber covered by the credits set forth in paragraphs 17, 18 and 19, all lumber sold and delivered by plaintiffs to defendant Cal-West Lumber Corp. complied with said defendant's order in all respects as to quality, date of delivery, the lengths of material delivered, and all other specifications;

"21. The total number of board feet of Douglas Fir shipped by plaintiffs to defendant Cal-West Lumber Corp. pursuant to said order was 180,694;

* * * * *

"24. Plaintiffs caused to be manufactured, pursuant to said order, and for the account of defendant Cal-West Lumber Corp., sufficient lumber to have fulfilled the balance of 119,306 board feet required to make an overall total of 300,000 board feet, but plaintiffs did not deliver said 119,306 board feet to said defendant because of said defendant's stop delivery order of June 22, 1956; that plaintiffs were at all times ready, willing and able to deliver said 119,306 board feet to said defendant but did not do so due to defendant's stop delivery order of June 22, 1956;"

From the Findings of Fact, the court made certain Conclusions of Law, including the following:

"3. That plaintiffs now hold for the account of and shall deliver to defendant Cal-West Lumber Corp. 8,404 board feet of 2x6 Douglas Fir covered by Invoice 6-1094;

"4. That defendant Cal-West Lumber Corp. now holds for the account of and shall deliver to plaintiffs 17,224 board feet of 2x6 Douglas Fir covered by invoices 6-1094 and 6-1201;

"5. That plaintiffs are entitled to judgment against defendant Cal-West Lumber Corp in the amount of Fifteen Thousand Two Hundred Eighty-three and 02/100 Dollars (\$15,283.02);"

It is contended on appeal that the trial court erred in the following particulars:

"I. The Court failed to make specific findings on material issues (written contract and release of attachment); and

"II. The Court failed to make specific findings on particular affirmative defenses and made inadequate awards on the cross-complaint."

[1] We are of the opinion that Finding No. 8 of the trial court set forth hereinabove is explicit and specific as to the order placed, and we are further of the opinion that the enumeration in the findings of the various specific sales and deliveries sufficiently negates by necessary inference the existence of a written contract in Oregon. See *Wood v. Giro*, 102 Cal. App. 160, 165, 282 P. 981; *Metcalf v. Hill*, 97 Cal.App. 597, 599, 275 P. 994; *Witkin, California Procedure*, (1954) Vol. 2, p. 1850.

Appellant asserts that "[t]o establish an oral contract, it was necessary to find authority in Mr. Cook to enter into a binding contract." Appellant admits the trial court did so find, but then appellant contends "[t]his finding is not supported by the evidence."

[2] The reporter's transcript of the proceedings has been reviewed in detail, and in our opinion there was substantial evidence to support each of the findings of the trial court, including Finding No. 5

with respect to the authority of Sellers' agent in Los Angeles. The instant case is clearly distinguishable from the case cited by appellant as *Peronio v. Everett-Johnson Lumber Co.*, 1941, 53 Cal.App.2d 786, which case is properly cited as *Beronio v. Everett-Johnson Lumber Company*, 1921, 53 Cal.App. 786, 200 P. 837. In the *Beronio* case a San Francisco soliciting agent of a Portland lumber company called upon the prospective purchaser in San Francisco relative to the purchase of certain lumber. An oral agreement was reached as to the quantity, price and terms of sale. The record before the court did not indicate any agreement as to a definite arrangement upon terms of payment. The order was sent to the lumber company, which refused to accept it unless the prospective purchaser would agree to honor a sight draft in payment of the lumber, which the prospective purchaser refused to do. Suit was instituted for failure to deliver, which resulted in a judgment for the purchaser, which was reversed on appeal on the basis that the soliciting agent under the stated facts had no power to bind the principal.

By contrast in the instant case there had been many prior dealings between the parties over a period of years, and there were a series of oral conversations during the spring of 1956 by and between Sellers' exclusive sales agent in Los Angeles, who was in daily contact with his home office in Eugene, Oregon, and the president and certain employees of Purchaser relative to bids to be placed by Purchaser for a residential subdivision known as "Homes of Merit," which bids if accepted would be the reason for this particular order. These discussions were culminated on June 6, 1956, when a telephonic order was placed by the president of Purchaser corporation to Sellers' Los Angeles sales agent. Subsequently, a written confirmation of the order was prepared by Sellers at their home office in Oregon and mailed to Purchaser at Los Angeles. As appellant has significantly pointed out "[i]n this instance, as in all prior deal-

ings between the parties, the defendant never did sign an office copy or return it to plaintiffs." However, pursuant to said order, purchaser did accept delivery of various shipments of lumber at Los Angeles, California, the first shipment having been accepted on June 8, 1956.

The Pre-Trial Conference Order set forth various issues to be determined, including the following:

"2. If the trial court rules that the contract between the parties, for the purchase and sale of the lumber in question was in writing and was executed in Oregon, should the attachment levied herein be released."

In our opinion, the trial court was not obliged to make a specific finding upon the release of the attachment inasmuch as the trial court did not find the existence of a written contract.

With respect to appellant's contention that the trial court failed to make specific findings on particular affirmative defenses and made inadequate awards on the cross-complaint, we think that it is abundantly apparent from a reading of Findings of Fact Nos. 11, 17, 18, 19 and 20 set forth hereinabove, that the trial court did consider the various contentions made with respect to shortages, quality and various additional costs claimed to have been incurred by Purchaser. Finding No. 11 clearly indicates that the trial court considered the contention made with respect to the claimed shortage of 8404 board feet and specifically ruled that delivery was made of this quantity of lumber, which Purchaser failed to pick up. Under such circumstances, the trial court correctly determined that the obligation to pay should be based upon the contract. In addition, the trial court specifically found Purchaser to be entitled to \$1,430.02 as the total amount of credits, which amount represented an allowance for the 17,224 board feet of lumber found by the trial court to have been properly rejected as being of inferior quality. As to the other items of damage claimed, the trial court upon

substantial evidence ruled adversely to Purchaser.

It is our opinion that the findings of fact as made by the trial court are sufficiently specific and are supported by substantial evidence.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.



162 Cal.App.2d 574

Ben JUDD, Plaintiff and Appellant,

v.

Lawrence CHABEK, Individually and as Administrator or Executor of the Estate of Edward W. Rausch, etc., Defendants,

Lawrence Chabek, as Executor of the Estate of Edward W. Rausch, deceased,
Respondent.

Civ. 23155.

District Court of Appeal, Second District,
Division 1, California.

Aug. 4, 1958.

Rehearing Denied Aug. 29, 1958.

Action to recover for injuries sustained. From an order of the Superior Court, Los Angeles County, William P. Haughton, J., granting defendant's motion for new trial the plaintiff appealed. The District Court of Appeal, Fox, P. J., held, inter alia, that in action for injuries to apartment house gardener by falling from ladder which he had placed against palm tree for purpose of sawing a palm frond, trial court did not abuse its discretion in granting defendant's motion for new trial under evidence which was sufficient to rebut presumption that defendant was negligent, and which showed that even if defendant was obligated to furnish the gardener a ladder defendant properly fulfilled his obligation.

Affirmed.

1. New Trial ⇐13

On consideration of motion for new trial, trial court must make an independent appraisal of the evidence, including all presumptions and reasonable inferences, and must judicially determine whether judgment effects a miscarriage of justice.

2. New Trial ⇐71

In considering motion for new trial, trial court is not bound by conflicting evidence, but may be governed by any substantial proof that would reasonably warrant the judgment for the moving party, even though such evidence consists of nothing more than inferences from established facts.

3. Appeal and Error ⇐1015(1)

On appeal from order granting a new trial, the order will not be reversed unless the reviewing court concludes that, as a matter of law, there is no substantial evidence to support a contrary judgment.

4. New Trial ⇐69, 72

In passing upon motion for new trial, trial court may evaluate credibility of witnesses and determine the weight to be given to their testimony.

5. Master and Servant ⇐265(2)

Testimony of apartment house owner's executor that gardener was under a duty to use and did use his own equipment when doing work around the apartment house would be sufficient to rebut presumption that executor was negligent when gardener fell from ladder which had been placed against palm tree for purpose of sawing a palm frond since the injury could no longer be traced to any act or omission by executor in regard to furnishing the gardener a safe ladder. West's Ann.Labor Code, §§ 3706, 3708.

6. New Trial ⇐70

In action for injuries to apartment house gardener by falling from ladder which he had placed against palm tree for purpose of sawing a palm frond, trial court did not abuse its discretion in granting defendant's motion for new trial under evidence

which was sufficient to rebut presumption that defendant was negligent and which showed that even if defendant was obligated to furnish the gardener a ladder defendant properly fulfilled his obligation.

7. Master and Servant ☞116(2)

The section of Administrative Code that where there is danger of a portable ladder slipping in use, provision shall be made to secure the ladder in position by use of hooks, ropes, scabs, spikes, cleats, or by other anti-slip devices, or by stationing an employee at base of ladder to hold it in position during use, was inapplicable to apartment house gardener's action for injuries caused by falling from ladder which he had placed against palm tree for purpose of sawing a palm frond, where there was no evidence that either the gardener or apartment house owner's executor had knowledge that there was any danger of the ladder slipping in use and both gardener and executor had used the ladder many times without mishap and on day of accident gardener had tested ladder before climbing and had determined it was on solid ground. West's Ann.Labor Code, §§ 3706, 3708.

8. New Trial ☞70

Where there was substantial evidence which would support a verdict and judgment in favor of defendant trial court did not err in granting defendant's motion for new trial.

9. Workmen's Compensation ☞1792

Where apartment house gardener who was injured by fall from ladder initially proceeded against owner's executor in his representative capacity before the Industrial Accident Commission which made an award against executor in such capacity, and executor never questioned the right of commission to make the award against him in his representative capacity, commission's determination in such regard was res judicata in subsequent action by gardener against executor in his representative capacity to recover for injuries sustained from such fall. West's Ann.Labor Code, § 3706.

Jack R. Berger, Los Angeles, for appellant.

Walter H. Young, Los Angeles, for respondent.

FOX, Presiding Justice.

This is an appeal by the plaintiff from an order granting the defendant's motion for a new trial following a jury verdict in plaintiff's favor.

Plaintiff worked for one Rausch as a gardener at an apartment house which Rausch owned. Rausch died in 1954, but plaintiff, pursuant to the authorization of defendant (who was Rausch's executor), continued to work around the premises. Plaintiff sustained his injury in August, 1955. The accident occurred while plaintiff was trimming one of the palm trees on the property. Plaintiff testified that he was using a ladder belonging to the Rausch estate. Plaintiff placed the ladder against the tree so that its bottom was resting on the grass near the tree and the top rung was resting against the tree, with the top part of the ladder straddling the tree on each side. Plaintiff made sure the ladder was on solid ground and tested it before ascending. He then climbed the ladder and was engaged in sawing a palm frond when he fell. He was some 10 or 12 feet above the ground when the fall occurred. He stated that he did not know exactly how he fell; that the ladder slipped or twisted. The ladder did not break. It was in good condition both before and after the accident. Plaintiff had never made any complaints about the ladder although he had used it probably a hundred times. Moreover, plaintiff had never asked for any tools or equipment to use with the ladder.

Defendant testified that he never gave plaintiff any specific instructions as to what work he should do around the property; that plaintiff did some work for other people who lived nearby; that plaintiff kept some tools and equipment of his own in an empty garage belonging to the apartment house, among which was a ladder similar to that owned by the Rausch estate; that

defendant told plaintiff after Rausch's death that plaintiff's employment would be continued and that plaintiff should continue to use his own tools when working on the premises; that plaintiff assented to this. Defendant also testified that shortly after the accident he had a conversation with plaintiff in which plaintiff stated that he had been trimming a tree, that he had placed the ladder rather close to the curb of the street, and that in passing an automobile came quite close to the curb causing him and the ladder to fall.

Plaintiff instituted proceedings before the Industrial Accident Commission, and that body determined that he was injured during the course of his employment and that his employer (defendant in his representative capacity) was uninsured, although not willfully so. Plaintiff received an award from the commission.

The present action was brought pursuant to Labor Code section 3706.¹ In effect it is an ordinary action for negligence, but under Labor Code section 3708 negligence is presumed and the burden of proof is upon the defendant employer to rebut such presumption; moreover, neither contributory negligence nor assumption of the risk is a defense. The action proceeded to trial and judgment against defendant in his representative capacity. The trial court, however, granted defendant's motion for a new trial upon the sole ground that the evidence was insufficient to justify the jury's verdict.

[1-4] "The applicable rule of review is stated in *Brown v. Guy*, 144 Cal.App.2d 659, 661, 301 P.2d 413, 414: 'Upon the consideration of a motion for a new trial the court must make an independent appraisal of the evidence, including all presumptions and reasonable inferences, and must judicially determine whether the judgment effects a miscarriage of justice. In considering such motion the trial court is not bound by a conflict in the evidence but may be govern-

ed by any substantial proof that would reasonably warrant a judgment for the moving party even though such evidence consists of nothing more than inferences from established facts. On appeal from the order it will not be reversed unless the reviewing court concludes that as a matter of law there is no substantial evidence to support a contrary judgment.' " *Hughey v. Candoli*, 159 Cal.App.2d 231, 323 P.2d 779. In *Thomas v. Moore*, 146 Cal.App.2d 59, 61, 303 P.2d 624, 626, this court quotes as follows from *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 358-359, 170 P.2d 465: "The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. [Citations.]. The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury, and may thus resolve the conflicting inferences in favor of the moving party * * *." In passing upon the motion the trial court is entitled to evaluate the credibility of the witnesses and determine the weight to be given to their testimony. *Hollingsworth v. Pemberton*, 138 Cal.App. 261, 265, 31 P.2d 1063; see, also, *Kelley v. Corcoran*, 16 Cal.App.2d 593, 596, 61 P.2d 344. "It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court." *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 307, 163 P.2d 689, 690.

[5,6] Applying these principles to the case at bar, it is clear that the trial court did not abuse its discretion in granting the motion for new trial. From defendant's testimony the trial court could infer that plaintiff was under a duty to use, and did

1. Labor Code § 3706 reads:

"If any employer fails to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an ap-

plication for compensation with the commission, and, in addition, may bring an action at law against such employer for damages, as if this division did not apply."

use, his own equipment when doing work around the apartment house. This would be sufficient to rebut the presumption that defendant was negligent since the injury could no longer be traced to any act or omission by defendant in regard to furnishing plaintiff a safe ladder. Moreover, even if we assume that defendant was obligated to furnish plaintiff a ladder, the trial court could conclude that defendant properly fulfilled his obligation. Plaintiff had used the ladder many times and had never suggested that it was unsafe; nor had he ever requested any equipment to use with the ladder. Defendant also had used the ladder many times and testified that it was in good condition and safe. The ladder remained undamaged after the accident, so the fall apparently was not caused by any defect in construction. And there was evidence of an admission by plaintiff that his fall was caused by a car passing too close to the curb near which he had placed the ladder. All this evidence tended to establish that plaintiff's injury was not proximately caused by any negligence on defendant's part. The trial court reasonably could determine that this evidence was sufficient to rebut the presumption in plaintiff's favor.

[7] Plaintiff places much emphasis on the fact that defendant did not voluntarily furnish him with "feet" for the ladder, an employee to assist him in using the ladder, ropes to be used with the ladder, or any other type of safety device. He argues that this shows defendant was negligent as a matter of law, relying upon section 3362 (a) of Article 17 in Title 8 of the California Administrative Code. That section states: "Where there is danger of a portable ladder slipping in use, provision shall be made to secure the ladder in position by use of hooks, ropes, scabs, spikes, cleats, or by other antislip devices, or by stationing an employee at the base of the ladder to hold it in position during use." The section has no application in the instant case. There is no evidence that either plaintiff or defendant had knowledge that there was any danger of the ladder "slipping in use." Both plaintiff and defendant had used the

ladder many times without mishap. On the day of the accident plaintiff had tested the ladder before climbing and had determined that it was on solid ground; the top of the ladder was straddling the tree to prevent it from sliding; and plaintiff was working only 10 or 12 feet from the ground. Under these conditions it does not appear that there was any danger of the ladder slipping. Because there was no apparent danger of slipping, it cannot be held that defendant was under any obligation to supply plaintiff with any of the aids mentioned in the above section.

[8] Since there was substantial evidence which would support a verdict and judgment in favor of defendant (the moving party), the trial court did not err in granting the motion for new trial.

Upon the former trial defendant challenged the sufficiency of the complaint to state a cause of action against him in his representative capacity. This issue will inevitably be raised on a new trial. It therefore seems appropriate for us to comment on this question.

[9] Initially, plaintiff proceeded against defendant in his representative capacity before the Industrial Accident Commission. That commission made an award against him in such capacity. Defendant never questioned the right of the commission to make the award against him in his representative capacity, and the commission's determination in that regard is *res judicata* in the instant action. *Scott v. Industrial Accident Commission*, 46 Cal.2d 76, 83, 293 P.2d 18; *French v. Rishell*, 40 Cal.2d 477, 254 P.2d 26. Labor Code section 3706 provides that where an employer fails to provide compensation insurance, the injured employee may bring an action at law against "such employer" in addition to proceeding against him before the commission. This indicates that it was proper for the employee in the instant case to sue the same employer against whom he had proceeded before the commission, namely, defendant in his representative capacity. To hold otherwise would lead to the inconsis-

ent result that a defendant might be held liable in his individual capacity by the courts although previously he had been held liable in his representative capacity by the commission, both for the same injury.

The order is affirmed.

ASHBURN and HERNDON, JJ., concur.



162 Cal.App.2d 431

Matter of the Application of Edward S. SZUBERT, for a Writ of Habeas Corpus.

Cr. 6292.

District Court of Appeal, Second District,
Division 3, California.

July 30, 1958.

Proceeding in habeas corpus to secure the release of petitioner from custody under judgment judging him in contempt for violation of preliminary injunction which restrained petitioner from removing from real property that was in litigation any buildings that were permanently affixed to the realty. The District Court of Appeal, Shinn, P. J., held that where the evidence adduced at the hearing was not before the court, the court must assume that it was sufficient to support the finding that chicken houses removed by petitioner were affixed to the land, and upheld the judgment and sentence.

Writ discharged and petitioner remanded.

1. Injunction ⇨230(1)

Where preliminary injunction restrained litigant from removing from real property any buildings that were permanently affixed to realty, finding by court that for purposes of hearing on charge of violating the preliminary injunction the

buildings removed by litigant were fixtures was sufficient finding as to status of the buildings to support contempt adjudication.

2. Habeas Corpus ⇨113(12)

In habeas corpus proceeding to secure release of petitioner from custody under judgment judging him in contempt for violation of preliminary injunction which restrained petitioner from removing from real property that was in litigation any buildings that were permanently affixed to realty, where evidence adduced at hearings was not before District Court of Appeal, court must assume that evidence was sufficient to support finding that chicken houses removed by petitioner were affixed to land.

Morris N. Karch, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent Sheriff.

SHINN, Presiding Justice.

The petition for habeas corpus upon which we issued a writ shows that petitioner is under a sentence of five days in jail for contempt of court. The charged offense consisted of the violation of a preliminary injunction which restrained petitioner from removing from real property that was in litigation any buildings that were permanently affixed to the realty. The petition alleges the issuance of the temporary injunction, that it was served upon him and that thereafter he removed some chicken houses, which he claimed were not attached to the soil, and which were under chattel mortgage to the Federal Housing Administration. As we shall see, the court found that he had removed permanent fixtures.

The injunction should have identified the buildings that must remain on the ground in order to retain the status quo. Petitioner was claiming no right to remove buildings that were permanently affixed, and no claim was made by the plaintiff that petitioner could not remove buildings that were per-

sonality. Restraining the removal of any buildings that belonged to the realty, without describing them, fell far short of reaching the desired objective of the restraint. When petitioner, presumably upon the advice of his attorney and in good faith removed buildings, he forced a decision as to the nature of the buildings in advance of a trial when all claimants, including the Federal Housing Administration, would be before the court and the issue would be properly presented.

In order that petitioner's guilt be established it was necessary that the court should determine that the buildings belonged to the realty. Petitioner alleged in his petition, and now contends, that the court did not decide that question of fact. He has furnished us with a partial report of the oral proceedings, exclusive of the evidence. The return contains copies of the minute order of May 2, 1958, which states in part: "Buildings found to be real property. Defendant found in contempt." Thereafter continuances were had to May 12th and 23rd. Petitioner was given an opportunity to purge himself of contempt. On May 12th he was sentenced to five days in jail but a stay was granted and the matter was continued to May 23rd. Petitioner not having purged himself of contempt the court ordered that the sentence be carried out. The minutes show "The court finds, for the purposes of this hearing, that buildings removed were fixtures." Petitioner contends that this was not a sufficient finding as to the status of the buildings, and he calls attention to the remarks of the trial judge to the effect that he was not determining the question of title to the fixtures and that that question would have to be decided in another proceeding.

[1,2] The finding that the buildings were fixtures "for the purpose of this proceeding" was sufficient. The orders as entered in the minutes were controlling. The remarks alluded to show only that the court did not undertake to determine all the claims upon the property, but decided only that upon the evidence adduced at the

hearings removal of the buildings constituted a violation of the injunction. Petitioner alleges that the buildings rested upon concrete blocks and were not affixed to the land. The evidence adduced at the hearings is not before us. We must assume that it was sufficient to support the finding that the buildings were affixed to the land. Petitioner advances no other contention.

Without the evidence before us we can do nothing but uphold the judgment and sentence.

The writ is discharged and the petitioner is remanded.

PATROSSO, J. pro tem., concurs.

PARKER WOOD, J., dissents.



162 Cal.App.2d 271

George A. ADAMS, also known as G. A. Adams, Plaintiff, Petitioner and Appellant,

v.

The COUNTY OF SAN JOAQUIN, State of California, Edgar H. Whiteside, sued herein as County Treasurer and Tax Collector of said County of San Joaquin; Fred Perrott, sued herein as County Auditor of the County of San Joaquin; W. R. Ruggles, Jr., Bruce McKnight, Charles W. Hawkins, Clifford B. Bull and Edmond N. Heinbockel, constituting the Members of the Board of Supervisors of the County of San Joaquin, State of California, Defendants and Respondents.

Civ. 9377.

District Court of Appeal, Third District, California.

July 21, 1958.

Action by sheep owner against county, county officials and County Board of Supervisors which had denied his claim against livestock indemnity fund for loss of sheep

allegedly killed by dogs. The Superior Court, San Joaquin County, M. G. Woodward and Thomas B. Quinn, JJ., sustained demurrer without leave to amend but stated that it would transfer case to Municipal Court for trial of action for money due and owing if sheep owner so desired. Judgment was entered for defendants, and sheep owner appealed. The District Court of Appeal, Schottky, J., held that causes of action of sheep owner for declaration of his rights with respect to county livestock indemnity fund and for writ of mandate compelling board of supervisors to approve his claim for damages were within jurisdiction of Superior Court, and where court properly sustained demurrers to such causes of action, it should have proceeded with cause of action for money due and owing or should have transferred it to Municipal Court, and sustaining of demurrer to such cause of action amounted to dismissal and was improper.

Judgment reversed insofar as it sustained demurrer to cause of action for money due and owing, with directions to trial court, and judgment affirmed insofar as it sustained demurrers to other causes of action.

1. Declaratory Judgment § 6, 394

Under statute providing that court may refuse declaratory relief where its declaration or determination is not necessary or proper, discretion to be exercised is not unlimited, but is legal or judicial discretion which is subject to appellate review, and declaratory relief must be granted when facts justifying that course are sufficiently alleged, and refusal is limited to cases where declaration of rights and allegations would be unnecessary at the time under all circumstances. West's Ann.Civ.Proc. §§ 1060, 1061.

2. Declaratory Judgment § 41, 42

A plaintiff's right to proceed for declaratory relief is not barred by fact that a cause of action has accrued, declaratory relief may be had without regard to existence of

other remedies, and before a court may deny declaratory relief on ground that other remedies exist it must appear that asserted remedies are available to plaintiff and are speedy and adequate or as well suited to plaintiff's needs as declaratory relief.

3. Declaratory Judgment § 209

Action, filed by sheep owner, who alleged that 12 of his sheep had been killed by dogs, for declaration of his rights with respect to county livestock indemnity fund and of duties of county and its officials could not be maintained where sheep owner had an adequate remedy in an action for money due and all issues could be determined in such action. West's Ann.Agric.Code, § 439.56; West's Ann.Code Civ.Proc. §§ 1060, 1061; West's Ann.Civ.Code, § 29715.

4. Mandamus § 101

Generally, a writ of mandate will not issue to review a decision of a County Board of Supervisors in rejecting a claim.

5. Mandamus § 101

County Board of Supervisors, in passing on a claim against county, acts in a quasi-judicial capacity and its discretion cannot be reviewed by a writ of mandate.

6. Mandamus § 101

Sheep owner, who alleged that 12 of his sheep were killed by a dog, was not entitled to writ of mandate to compel County Board of Supervisors to approve his claim against livestock indemnity fund. West's Ann. Agric.Code, § 439.56.

7. Pleading § 218(4)

Causes of action of sheep owner, whose sheep had been killed by dogs, for declaration of his rights with respect to county livestock indemnity fund and for writ of mandate compelling County Board of Supervisors to approve his claim for damages, were within jurisdiction of Superior Court and where court sustained demurrers to such causes of action it should have proceeded with cause of action against county for money due and owing or should have transferred it to Municipal Court and sustaining of demurrer to such cause of action

amounted to dismissal of action and was improper.

8. Costs $\hookrightarrow$ 146

"Allowable costs" are those necessarily incurred.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Allowable Costs".

9. Costs $\hookrightarrow$ 189

A reporter's transcript for a party's own use is not a cost necessarily incurred and is not necessarily allowable.

Louis T. Arbios, and Fred M. Bollinger, Stockton, for appellant.

Richard W. Dickenson, San Joaquin County Counsel, and Frank Gillio, Deputy, Stockton, for respondents.

SCHOTTKY, Justice.

Plaintiff filed a verified claim with the Board of Supervisors of San Joaquin County, pursuant to section 439.56 of the Agricultural Code, to recover damages in the sum of \$240 for the loss of 12 sheep allegedly killed by dogs. Section 439.56 reads as follows:

"Each such claim shall be verified by the affidavits of two disinterested witnesses who shall fix the value of the livestock, the affidavits to be executed within four days after the finding of the carcasses of each animal and to establish the fact beyond reasonable doubt that the animal was killed by a dog or dogs. Such claims shall be paid from the fund provided for in this chapter in the same manner as other claims against the county are paid."

Attached to the claim were the affidavits required by the section.

A hearing was held on the claim by the board, at which time the only testimony that was considered by the board was that of plaintiff and the persons who executed the affidavits in support of appellant's claim. Each one testified that in his opinion the sheep had been bitten by dogs and the bite led to the death of the sheep. At the con-

clusion of the hearing the board determined by a written order "that it had not been established beyond a reasonable doubt that the animals which are the subject of the claim were killed by a dog or dogs" and denied the claim.

Plaintiff thereafter filed an action in the superior court, the complaint setting forth three causes of action. The first sought a declaration of appellant's rights in the livestock indemnity fund and the duties of the various respondents. It was alleged that an actual controversy existed between the parties and that plaintiff did not have an adequate remedy at law. It was also alleged that the board had rejected all claims and that the board apparently seeks a declaration of their rights and duties in the matter; and that the board has a policy of rejecting all such claims which plaintiff believes is due to a misconception of the board as to the validity of the act providing for indemnification. The second cause of action, which was a common count for money due and owing sought the sum of \$240. The third cause of action sought a writ of mandate to compel the board of supervisors to approve the claim.

Defendants filed a demurrer which set up grounds of general and special demurrer to each cause of action. The court sustained the demurrer without leave to amend, but stated in its memorandum opinion that it would transfer the cause to the municipal court for trial on the second cause of action if plaintiff so desired. Judgment was thereafter entered in favor of defendants, and plaintiff has appealed from said judgment.

We have concluded that the court correctly sustained the demurrers to the first (declaratory relief) and third (mandamus) causes of action but erred in sustaining the demurrer to the second cause of action which was an action on the claim against the county.

[1] Section 1060 of the Code of Civil Procedure provides that a person may bring an action for declaratory relief. Section 1061 provides that the court may refuse declaratory relief where its declaration or

determination is not necessary or proper under all the circumstances. The discretion to be exercised pursuant to the latter section is not unlimited. It is legal or judicial discretion subject to appellate review and declaratory relief must be granted when the facts justifying that course are sufficiently alleged. Refusal is limited to cases where a declaration of rights and obligations would be unnecessary at the time under all circumstances. The determination rests on the facts in each case. *Kessloff v. Pearson*, 37 Cal.2d 609, 612-613, 233 P.2d 899. There are cases which hold that where a cause of action has accrued the trial court may refuse declaratory relief where an adequate remedy exists under some other form of action. *Schessler v. Keck*, 125 Cal.App. 2d 827, 271 P.2d 588 and cases cited therein. To the same effect see *Kessloff v. Pearson*, supra.

[2,3] Appellant had an accrued cause of action. Section 29715 of the Government Code provides that a claimant dissatisfied with the rejection of his claim may sue the county on the claim at any time within six months after the action of the board. It would seem that a suit on the claim would afford appellant all the relief that he needs. However, a plaintiff's right to proceed is not barred by the fact that a cause of action has accrued. Declaratory relief may be had without regard to the existence of other remedies. Before a court may deny declaratory relief on the ground that other remedies exist it must appear that the asserted remedies are available to plaintiff and are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief. *Columbia Pictures Corp. v. DeToth*, 26 Cal.2d 753, 761, 161 P.2d 217, 162 A.L.R. 747. We are of the opinion, however, that an action for money due is adequate in the instant case and all issues can be determined in the action. Therefore, the court properly sustained the demurrer to the first cause of action.

[4-6] As to the third cause of action which sought a writ of mandate, the general rule is that a writ of mandate will not issue

to review a decision of a board of supervisors in rejecting a claim. *Tilden v. Board of Sup'rs of Sacramento County*, 41 Cal. 68; *Burbank v. Hamilton*, 63 Cal.App. 745, 219 P. 1047; *Tulare County v. Woody*, 132 Cal.App. 459, 22 P.2d 743. See also *Irvine v. Gibson*, 19 Cal.2d 14, 118 P.2d 812. The board, in passing on a claim, acts in a quasi judicial capacity and their discretion can not be reviewed by a writ of mandate. We agree with the following comment of the trial judge in his memorandum opinion:

"As to the writ of mandamus, the court cannot require the Board of Supervisors to decide the case in favor of plaintiff merely because there was circumstantial proof—and strong proof at that—that plaintiff's sheep were killed by dogs. The Board of Supervisors is vested with quasi judicial powers, and the transcript of the hearing shows that the members of the Board were not satisfied that the evidence met the degree of proof required by the statute. The requirement in the statute with reference to the degree of proof before claims of this character can be approved, presents a question for judicial determination, and not the mere performance of a ministerial act. Unless there has been an abuse of discretion, the court is not justified in interfering regardless of whether the court would have decided the matter in the same manner. The fact that the county offered no rebutting evidence did not place the Board of Supervisors in the position where it was forced to approve the claim. The members found that the proof offered in support of the claim did not establish beyond a reasonable doubt that the sheep were killed or maimed by a dog or dogs. In this they were exercising the well established and historic right which vests in every trier of facts."

We therefore conclude that the court correctly sustained the demurrer to the third cause of action.

[7] However, we believe that the court erred in sustaining the demurrer to the second cause of action without leave to amend. This cause of action incorporated by reference all of the allegations of the first cause of action with reference to the filing of the claim and proceedings before the Board of Supervisors and sought to recover judgment for \$240, the amount of the claim.

The first cause of action, which was for declaratory relief, and the third cause of action, which was for a writ of mandate, were within the jurisdiction of the superior court and the action was therefore properly filed in the superior court. When the court determined that the demurrer to these two causes of action should be sustained without leave to amend it should have proceeded with the second cause of action or should have transferred it to the municipal court, as provided in the second paragraph of section 396 of the Code of Civil Procedure. When, instead, it sustained the demurrer to the second cause of action and entered judgment in favor of defendants on said cause of action, this in effect amounted to a dismissal of said cause of action. This was error, for as stated in *Wexler v. Goldstein*, 146 Cal.App.2d 410, at page 414, 304 P.2d 41, at page 43:

"The superior court is not under the same disability as the municipal court. The fifth paragraph of section 396 provides: 'Nothing herein shall be construed to require the superior court to transfer any action or proceeding because the judgment to be rendered, as determined at the trial or hearing, is one which might have been rendered by a municipal or justice court in the same county or city and county.' (Emphasis added.) The effect of this paragraph is to qualify the second paragraph of section 396 as to superior courts only. It gives such courts the discretion either to transfer back to the municipal courts or retain jurisdiction where what otherwise would be a lack of jurisdiction is 'determined at the trial or hearing.'"

[8, 9] Appellant's final contention is that the court erred in allowing \$30 as costs for preparation of a reporter's transcript for the use of the respondents. Allowable costs are those necessarily incurred. A reporter's transcript for a party's own use is not a cost necessarily incurred. *Mt. Shasta Power Corp. v. McArthur*, 111 Cal.App. 640, 295 P. 1049; 13 Cal.Jur.2d, Costs, p. 255. However, it is unnecessary to rule upon this contention because of the fact that we are reversing the judgment.

The judgment is reversed in so far as it sustains without leave to amend the demurrer to the second cause of action, with directions to the trial court to either proceed with the determination, on its merits, of said cause of action or to transfer it to the municipal court. In so far as the judgment sustains the demurrers to the first and third causes of action it is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.



162 Cal.App.2d 458

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Robert TENNEY, Defendant and Appellant.
Cr. 3441.

District Court of Appeal, First District,
Division 1, California.

July 31, 1958.

Hearing Denied Sept. 24, 1958.

Defendant was convicted of unlawful possession, sale, and transportation of narcotics. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Peters, P. J., held that, where defendant brought heroin to police officer's

hotel room, sold portion of heroin to officer, and, after sale was complete, left officer's hotel room with remaining portion of heroin, transportation of the narcotic was incidental to its sale and to subsequent possession of unsold portion, and therefore, defendant could be convicted of sale and possession of narcotics, but not of transportation.

Judgment reversed in part and affirmed in part.

1. Criminal Law ⇨1081

Rule of appeal requiring notice of appeal to be filed within 10 days after rendition of judgment from which appeal is taken is jurisdictional but is not absolute in its application. West's Ann.Rules on Appeal, rule 31.

2. Criminal Law ⇨1081

Where defendant, who is in custody, makes a good faith effort to file notice of appeal from judgment of conviction within the statutory period but is prevented from doing so by acts of prison authorities, his appeal will be considered as having been timely filed. West's Ann.Rules on Appeal, rule 31.

3. Criminal Law ⇨1081

Prisoner's delivery to prison officials, within the statutory period, of notice of appeal from his judgment of conviction, together with request that notice be mailed to clerk of court, constitutes constructive delivery to the appropriate clerk, and defendant will not be charged with prison officials' subsequent failure to prepare and mail the notice in time. West's Ann.Rules on Appeal, rule 31.

4. Criminal Law ⇨1081

Where notice to prepare notice of appeal from judgment of conviction was delivered by prisoner to prison officials within the statutory 10-day period after rendition of the judgment, notice of appeal was constructively filed in time, even though not received by clerk of court until after expiration of the period. West's Ann.Rules on Appeal, rule 31.

5. Criminal Law ⇨29

Where single act relates to but one victim and violates but one statute, it cannot be transformed into multiple offenses by separately charging violations of different parts of the statute.

6. Poisons ⇨4

Where defendant brought heroin to police officer's hotel room, sold portion of heroin to officer, and, after sale was complete, left hotel room with remaining portion of heroin, transportation of the narcotic was incidental to its sale and to subsequent possession of unsold portion, and, therefore, defendant could not be convicted of transportation, but he could be convicted of sale and possession of narcotics, since possession of retained heroin was not incidental to sale of the rest.

George S. Youngling, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant, Robert Tenney, on three separate counts, was convicted of the unlawful possession, sale, and transportation of narcotics. He appeals from the judgment of conviction.

[1-3] The attorney general contends that the notice of appeal was filed too late. Judgment was entered on August 12, 1957. The notice of appeal, dated August 26, 1957, was not filed with the clerk of the Superior Court until August 29, 1957. Under Rule 31 of the Rules on Appeal such notices must be filed within 10 days after the rendition of the judgment. This rule is jurisdictional. *People v. Riser*, 47 Cal.2d 594, 305 P.2d 18. Thus, the appeal here involved appears to have been filed too late. But the rule is not absolute in its application. It is now well settled that, if the defendant is in custody, and makes a good faith effort to file the required notice within the statutory period, but is prevented from doing so by the

acts of the prison authorities, the appeal will be considered as having been filed in time. The theory is that, if the notice of appeal is delivered to the prison officials within the statutory period with a request to mail it, such delivery is a constructive delivery to the appropriate county clerk, and the subsequent failure of the prison officials to prepare and mail the notice within time cannot adversely affect the rights of defendant. *People v. Slobodion*, 30 Cal. 2d 362, 181 P.2d 868; *People v. Head*, 46 Cal.2d 886, 299 P.2d 872.

The facts of the present case are such as to bring it within the rule of these cases. The affidavits disclose that after the judgment of August 12, 1957, on August 14th, defendant was sent to the reception center at Vacaville. He avers that on August 19, 1957, he "prepared in writing and submitted a Notice of Appeal" to the proper prison officials; that three or four days later he was informed by a prison clerk that the prison office had been delayed in typing his notice of appeal because of a heavy work schedule and that the Superintendent would notify the proper officials that the delay was no fault of defendant; that the notice of appeal was not typed up until August 26, 1957, and not received by the county clerk until August 29, 1957. The Superintendent at Vacaville avers that defendant applied for a "Notification of Intent to Appeal" to the prison officials on August 21, 1957, but that due to the work schedule in the prison it was not executed until August 26, 1957. It is further pointed out in that affidavit that, in August of 1957, Vacaville was in the process of organization and the staff disorganized and for this reason appellant "was not given the opportunity to execute the Notification of Intention to Appeal until August 26, 1957."

[4] Thus, the only conflict is whether the notice to prepare the notice of appeal was delivered to the prison officials on August 19th or 21st. This conflict is immaterial. Either date, plus mailing time, was within the 10-day period. Thus, the notice of appeal was constructively filed in time.

On the merits, the facts are as follows: One John Keey, a recent arrival from New York, in March of 1957, was employed as a salaried employee by the State Bureau of Narcotic Enforcement as an undercover agent. Pursuant to instructions, he took up residence in a Fillmore district hotel in San Francisco and began to make narcotic purchases from various individuals. Early in April, 1957, Keey met the defendant on two occasions and talked to him "vaguely" about narcotics. On April 17, 1957, about 7:30 p. m. he again met the defendant in front of a pool room on Fillmore Street. Keey asked defendant if he had seen one Johnson, a known narcotic peddler in the area. Defendant replied that he had not, and asked Keey "if I wanted some stuff, or needed some stuff, that he had bought some himself, and was going to cut it up, and he would sell me some." Keey agreed to the purchase and defendant suggested that the transaction be completed at his mother's house, some two blocks distant. Keey agreed and told defendant that he wanted to purchase \$5 worth of heroin.

When the two men arrived at the home of defendant's mother, no one was there, and they were unable to get in. Keey suggested that they go to his hotel room to complete the transaction. Defendant agreed. The two then proceeded to Keey's room. Defendant thereupon produced two packages of white powder which he mixed together and then divided into sections, and then put a small quantity of the powder into a paper and handed it to Keey. Keey gave appellant \$5 for the bundle, and defendant left with the balance of the powder. The powder delivered to Keey, upon analysis, was discovered to be heroin. Appellant was arrested on May 2, 1957.

Defendant did not testify. Through his mother and brother he attempted to show that he was in Sacramento on April 17, 1957, but this testimony was obviously not believed by the jury.

Defendant, in three separate counts, was charged with the illegal possession, sale, and transportation of narcotics, all growing out of the facts as testified to by Keey.

He was found guilty on all three counts and was sentenced on each count, the terms to run concurrently. Defendant appeals.

[5] Clearly, the judgment was too inclusive. When a single act relates to but one victim, and violates but one statute, it cannot be transformed into multiple offenses by separately charging violations of different parts of the statute. The Supreme Court has so decided. In *People v. Roberts*, 40 Cal.2d 483, 254 P.2d 501, the appellant and another defendant were charged with illegally transporting, selling and possessing heroin, and with conspiracy. The defendants were found guilty on all four counts. The Supreme Court held that only the sale and conspiracy convictions could stand. In so holding, the court stated (40 Cal.2d at page 491, 254 P.2d at page 505): "The information charges and there is evidence that on April 3 defendant Roberts transported, furnished, and possessed heroin. Each of these acts is denounced by section 11500 of the Health and Safety Code. The three acts are charged and adjudged as separate crimes. However, 'co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted.' (*People v. Clemett* (1929), 208 Cal. 142, 144, 280 P. 681; see also *People v. Knowles* (1950), 35 Cal.2d 175, 187, 217 P. 2d 1.) The present case resembles the *Clemett* case in that the only possession and transportation of heroin shown were those necessarily incident to its sale. And as in the *Clemett* case (at page 150 of 208 Cal., at page 684 of 280 P.) the error can be corrected by this court."

This court was presented with the same problem in *People v. Branch*, 119 Cal.App. 2d 490, 260 P.2d 27. We there stated (119 Cal.App.2d at page 495, 260 P.2d at page 30):

"There is one last point that must be considered, and that is whether appellant has been improperly convicted of two offenses—possession and sale—when, in fact, the possession was incidental to the

sale. Appellant did not raise this point in his briefs, but the point was suggested, with commendable objectivity, by the Attorney General because of the opinion of the Supreme Court in *People v. Roberts*, 40 Cal.2d 483, 254 P.2d 501. In that case it was held that, where the possession and transportation of a narcotic were incidental to a sale of the same, separate convictions for the possession and transportation could not be had. The case is based upon the interpretation of section 654 of the Penal Code * * * Under the rule of this section, as interpreted by the Supreme Court, a single criminal act, whether it gives rise to included offenses or not, can only be punished once. By this section, it is indispensable in order to impose separate punishments that there be evidence of separate and divisible acts that are not incidental to each other. In determining this question the courts have refused to dissect the evidence minutely in an attempt to find separate offenses, but, on the contrary, have held that a broad transactional approach should be made. The evidence in the instant case, so viewed, shows that the possession of appellant of the marijuana was incidental to its sale or offer to sell to Belle. For that reason but one offense is involved.

"The attorney general seeks to avoid the effects of this error by pointing out that, since the sentences on the two counts have been made to run concurrently, no possible prejudice can result from the judgment. This is an unrealistic approach. The dual judgment may very well adversely affect appellant's rights when he comes before the proper authorities to have his definite terms fixed. This factor was sufficient to require a reversal in *People v. Kehoe*, 33 Cal.2d 711, 204 P.2d 321; *People v. Roberts*, 40 Cal.2d 483, 254 P.2d 501; *People v. Knowles*, 35 Cal.2d 175, 217 P.2d 1; *People v. Craig*, 17 Cal.2d 453, 110 P.2d 403.

"For the above reasons the judgment is affirmed as to count three involving the charge of an offer to sell a narcotic, reversed as to count one involving a charge

of unlawful possession, and the order denying a new trial is affirmed."

[6] The attorney general fairly and properly concedes that, under the rule of the Roberts and Branch cases, *supra*, the transportation count cannot be sustained. It is admitted that, under the evidence, the transportation of the narcotics was incidental to its sale to Keelys and to the possession of the remaining portion not sold to Keelys.

Keelys' testimony, however, does support both the sale and possession charges. As to the sale count this is obvious. As to the possession count, while the possession obviously existing in appellant prior to the sale was incidental to the sale, that is not true of the possession subsequent to the sale. Under the evidence, Keelys only purchased a portion of the heroin possessed by appellant. When appellant left Keelys' hotel room after the sale was complete, he took the remainder of the heroin with him. While that subsequent transportation cannot be separated from the subsequent possession, and so cannot support a separate transportation charge, it does support a separate possession charge. The subsequent possession by appellant was in no way incidental to the prior sale. The problem is similar to the one presented in *People v. Holliday*, 120 Cal.App.2d 562, 261 P.2d 301, where convictions of transportation and possession were sustained. After referring to the case of *People v. Knowles*, 35 Cal. 2d 175, 187, 217 P.2d 1, 8, in which it was held that there "can be only one conviction when a single act of transportation is proved and the only act of possession is that incident to the transportation," the court in the Holliday case stated (120 Cal.App.2d at page 564, 261 P.2d at page 302):

"Appellant, however, does not come within the protection of these principles because not merely a single but multiple and

separate criminal acts are shown and the act of transportation is not incident to possession. Here appellant's conviction of possession can be sustained upon the basis of his possession of marijuana both *before* and *after* the transportation and *apart* from such transportation. It will be recalled that when appellant offered to make a sale to Ruskin he first went back some distance behind a building and returned with his contraband merchandise. This justifies an inference that the marijuana was hidden there and was not brought in the coupe Kelly was driving. The crime of possession was then established and complete, and no transportation of the commodity had taken place. If the contemplated sale had been effected appellant would not have been involved in transporting his contraband back to the hotel. Even though the sale was not completed, appellant's transportation of the marijuana in the coupe was not incident to his prior possession and attempted sale. It was a separate and independent decision and act on his part. He could have returned it to its former hiding place or thrown it away * * *.

"Thus separate and distinct acts have been proved as the basis of each conviction. Such convictions may be sustained even though the acts on which each is based were closely connected in time and were part of the same criminal venture."

Thus appellant was properly convicted of both the sale and the possession of narcotics. The possession of the retained heroin was not incidental to the sale, but was a separate and distinct act.

For the foregoing reasons the judgment is reversed as to count three charging unlawful transportation, and is affirmed as to counts one and two involving charges of unlawful possession and sale.

BRAY, J., and FRED B. WOOD, J., concur.

Hearing denied; SPENCE, J., dissenting.

162 Cal.App.2d 371

MARSH WALL PRODUCTS, Inc., a corporation, Plaintiff and Respondent,

v.

HENRY MARCUS BUILDING SPECIALTIES, Henry Marcus, Oscar Altman, Morris Altman, and Samuel Podbresky, Defendants,

Oscar Altman, Appellant.

Civ. 22724.

District Court of Appeal, Second District,
Division 3, California.

July 28, 1958.

Rehearing Denied Aug. 22, 1958.

Action on promissory notes and to recover purchase price of building materials sold, against defendants individually and as partners. All of the defendants except one defaulted, and the Superior Court of Los Angeles County, Arthur K. Marshall, Judge pro tem., entered judgment against all of the defendants, and nondefaulting defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained finding that payee of notes did not have knowledge of fact that defendant had withdrawn as a partner or of the agreement between defendant and other partners whereby remaining partners assumed debts of partnership.

Affirmed.

1. Partnership ⇨242(5)

Where person who had withdrawn from partnership under agreement by remaining partners to assume partnership debts sought to escape liability on partnership notes executed prior to his withdrawal, burden of proving that payee of notes had knowledge of the person's withdrawal from partnership was on such party.

2. Partnership ⇨242(5)

In action to recover on notes of partnership, evidence sustained finding that payee of note had no knowledge that defendant had withdrawn from partnership and that remaining partners had assumed debts of partnership prior to act of payee in extending time for payment of partner-

ship obligations. West's Ann.Corp.Code, § 15036(3).

3. Partnership ⇨217(3)

In action to recover on partnership notes, evidence sustained finding that person, whose name was used in company's title, executed notes on behalf of partnership within the scope of his authority and as agent for the other four partners. West's Ann.Corp.Code, § 15009(1).

4. Partnership ⇨217(3)

In action to recover from defendants individually and as partners for building materials furnished partnership on open book account, evidence was sufficient to support finding that plaintiff had furnished merchandise to partnership of a reasonable value as found by court.

5. Partnership ⇨242(5)

In action to recover against defendants individually and as partners for merchandise furnished to partnership on open account, evidence supported findings that plaintiff did not know that one of the defendants had withdrawn from partnership before all of the merchandise was furnished, and that defendant was indebted to plaintiff on open book account. West's Ann.Corp.Code, § 15035.

6. Bills and Notes ⇨394

Demand for payment of partnership notes was not necessary prior to commencing an action thereon against defendants individually and as partners, where defendant's answer denied any liability on notes so that if a demand had been made it would have been refused.

7. Evidence ⇨271(13)

In action to recover on promissory notes against defendants individually and as partners, including defendant who had withdrawn from partnership, there was no error in refusing to admit copy of letter written by partnership employee to attorneys for partnership to effect the creditors had been told of withdrawal of defendant from partnership, where letter was not sought to be admitted to refute inference that employee's testimony was of recent

fabrication, but as a memorandum in confirmation of his testimony.

8. Trial ☞414

In action on open account, where defendant claimed that there was a material variance between date of transaction as alleged in complaint and evidence on trial, and after denial of motion to strike testimony defendant went forward with other defenses and did not demand a bill of particulars, there was no error in denying motion to strike.

9. Bills and Notes ☞491, 534

Where partnership notes provided for payment of attorney's fees reasonably incurred in enforcing payment of notes and in prayer of complaint payee asked for attorney's fees, it was not necessary to present testimony as to extent and reasonable value of legal services rendered and there was no error in allowing attorney's fees for legal services pertaining to notes.

Mathon & Redlich, and Benjamin D. Mathon, Beverly Hills, for appellant.

Littlejohn, Callister & McNabb, and E. Talbot Callister, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action on seven promissory notes and to recover the purchase price of building materials sold. The action was against Henry Marcus, Oscar Altman, and three other persons, individually and as partners. Henry Marcus Building Specialties, the partnership, was also named as a defendant. In a nonjury trial, judgment was in favor of plaintiff. Oscar Altman appeals from the judgment.

Appellant contends that certain findings are not supported by the evidence. Generally stated, appellant's argument is that plaintiff knew that appellant had withdrawn from the partnership and that the remaining partners had assumed his obligations; and that, in view of such knowledge, the act of plaintiff in extending time for

payment of the partnership obligations discharged appellant from liability.

Prior to March 18, 1954, Henry Marcus, Oscar Altman, and three other persons became partners in the business of selling building materials under the partnership name of Henry Marcus Building Specialties. On March 18, 1954, Henry Marcus signed, and delivered to plaintiff, seven promissory notes, each for \$566.35, payable respectively on the first of each month commencing June 1, 1954. The notes were signed, "Henry Marcus Building Specialties By Henry Marcus."

On April 23, 1954, Altman and the other partners entered into a written agreement whereby Altman withdrew from the partnership and Henry Marcus and two of the other partners agreed to assume the partnership obligations of Altman. On May 10, 1954, a notice of dissolution of the partnership was published in a newspaper and, also on that day, the notice was filed in the office of the county clerk. The notice, which was dated April 29, 1954, stated that the business would be conducted by the other partners and that they would pay all debts of the partnership.

About June 15, 1954, plaintiff and other creditors of the partnership, and Henry Marcus acting on behalf of the partnership, signed an agreement which provided that plaintiff and the other creditors extended the time of payment of their claims against the partnership for a period ending December 31, 1954, and thereafter for such successive periods of 90 days each as the creditors' committee (referred to in the agreement) deemed advisable in order to carry out the purposes of the agreement.

This action was filed on August 5, 1955.

The first cause of action was for the recovery of \$3,964.45 due upon seven promissory notes. The second, third, and fourth causes of action were, respectively, for the recovery of amounts due: (1) for the reasonable value of merchandise sold; (2) upon an open book account; and (3) upon an account stated.

Defaults of the partnership, Henry Marcus, and two other defendants were entered. One defendant was not served. Altman filed an answer.

The court made detailed findings of fact which were in substance the same as the facts hereinabove set forth regarding the partnership, the notes, the withdrawal agreement, the notice of dissolution, and the extension agreement. The court also found that Marcus executed the notes, within the scope of his authority, as agent for the defendants; plaintiff did not know, until after the complaint was filed, that Altman had withdrawn as a partner; plaintiff did not have knowledge of the agreement between Altman and the other partners, whereby Altman withdrew from the partnership and the remaining partners assumed the debts; and that the extension agreement did not prejudice Altman's rights. The court also found that the defendants were indebted to plaintiff for \$2,075.31 on each of the other causes of action (merchandise sold, open book account, and account stated).

A copy of the judgment is not in the record, but it will be assumed that the judgment was in accordance with the direction for judgment as stated in the conclusions of law. Said direction was that plaintiff was entitled to judgment against the partnership, Marcus, Altman, and the two defendants whose defaults were entered, as follows: \$3,964.45, on the first cause of action; and \$2,075.31, on the second, third, and fourth causes of action; and for \$600 attorneys' fees.

Altman relies upon section 15036, subdivision (3), of the Corporations Code, which provides: "Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations."

Appellant (Altman) contends that the evidence does not support certain findings, namely: that plaintiff did not know, until

after the complaint was filed, that Altman had withdrawn as a partner; and that plaintiff did not have knowledge of the agreement between Altman and the other partners, whereby Altman withdrew from the partnership and the remaining partners assumed the debts. In support of his contention he refers to the testimony of his witnesses, Mr. Vind and Mr. Pfaelzer.

Mr. Vind, an employee of the partnership, testified that in the first or second week of May, 1954, he went to plaintiff's office and told Mr. Crampton, plaintiff's division manager, that Altman was no longer a partner in the partnership. He testified further that in the first part of June, at the first meeting of creditors of the partnership, he told the creditors that Altman was no longer a part of the company. He also testified that Mr. Page, plaintiff's credit manager, attended that meeting; subsequently a creditors' committee was formed; he (witness) told the committee that Altman was no longer a part of the company and that "we were buying back his advances to the company on a payment program"; Mr. Pfaelzer (attorney for the partnership) advised the committee as to the contents of the agreement of April 23, 1954, between Altman and the other partners; and that the creditors' attorney (apparently not referring to Mr. Pfaelzer) read the agreement.

Mr. Pfaelzer, attorney for the partnership, testified that he attended the first meeting of the creditors on June 3, 1954; Mr. Page attended the meeting as a representative of plaintiff; he (witness) believed that, at the meeting, he told the representatives of the creditors of the changes that had been made in the partnership organization; at the meeting there was a discussion as to the manner in which the partnership could be operated to satisfy the obligations of the business, and there was "reference to Oscar Altman as a person who had departed from the company"; he (witness) attended the second meeting of the creditors on June 10, 1954; he believed that Mr. Page was there; at the meeting there was "reference to his [Altman's] withdrawal

from the business"; and at the meeting a creditors' committee was elected.

Altman argues that the testimony of those witnesses shows that plaintiff had knowledge that he had withdrawn from the partnership and that the other partners intended to continue the business for the purpose of paying the debts of the partnership; that from such knowledge, notice of the agreement between Altman and the other partners must be imputed to plaintiff; that the testimony of Mr. Vind shows that the creditors' committee knew the contents of the agreement, and that such knowledge must be imputed to plaintiff.

In addition to the testimony of those witnesses, there was testimony by Mr. Crampton, a witness called by plaintiff. He testified that he is division manager of plaintiff; in the latter part of April, or in May, 1954, Mr. Vind came to his office; he (witness) did not remember any conversation relating to Altman or to the withdrawal of Altman as a partner; he did not know, until after the commencement of the action, that Altman had withdrawn from the partnership; in June, 1954, Mr. Page was manager of plaintiff's Los Angeles office; Mr. Page was not employed by plaintiff at the time of the trial; and he (witness) did not know whether a representative of plaintiff attended any meetings of the creditors' committee.

[1,2] A question of fact was presented as to whether plaintiff had knowledge that Altman had withdrawn from the partnership, and that the remaining partners had assumed the debts of the partnership. The burden of proving that plaintiff had such knowledge was on Altman. See *Epley v. Hiller*, 128 Cal.App.2d 100, 103-104, 274 P.2d 696. The findings were to the effect that Altman had not carried the burden of such proof. The evidence was sufficient to support the findings that plaintiff did not know that Altman had withdrawn and did not know that the remaining partners had assumed the debts.

[3] Altman contends that the evidence does not support the finding that Marcus

executed the notes as agent for the defendants and within the scope of his authority.

Section 15009, subdivision (1), of the Corporations Code provides: "Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority."

Altman argues that the evidence shows that Marcus did not have authority to execute the notes for the partnership and that plaintiff knew that Marcus did not have such authority. He argues further that since there was no evidence that partnership notes had been executed previously in favor of plaintiff, there was no evidence that the notes involved here were executed within the usual course of business between plaintiff and the partnership. In support of his argument, Altman refers to his testimony and to 14 checks which were received in evidence. Altman testified that "no one partner" had authority to execute a note on behalf of the partnership. The 14 checks, referred to, were payable to plaintiff and were signed by two persons on behalf of the partnership. Even if it be assumed that plaintiff observed that there were two signatures on the checks, the court was not required to infer that plaintiff knew how many signatures were required on a note. It is to be noted that 13 of the 14 checks bore dates which were subsequent to the date of the notes (March 18, 1954). Mr. Crampton (plaintiff's western division manager) testified that the notes were signed by Marcus in his presence; the notes were given to cover the previous account of the partnership for materials, and for the purpose of obtaining additional materials on credit; he (wit-

ness) was never advised that two signatures were required on a note of the partnership. The evidence supports the finding that Marcus executed the notes, within the scope of his authority, as agent of the defendants.

[4] Altman contends that the evidence does not support the finding that about July 1, 1954, plaintiff furnished merchandise of the reasonable value of \$2,075.31 to defendants, upon an open book account. Plaintiff introduced in evidence, without objection by Altman, a copy of a statement of account, dated July 1, 1954, for merchandise sold to the partnership. The statement covered a period from March 30 to May 25, 1954, inclusive, showing that a balance of \$2,075.31 was unpaid. Mr. Crampton testified to the effect that after the notes were executed, plaintiff sold merchandise to the partnership on an open book account; the statement, received in evidence, was a statement of the account; the dates listed in the statement were the dates of the invoices; the prices listed therein were the invoice prices; and the amounts listed therein were unpaid. There was no evidence on behalf of Altman (the only defendant who filed an answer) to the effect that the merchandise was not ordered or that it was not of the reasonable value as shown on the statement. The finding was supported by the evidence.

[5] Altman contends further that, in any event, there was no liability on his part for merchandise delivered after he withdrew from the partnership (about April 16, 1954) and after his withdrawal was reported to plaintiff about May 15, 1954. It appears from the statement of account and from the testimony of Mr. Crampton that the charge for merchandise, delivered after April 23, was \$957.70. Section 15035 of the Corporations Code provides: "(1) After dissolution a partner can bind the partnership * * * (b) by any transaction which would bind the partnership if dissolution had not taken place, provided, the other party to the transaction: I. Had extended credit to the partnership prior to the dissolution and had no knowl-

edge or notice of the dissolution * * *." Mr. Crampton testified that plaintiff had extended credit to the partnership prior to dissolution. As above stated, the court found that plaintiff did not know that Altman had withdrawn from the partnership until after the filing of the complaint. The evidence supports the finding that Altman was indebted to plaintiff on the open book account.

[6] Appellant also contends that the evidence does not support the finding that a demand was made upon him for payment of the notes and the account. A demand prior to commencing the action was not necessary. In his answer, Altman denied any liability on the notes or the account. It is clear from his answer that if a demand had been made it would have been refused. In *Roadman v. Traeger*, 5 Cal.App.2d 749, at page 750, 43 P.2d 564, at page 564, it was held that where "it is plain from the answer" that a demand would have been refused, a defendant may not object that no demand was made. Under the circumstances, the finding with reference to a demand was of no significance.

[7] Altman contends that the court erred in refusing to receive in evidence a copy of a letter, dated May 16, 1954, which was written by Mr. Vind (employee of the partnership) to the attorneys for the partnership. The letter stated that, attached to the letter, there was a list of creditors who had been contacted regarding the financial problem of the partnership, and that those creditors had been told "of the withdrawal of Oscar Altman" from the partnership. Plaintiff's name was on that list of creditors. Altman argues that since Mr. Vind was questioned closely on cross-examination regarding his conversation with Mr. Crampton (about withdrawal of Altman), the letter was admissible to refute an inference that such conversation was of recent fabrication. There was no statement, at the time the letter was offered in evidence, that it was offered to refute such an inference. Altman's attorney stated, at that time, that it was offered as a memorandum in confirmation of

Mr. Vind's testimony. The court did not err in sustaining the objection.

[8] Altman also contends that the court erred in denying his motion to strike out all testimony on behalf of plaintiff relating to the causes of action upon an open book account, and for the reasonable value of merchandise sold. He argues that since it was alleged in the complaint that certain transactions occurred on or about July 1, 1954, and since the evidence referred to transactions extending from March 30 to May 25, 1954, there was a material variance between the pleading and the proof. During the argument on the motion to strike the testimony, the judge asked Altman's attorney if he desired a continuance of the matter. The attorney replied that if the judge denied the motion the defendant would go forward with the other defenses. The complaint was filed August 5, 1955. It was alleged in the complaint, as follows: (1) that within two years immediately preceding the commencement of the action, to wit, on or about July 1, 1954, the defendants became indebted to plaintiff for merchandise sold; (2) that within four years immediately preceding the commencement of the action, to wit, on or about July 1, 1954, defendants became indebted to plaintiff upon an open book account for merchandise of the reasonable value of \$2,075.31. There was no demand for a bill of particulars. The court did not err in denying the motion to strike the testimony.

[9] Altman contends that attorney's fees should not have been awarded. His argument is that there was no allegation or proof that plaintiff paid attorney's fees, and that there was no evidence as to the legal services rendered. The notes provided for payment of attorney's fees reasonably incurred in enforcing payment of the notes. In the prayer of the complaint, plaintiff asked for attorney's fees. Plaintiff was represented by attorneys in commencing and prosecuting the action. The record of the proceedings were before the trial judge. It was not necessary to present testimony as to the extent and reason-

able value of legal services rendered. See *Lewis & Queen v. S. Edmondson & Sons*, 113 Cal.App.2d 705, 708, 248 P.2d 973. The court did not err in allowing attorney's fees for legal services pertaining to the notes.

In view of the above conclusions, which require affirmance of the judgment, it is not necessary to discuss other contentions on appeal.

The judgment is affirmed.

SHINN, P. J., and PATROSSO, J.
pro tem., concur.



162 Cal.App.2d 245

Chris R. PETERSEN, II, as Executor of the Last Will and Testament of Mary Petersen, also known as Mrs. Chris Petersen, Deceased, Plaintiff and Respondent,

v.

Irwin FRIEDMAN and Nathalie Friedman, his wife, Defendants and Appellants.

Civ. 17863.

**District Court of Appeal, First District,
Division 2, California.**

July 21, 1958.

Suit to enjoin owner of adjacent premises from violating express easement of light, air and unobstructed view created in favor of plaintiff's property and to compel removal of certain television aerials. The Superior Court, San Francisco City and County, Eustace Cullinan, Jr., J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Kaufman, P. J., held that since reservation, extending to all uses to which servient estate might thereafter be devoted, was clear, there was no room for construction or determination of intent of parties, and that television aerials could be held violative of reserved easement even though easement

had been created before such devices were known.

Affirmed.

1. Easements ⇐2

In California, easements of light and air may be created. West's Ann.Civ.Code, § 801.

2. Easements ⇐59

Where reservation, extending to all uses to which servient estate might thereafter be devoted, was clear, there was no room for construction or determination of intent of parties, and television aerials could be held violative of reserved easement of light, air and unobstructed view even though easement had been created before such devices were known. West's Ann.Civ.Code, § 801.

3. Easements ⇐61(9½)

In suit to enjoin owner of adjacent premises from violating express easement of light, air and unobstructed view created in favor of plaintiff's property and to compel removal of certain television aerials, fact questions were presented with regard to whether aerials obstructed plaintiff's view and otherwise interfered with easement to detriment of plaintiff.

4. Appeal and Error ⇐954(1)

Injunction ⇐135

Question of granting or refusing an injunction is addressed to sound discretion of lower court, and its action will not be reversed on appeal unless there appears to have been an abuse of discretion.

Charles M. Stark, Paul W. McComish,
San Francisco, for appellants.

Albert Picard, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

The parties are owners of adjacent parcels of improved real estate situated on Franklin Street in San Francisco. Plaintiff's complaint sought to perpetually enjoin the defendants from violating an ex-

press easement of light, air and unobstructed view created in favor of plaintiff's property and to compel the defendants to remove certain television aerials and antennae. The trial court found all of the allegations of the complaint to be true, rendered judgment for the plaintiff, and issued both injunctions requested. Defendants appeal.

The nature and creation of the easement appurtenant to plaintiff's property is not in dispute. On November 6, 1942, Mary Petersen, now deceased, also known as Mrs. Chris Petersen, by a grant deed duly recorded conveyed a part of her property on Franklin Street to C. A. Petersen. The deed contained the following reservation of an easement:

"Reserving, however, unto the first party, her successors and assigns, as and for an appurtenance to the real property hereinafter particularly described and designated as 'Parcel A' and any part thereof, a *perpetual easement of right to receive light, air and unobstructed view over that portion of the real property hereinabove described*, to the extent that said light, air and view will be received and enjoyed by limiting any structure, fence, trees or shrubs upon said property hereinabove described or any part thereof, to a height *not* extending above a horizontal plane 28 feet above the level of the sidewalk of Franklin Street as the sidewalk level now exists at the junction of the southern and western boundary lines of the property hereinabove described. Any obstruction of such view above said horizontal plane except by a peaked gable roof extending the entire width of the front of the building referred to herein and extending 9 feet in an easterly direction from a point 1 foot 6 inches east of Franklin Street, the height of said peaked roof being 3 feet 2 inches together with spindles 3 feet in height on the peak of said roof, and except the necessary number of flues or vents constructed of galvanized iron and/or

terra cotta not over 4 feet in height, shall be considered an unauthorized interference with such right or easement and shall be removed upon demand at the expense of second party, and his successors and assigns in the ownership of that real property described or any part thereof."

Thereafter, the defendants, by mesne conveyances from C. A. Petersen, acquired all of the property conveyed by the deed of November 6, 1942, subject to the reservation. Plaintiff is the duly appointed and qualified executor of the estate of Mary Petersen, which is the owner of the dominant tenement.

Defendants' contentions on appeal are limited to the following: 1) that it could not have been the intent of the parties to preclude the erection of television aerials and antennae on the defendants' roof as the easement was created before such devices were known; 2) that the evidence does not support the judgment.

[1,2] The language of the easement is clear and leaves no room for construction or determination of the intent of the parties, as contended by the defendant. Its purpose is to avoid any type of obstruction of the light, air and view without regard to the nature thereof. The reservation was not limited to the use then being made of the servient estate, but extended to all uses to which the servient estate might thereafter be devoted. Easements of light and air may be created in this state. Civil Code, § 801; *Bryan v. Grosse*, 155 Cal. 132, 99 P. 499. Although we have not been able to find a California precedent on an easement of view, the weight of authority is that such an easement may be created by express grant. See 142 A.L.R. 467 and cases collected therein. It has been held in this state however that interference with an easement of light, air or view by a structure in the street is ground for an injunction. *Williams v. Los Angeles R. Co.*, 150 Cal. 592, 89 P. 330.

[3,4] As to defendant's second contention, the issues of whether or not the

aerials and antennae obstructed plaintiff's view and otherwise interfered with the easement to the detriment of the plaintiff, were questions of fact for the lower court. The plaintiff offered evidence as to the size and nature of the obstructions and testified that because of the presence of the aerials and antennae, he received a lesser rental for the apartments on his property. The question of granting or refusing an injunction is addressed to the sound discretion of the lower court and its action will not be reversed on appeal unless there appears to be an abuse of discretion. *Williams v. Los Angeles R. Co.*, supra. The record here supports the judgment.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.



162 Cal.App.2d 590

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Albert Gilbert RENTERIA, Defendant and
Appellant.**

Cr. 6197.

**District Court of Appeal, Second District,
Division 3, California.**

Aug. 4, 1958.

Defendant was convicted of first degree burglary. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that Superior Court was warranted in drawing an inference of guilt from fact that goods stolen from residence were found in possession of defendant within a few hours after the burglary, together with further fact that, when questioned about ownership of the stolen property and the manner in which it came into

his possession, defendant gave false, evasive, and inconsistent answers.

Judgment affirmed.

1. Burglary ☞41(1)

Evidence sustained conviction for first degree burglary. West's Ann.Pen.Code, §§ 459, 460.

2. Burglary ☞29

Criminal Law ☞318

In burglary prosecution, trial court was warranted in drawing an inference of guilt from fact that goods stolen from residence were found in possession of defendant within a few hours after the burglary, together with further fact that, when questioned about ownership of stolen property and manner in which it came into his possession, defendant gave false, evasive and inconsistent answers. West's Ann.Pen.Code, §§ 459, 460.

3. Criminal Law ☞554

In burglary prosecution, trial court was not required, as a matter of law, to give credence to testimony of defendant that he had purchased the stolen property from an unknown couple he had met in a barroom on the night of the burglary. West's Ann.Pen.Code, §§ 459, 460.

4. Burglary ☞10

Where burglary was committed in a dwelling house during the nighttime, trial court did not err in determining that burglary was burglary of the first degree. West's Ann.Pen.Code, §§ 459, 460.

5. Criminal Law ☞1036(4)

Where defendant was represented by counsel at trial of burglary prosecution, and his counsel did not object to introduction in evidence of stolen articles taken from defendant's person and from his automobile, admissibility of the evidence could not be questioned on appeal. West's Ann. Pen.Code, §§ 459, 460.

SHINN, Presiding Justice.

In a court trial, Albert Gilbert Renteria was convicted of an offense of first degree burglary and was sentenced to state prison for the term prescribed by law. The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. Defendant appeals from the judgment.

Sometime between 7:30 and 10 p. m. on the night of November 10, 1957, the residence of Eva Solis was broken into by means of a living room window while Mrs. Solis and her family were away from the premises. Various items were missing when they returned. These included 13 skirts and a pair of slacks belonging to Mrs. Solis' daughter, Melinda; two women's purses; a portable radio; two jewelry boxes containing costume jewelry; a lady's white gold wrist watch and two rings. One of the purses belonged to Melinda Solis; it contained her wallet and personal papers.

At about 3:30 a. m. the following morning, Officer Beard of the Montebello Police Department was on duty in a patrol car at the intersection of Whittier Boulevard and Second Street in the City of Montebello. He observed a Chevrolet sedan traveling west on Whittier Boulevard enter the intersection at 50 to 60 miles per hour, skid through a stop light, turn south on Second Street and continue at a high rate of speed. The officer pursued the car, using his red light and siren. The Chevrolet made a right turn on Los Angeles Street, then turned left on Third Street, which is a dead-end street. After it had traveled half a block on Third Street, the lights of the Chevrolet were turned off; the car proceeded a short distance and then stopped. Officer Beard testified that as he approached the car defendant stepped out; there was a woman in the car. The officer made a search of defendant's person and removed a ring from his pocket; the ring was subsequently identified as one that was missing from the Solis residence. Beard asked defendant who owned the ring and Renteria said that

Albert Gilbert Renteria, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., of State of California, for respondent.

it was his property. Upon being asked where he obtained the ring defendant replied that he had bought it from a man in a bar the day before. The officer placed defendant under arrest for failing to yield to a red light and siren, evading arrest and reckless driving. He then made a search of the car. On the front seat he discovered the wallet and identification papers belonging to Melinda Solis and in the trunk of the car he found numerous articles that were proved to be missing from the Solis residence. When asked by the officer where he obtained the articles found in his car, defendant said that they belonged to his sister, that he had moved the previous day and that he had not yet returned them to her. Defendant gave his sister's name to the officer and offered to give him her telephone number, but he did not do so.

Jack Owens, a Los Angeles County Sheriff's Deputy, testified that he had a conversation with defendant on the morning of November 12th at the police station. In response to the deputy's questions defendant denied stealing anything from the Solis residence. Upon being asked who owned the articles and how they happened to be in his car, defendant replied that he did not know. He admitted telling Officer Beard that the articles belonged to his sister but he said that "he was just lying" when he made the statement.

Renteria was the only witness for the defense. He denied his guilt of burglary. He testified that he was at the home of his girl friend, a Mrs. Juarez, until about 6 p.m. on November 10th. He then went to his father's house, which was only a few blocks away, and returned about 8:30 p.m. He drove Mrs. Juarez to a beer parlor called the Rocky Point, where they remained until about 11 p.m. While they were seated in a booth, a man and a woman whom defendant did not know approached him and offered to sell him the contents of a small shopping bag for \$25. Defendant stated that he saw some skirts, a purse and two jewelry boxes containing jewelry in the shopping bag; he did not notice whether

the bag contained a wallet, a wrist watch and a second purse, although he "guessed" that they were also in the bag. Defendant purchased the contents of the bag for \$7 and put them in the trunk of his car. He then drove his girl friend to another beer parlor, where they remained until 2 a.m. Defendant admitted skidding through the red light at the intersection of Whittier Boulevard and Second Avenue but he denied attempting to evade arrest.

Upon request for appointment of counsel on the present appeal the court referred the matter to the Los Angeles Bar Association Committee on Criminal Appeals for report to the court as to possible merit in the appeal. The matter was assigned to a member of the committee who has made written report to the court stating that the record had been examined and that in the opinion of the attorney it disclosed no meritorious ground of appeal. After we had examined the record the request for appointment of counsel was denied. Defendant was duly so advised and his time to file a brief was substantially extended. No brief has been filed. In accordance with our usual practice we have made a thorough study of the record. We have discovered no insufficiency of the evidence and no error at the trial.

[1-4] Section 459 of the Penal Code provides in material part: "Every person who enters any house, room, apartment, * * * with intent to commit grand or petit larceny or any felony is guilty of burglary." In our opinion, the evidence was sufficient to sustain a finding that defendant was guilty of burglary. The goods stolen from the Solis residence were found in his possession within a few hours after the theft. The court was warranted in drawing an inference of guilt from that fact together with the further fact that, when questioned about the ownership of the stolen property and the manner in which it came into his possession, defendant gave false, evasive and inconsistent answers. *People v. Brown*, 136 Cal.App.2d 244, 246, 288 P.2d 984, and cases cited. The court was not required, as a matter of law, to

give credence to Renteria's testimony that he purchased the property from an unknown couple he met in a barroom on the night of the burglary. *People v. Mercer*, 103 Cal.App.2d 782, 789, 230 P.2d 4. As the offense was committed in a dwelling house during the nighttime, the court did not err in determining it to be burglary of the first degree. Pen.Code § 460.

[5] Defendant was represented by counsel at the trial and his counsel did not object to the introduction in evidence of the articles taken from his person and from his car. In the absence of a proper objection in the trial court, the admissibility of the evidence may not be questioned on the appeal. (3 Cal.Jur.2d 634.)

The judgment is affirmed.

PARKER WOOD, J., and PATROSSO, J. pro tem., concur.



162 Cal.App.2d 41

J. C. MATTOS, Plaintiff and Respondent,
v.

Manuel R. MATTOS, Defendant and
Appellant.
Civ. 17952.

District Court of Appeal, First District,
Division 2, California.
July 9, 1958.

Action for abatement of a nuisance. The Superior Court, Marin County, N. Charles Brusatori, J., entered judgment in favor of plaintiff and defendant appealed. The District Court of Appeal, Draper, J., held that defendant's trees, which were blown down and covered a substantial area of plaintiff's land, and appreciably restricted its use for grazing purposes to which such land was normally devoted, constituted a "nuisance" and entitled plaintiff to abatement thereof, even though there was no showing that any act or conduct on the

part of defendant caused the falling of the trees.

Judgment affirmed.

1. Nuisance ⇨19

Defendant's trees, which were blown down and covered a substantial area of plaintiff's land, and appreciably restricted its use for grazing purposes to which such land was normally devoted, constituted a "nuisance" and entitled plaintiff to abatement thereof, even though there was no showing that any act or conduct on the part of defendant caused the falling of the trees. West's Ann.Civ.Code, § 3479.

See publication Words and Phrases, for other judicial constructions and definitions of "Nuisance".

2. Limitation of Actions ⇨55(5)

Construction of a building partly upon the land of another is a permanent encroachment thereon, and the entire cause of action for past as well as prospective damages for such construction accrues when the trespass occurs.

3. Limitation of Actions ⇨55(5)

Roots and branches of defendant's trees which fell upon plaintiff's lands constituted a "continuing intrusion" upon plaintiff's land, and therefore plaintiff's action for abatement of such intrusion was not time barred, even though not brought within three years after trees originally fell. West's Ann.Code Civ.Proc. § 338, subd. 2.

4. Adjoining Landowners ⇨5

Where a storm which blew over defendant's trees onto plaintiff's land, was at most, of somewhat more than average intensity, an implied finding was warranted that the falling of such trees was not within the category of an "act of God".

See publication Words and Phrases, for other judicial constructions and definitions of "Act of God".

5. Adjoining Landowners ⇨5

An owner of land has an absolute liability to remove portions of his trees which extend over and upon another's land and thereby constitute a nuisance.

Lounibos & Lounibos, Petaluma, for appellant.

Freitas, Allen, McCarthy & Bettini, San Rafael, for respondent.

DRAPER, Justice.

Defendant appeals from judgment directing abatement of a nuisance. A large number of eucalyptus trees stood on defendant's land along its boundary with the lands of plaintiff. In 1951 some of these trees were blown down, so that they lay across the boundary line. While the testimony is not detailed, photographs in evidence show that the roots of these trees remain upon the lands of defendant, with portions of them still embedded in the soil. After trial without jury, the court ordered defendant to remove the trees from plaintiff's land. Defendant appeals.

[1] Appellant first argues that the judgment is erroneous because there is no showing that any act or conduct of his caused the damage. It is true that there is neither showing nor finding of any negligent or wrongful act or omission of defendant proximately causing the falling of the trees. But no such showing is required. If the trees remained upright, with some of their branches extending over or upon plaintiff's land, they clearly would constitute a nuisance, which defendant could be required to abate. *Bonde v. Bishop*, 112 Cal.App.2d 1, 245 P.2d 617; see also *Grandona v. Lovdal*, 70 Cal. 161, 11 P. 623; *Parsons v. Luhr*, 205 Cal. 193, 270 P. 443. We are unable to distinguish the situation before us, where portions of the trunks as well as branches lie upon and over plaintiff's land. The evidence is clear that these portions of defendant's trees cover a substantial area of plaintiff's land, and appreciably restrict its use for the grazing purposes to which it is normally devoted. Thus they constitute a nuisance (Civ.Code, § 3479) and justify plaintiff's action for abatement thereof (Code Civ.Proc., § 731).

[2,3] Defendant contends that the action is barred by the statute of limitations. (Code Civ.Proc., § 338, subd. 2.) For purposes of application of the statute to actions for damages from or for the abatement of a nuisance, a distinction is drawn between those intrusions upon another's land which are "permanent" and those which are "continuing." *Tracey v. Ferrera*, 144 Cal.App. 2d 827, 301 P.2d 905. Construction of a building partly upon the land of another is a permanent encroachment thereon and the entire cause of action for past as well as prospective damages accrues when the trespass occurs. *Bertram v. Orlando*, 102 Cal. App.2d 506, 227 P.2d 894, 24 A.L.R.2d 899. But, "if the nuisance may be discontinued at any time" (*Phillips v. City of Pasadena*, 27 Cal.2d 104, 107, 162 P.2d 625) or when the encroachment "is abatable" (*Kafka v. Bozio*, 191 Cal. 746, 751, 218 P. 753, 29 A.L.R. 833), the nuisance is continuing and each repetition or continuance amounts to another wrong giving rise to a new cause of action. Roots and branches of trees have been held to fall in the "continuing" classification. *Stevens v. Moon*, 54 Cal.App. 737, 743, 202 P. 961. This action is not barred.

[4,5] Defendant finally contends that the falling of the trees was due to a wind-storm of such intensity as to amount to an "act of God," and thus free him of responsibility. As already pointed out, this action is not based upon a claim of negligence, but upon the absolute liability of an owner to remove portions of his trees which extend over and upon another's land so as to constitute a nuisance. In any event, defendant's contention raised only a question of fact. The evidence, which indicates that at most this storm was of somewhat more than average intensity, warrants the implied finding that the falling of the trees was not within the category of an act of God. *Conlin v. Coyne*, 19 Cal.App.2d 78, 86-87, 64 P.2d 1123.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

162 Cal.App.2d 449

Hazel NICKOLA, Petitioner and Appellant,
v.

Russell S. MUNRO, Director of the Department of Alcoholic Beverage Control of the State of California, Respondent.

Civ. 18014.

District Court of Appeal, First District,
Division 1, California.

July 31, 1958.

Hearing Denied Sept. 24, 1958.

Proceeding to revoke liquor license on ground that licensee permitted premises to become and remain a resort for sexual perverts. The Superior Court, County of San Mateo, Louis B. Dematteis, J., affirmed departmental decisions revoking license, and licensee appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained finding that patrons of tavern, to knowledge of licensee, committed acts that should have informed licensee that they were sex perverts and that such acts amounted to sexual perversion.

Affirmed.

1. Intoxicating Liquors ⇨106(2)

Before a liquor licensee can be disciplined under section providing for suspension or revocation of license if licensee permits premises to be used as resort for sexual perverts, licensee must have actual knowledge that his premises are being used for such purposes, or must know facts that to a reasonable person would indicate that such was the fact, and improper or illegal or immoral conduct must occur on premises. West's Ann.Bus. & Prof.Code, § 24200(e).

2. Intoxicating Liquors ⇨106(2)

Where one male seeks sexual gratification from another in a public tavern, he has committed acts of sexual perversion and demonstrated that he is a sex pervert within statute providing for suspension or revocation of liquor license where premises are permitted by licensee to be a resort for sex perverts, even though perverted acts in violation of Penal Code, such as sodomy

or oral copulation, are not committed. West's Ann.Bus. & Prof.Code, § 24200(b, e); West's Ann.Pen.Code, § 288a.

3. Intoxicating Liquors ⇨108(5)

In proceeding to revoke liquor license for permitting premises to become and remain a resort for sex perverts, evidence sustained finding that many patrons of tavern, to knowledge of licensee, committed acts that should have informed licensee that they were sex perverts and that acts amounted to sex perversion. West's Ann. Bus. & Prof.Code, § 24200(e); West's Ann.Pen.Code, § 288a.

4. Intoxicating Liquors ⇨15

Statute providing for suspension or revocation of liquor licenses where premises become a resort for sex perverts is constitutional in that continuance of license on such premises would be contrary to public welfare or morals. West's Ann.Pen. Code, § 24200(b, e).

5. Intoxicating Liquors ⇨108(5)

In proceeding for revocation of liquor license, evidence sustained finding that liquor licensee sold or furnished an alcoholic beverage to minor. West's Ann.Bus. & Prof.Code, § 25658(a, b).

6. Intoxicating Liquors ⇨106(1)

Mere fact that minor ordered nonalcoholic drink and was served cognac through a misunderstanding was no defense in proceeding to revoke liquor license on charge of violation of statute relating to sale and purchase of liquor by a minor. West's Ann.Bus. & Prof.Code, § 25658(a, b).

John A. Putkey, Daly City, for appellant.
Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Petitioner-appellant, Hazel Nickola, holds an on-sale general liquor license, and operates a tavern in San Mateo County. She was accused of violating section 25658(a)

and (b)¹, and section 24200(b) and (c)² of the Business and Professions Code.

Count one of the accusation charges that: "On or about February 18, 1956 and for some time prior thereto, on that portion of the premises upon which alcoholic beverages were sold the above-named licensee permitted the above-described licensed premises to become and remain a resort for sexual perverts."

Count two charges that on February 17, 1956, the licensee sold and furnished an alcoholic beverage to one Grant Dailey, a minor.

The Department of Alcoholic Beverage Control adopted the recommendations of its hearing officer, who had found the allegations of the accusation to be true, and recommended that the license involved be revoked for the violation set forth in Count One and that it be suspended for 15 days for the violation set forth in Count Two. The Appeals Board affirmed the Department decision. The Superior Court found that the departmental decisions were proper, that the evidence supported the findings, and entered its judgment denying the petition for a writ of mandate. The licensee appeals.

The facts as developed at the hearing amply support the challenged findings. The licensee has operated the tavern in question since 1939. Following the war, and particularly in 1954 and 1955 business declined, but in January of 1956 and until February 19th of that year there was a marked increase. In the latter part of November and early in December, 1955, representatives of the San Mateo County Sheriff's office warned the licensee that some of the activities taking place in the tavern should

be discontinued. Between January 7, 1956, and February 18th of that year various agents of the Department of Alcoholic Beverage Control and members of the sheriff's office, singly and in groups, visited the tavern on at least seven different occasions. On these visits there were between 100 and 250 patrons in the establishment, over 90 per cent male. Most of the patrons were young men in their twenties, and many of them were under 21. The licensee was present in the tavern during most of these visits. The representatives of the law testified that they observed the same people present on several different occasions. There was almost continuous dancing taking place during these visits. The vast majority of dancers were men dancing with other men in close and affectionate embrace. Many of the men had their arms wrapped around each other's waists, or shoulders, or buttocks. Many men were observed kissing or fondling or biting each other, or holding hands, and other men were seen sitting on the laps of their male companions and kissing and fondling each other. The few female patrons were dressed in mannish attire, and most of them danced with each other. Some of the male dancers, while dancing, wrapped their arms around the buttocks of their companions and vigorously rotated their pelvic areas, to the evident enjoyment of other patrons. Men were seen powdering their faces, talking in effeminate voices, and generally acting like over-affectionate females. Two of the agents were solicited to dance by a male patron who was called Ramona. On one occasion a Filipino male and a white male were observed standing with their arms encircling each other's shoulders.

1. § 25658(a) and (b) relate to the sale to and purchase of liquor by a minor.
2. § 24200 provides the grounds for suspension or revocation of licenses. Subdivision (b) is a general provision. Subdivision (c) was added to the section in 1955 (Stats. of 1955 p. 2230, Chap. 1217). It provides: "(c) Where the portion of the premises of the licensee upon which the activities permitted by the license are conducted are a resort for illegal pos-

sessors or users of narcotics, prostitutes, pimps, panders, or sexual perverts. In addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, pimps, panders, or sexual perverts."

The accusation here involved was filed March 13, 1956.

The white patron kissed the Filipino while the latter nestled his head into the shoulder of his companion. Frequent cases of men inserting their fingers into the buttocks areas of their companions were observed. One agent saw a young man place his hand in the crotch area of three men as the young man passed them. Another agent saw a male patron fondle the private parts of a Negro patron for a period of several seconds. Other evidence could be referred to, but the above summary is illustrative of the type of activity observed in the tavern over a rather lengthy period. Although the licensee and her employees were present while these various activities were openly going on, no one remonstrated or attempted to stop them.

The sheriff testified that the tavern had a general reputation in the county as a place where homosexuals were gathering for dancing and entertainment, and as a place catering to sexual perverts. This testimony was corroborated by various people who live near the tavern who testified that it had a reputation of being patronized by sexual deviates, or homosexuals, or being a hangout for degenerates and undesirables.

The defense did not contradict much of this evidence. A special officer employed by the tavern for five days in February, 1956, testified that when he was first employed the licensee told him that the place was "gay." While he denied seeing male patrons fondle each other, he saw men dancing with men in close embrace, and did see men biting each other. He was never told to throw such people out, and did not do so. Several employees of the tavern, while denying seeing any fondling of private parts, or kissing, admitted that men frequently danced with men in close embrace, and women with women, and admitted knowing that the establishment had a reputation for catering to homosexuals.

Sheriff Whitmore of San Mateo County conducted a raid on the tavern on February 19, 1956. Of the 225 patrons then present, 78 men, 10 women and 2 juveniles were

arrested. On the way to the jail the licensee was asked if she knew that her customers were sexual perverts. She replied that she did know that fact, and that she also knew that men were dancing with men, and women with women on the premises. Among the persons arrested were two men who had been convicted of violations of section 288a of the Penal Code—oral copulation—and one who had been convicted of being a lewd and dissolute person. There was no evidence, however, that the licensee knew of these convictions.

The licensee testified that men began to dance with men in her tavern about the first of 1956, and the real crowds began coming to the tavern shortly after February 1, 1956. She admitted telling the special officer hired by her that the place was "gay," but by this she simply meant that it was a hilarious, jovial crowd. She did not observe any kissing, or embracing of men by men and did not see anyone fondle the privates of another. She admitted she had heard rumors in January that her place was becoming a hangout for homosexuals.

On the second count, Grant Dailey, a high school student who was 19 years and 7 months of age, testified that he visited the premises on the evening of February 17, 1956, in the company of an adult friend. He had heard that the tavern was "an exceedingly unusual place" because "frequented by a certain type of people" who were "exceedingly informal" and who were "a certain type of intellectual." During the evening he was served a cognac by "mistake." His friend, an adult, ordered a drink, and he ordered a Calso. The waitress misunderstood and brought a cognac, or "At least I got a cognac." He stated "I received a cognac from the waitress," and that he paid for a cognac. He partly consumed the cognac. There were 6 or 8 people at his table and the waitress placed the tray with the drinks on the table and when they were passed around he got a cognac. He returned to the tavern on February 18th and was taken into custody when the place was raided in the early morning hours of February 19th.

The hearing officer, on this evidence, found that it was true that the licensee "permitted the above-described licensed premises to become and remain a resort for sexual perverts," determined that this was a violation of section 24200(e) of the Business and Professions Code and of Article XX, section 22, of the state Constitution, and recommended a revocation of the license. On the second count, he found that the licensee had furnished liquor to a minor, and recommended a 15-day suspension. This proposed decision was adopted by the Department of Alcoholic Beverage Control and affirmed by the Appeals Board. The Superior Court affirmed the recommendations, and denied the petition for a writ of mandate.

Section 24200(e) of the Business and Professions Code as enacted in 1955 provides that it is a ground of suspension or revocation of a license if the licensed premises are conducted as a "resort for illegal possessors or users of narcotics, prostitutes, pimps, panders, or sexual perverts." Article XX, § 22, of the Constitution empowers the Department of Alcoholic Control to suspend or revoke a license if it shall determine for good cause that the continuance of the license "would be contrary to public welfare or morals."

The main contentions of the licensee are that the finding that she permitted the tavern to be conducted as a "resort" for "sexual perverts" is unsupported by the evidence, and that if the evidence be interpreted as showing a violation of the section, then the section is unconstitutional.

The general problem involved is not new. It came before the Supreme Court in 1951, before section 24200(e) was enacted, in the case of *Stoumen v. Reilly*, 37 Cal.2d 713, 234 P.2d 969. There the licensee was charged with permitting the licensed premises to be used as a disorderly house for purposes injurious to public morals. The evidence showed that, to the knowledge of the licensee, the premises were patronized by persons of homosexual tendencies who used the tavern as a meeting place. There

was no evidence of any immoral or illegal or improper conduct on the premises. The court held that the then provisions of the law required that some improper conduct take place on the premises before a violation could be found, and that the then statute did not attempt to regulate mere patronage. The court pointed out that adult members of the public have a right to patronize a bar (37 Cal.2d at page 716, 234 P.2d at page 971) "so long as they are acting properly and are not committing illegal or immoral acts," and that the proprietor has no right to exclude such persons except for good cause. The court held that homosexuals had the legal right to patronize a bar and that (37 Cal.2d at page 716, 234 P.2d at page 971) "mere proof of patronage, without proof of the commission of illegal or immoral acts on the premises, or resort thereto for such purposes" was not sufficient to show a violation of the then law. The mere fact that the bar was reputed to be a meeting place for homosexuals, said the court, does not imply that the premises were being used for an improper purpose. The court also held that the suspension of the license could not be justified under Article XX, section 22 of the Constitution, which also necessarily required improper conduct as a basis for the suspension.

[1] Then in 1955 section 24200(e) was added to the Business and Professions Code. That section, as already pointed out, permits suspension or revocation if the licensee permits the premises to be used as a "resort for * * * sexual perverts." We think that, before a licensee can be disciplined under this section, the licensee must have actual knowledge that his premises are being used for such purposes, or must know facts that to a reasonable person would indicate that such was the fact. The usual and normal way that the tavern operator would or should know such fact is by the patrons engaging in such conduct on the premises that a reasonable man would know that the premises are being used as a "resort for * * * sexual perverts." We do not think that section

24200(e) was passed by the Legislature to repeal or to change the rule of the Stoumen case to the effect that improper or illegal or immoral conduct must occur on the premises before discipline of the licensee is permitted, but was passed with the Stoumen case in mind to clarify the rule of that case. This was the precise holding of this court in *Kershaw v. Department of Alcoholic Beverage Control*, 155 Cal.App.2d 544, 318 P.2d 494, 497, decided in 1957. There the licensee was charged with allowing the licensed premises to be used in violation of the disorderly house statute involved in the Stoumen case, and as a "resort for * * * sexual perverts" in violation of section 24200(e) of the Business and Professions Code. The evidence showed the commission of improper and immoral acts of the same general type as are here involved. This court stated (155 Cal.App.2d at page 548, 318 P.2d at page 496): "There is evidence that such conduct was readily observable by the licensee and her agents, that much of it was observed by them, and that they took no measures to prevent or curb it. The evidence also supports an inference that these were not mere isolated, occasional, unexpected, unpreventable and uncontrollable incidents."

With specific reference to section 24200 (e) this court stated that the evidence (155 Cal.App.2d at page 548, 318 P.2d at page 497) "warrants inferences that the place is customarily and regularly used by persons who are prone to and do engage in aberrant sexual conduct to the extent of qualifying as 'sex perverts' under the statute, and that they use this public place as a haunt or gathering place for mutual stimulation of their sexually aberrant urges and a place of assignation for the renewal of old and the making of new associations looking toward the consummation of those urges." This language aptly describes the situation here involved.

In the *Kershaw* opinion the court also held that the words "sex pervert" used in the section were not so vague, indefinite and uncertain as to render the section unenforceable. The court first quoted the

definition of "perversion" in Webster's New Collegiate Dictionary (2d ed.) as (155 Cal. App.2d at page 549, 318 P.2d at page 497): "A maladjustment of the sexual life, such that satisfaction is sought in aberrant ways," and then held that "Seeking and obtaining sexual satisfaction with a person of the same sex is considered an aberrant method by the great majority of people. * * * No more precise definition is necessary for the purposes of this case." The court quite properly refused to fix the outermost limits of the terms, stating (155 Cal.App.2d at page 549, 318 P.2d at page 498): "'Obscenity' and 'sex perverts' have a core of meaning to the average person. Homosexual activity, to the extent indicated by the patrons of the licensee's bar, is within the general meaning of sexual perversion. That there may be borderline situations about which opinion may be divided should not vitiate the statute. * * *

"It is not necessary, under the circumstances of this case, that we seek to ascertain and mark with precision the extreme outer limits of the meaning of the expression 'sex perverts'; and then to read the statute as if it prohibited any liquor licensee from suffering any portion of the premises to be patronized by sex perverts no matter how orderly their conduct or circumspect their behavior while in attendance. That is but one of a number of hypothetical situations that might be conjured up. 'The answer is that those situations are not here involved and the petitioner is limited in its attack to the factual situation now before this court. [Citing many cases.]'"

In reference to the argument that section 24200(e) was intended to overturn the principles announced in the Stoumen case, this court stated (155 Cal.App.2d at page 550, 318 P.2d at page 498): "We do not feel compelled to infer any such legislative intent. It would seem a fair inference to conclude that in making that amendment the Legislature acted in the light of and consistently with the rule of the Stoumen case, by inference excluding from the coverage of subdivision (e) the type of

conduct which the Supreme Court had declared harmless and not inimical to public welfare or morals. The court having so recently and with such clarity said it, why should the Legislature say it again?"

[2, 3] The Kershaw case is on all fours with the instant one. The contention that the words "sex pervert" must be limited to one who commits perverted acts in violation of the Penal Code, such as sodomy or oral copulation, is without merit. This argument was disposed of adversely to appellant in the Kershaw case. To what was there said we add that when one male, by acts of the type here involved, seeks sexual gratification from another in a public tavern, he has committed acts of sex perversion and demonstrated that he is a sex pervert. We do not find it necessary to discuss the psychological aspects of homosexuality or to determine the outermost limits of homosexual conduct that amounts to sex perversion. All that we have to determine in this case is that the conduct here involved supports the finding that many of the patrons of this tavern, to the knowledge of the licensee, committed acts that should have informed the licensee that they were sex perverts, and that the acts amounted to sex perversion. The fact, if it be a fact, that these acts may not have been punishable under the Penal Code is immaterial. Seeking sexual satisfaction in the manner here described in a public tavern offends the moral sense of the general public. There are many things that can be done in the privacy of the home which may not be illegal, but if done in a public tavern are directly offensive to public morals and decency, and demonstrate that the participants are sex perverts. The continuance of the license under such circumstances "would be contrary to public welfare or morals" as provided in our Constitution. That is the type of conduct here involved. Further than that we do not have to go.

[4] We hold that the statute as construed herein is constitutional and that the evidence is sufficient to support the finding that the licensee violated its terms.

[5, 6] It is equally clear that there is substantial evidence to support the finding that the licensee sold or furnished an alcoholic beverage to a minor. The mere fact that the minor testified he ordered Calso and was served a cognac through a misunderstanding is no defense. The witness placed the drink on the table and it was handed to the minor. This is sufficient. The pertinent statute specifies that it is an offense to cause an alcoholic beverage to be furnished or given to a minor. That statute was here violated.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



162 Cal.App.2d 465

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

John Ray BALL, Defendant and Appellant.
Cr. 3481.

District Court of Appeal, First District,
Division 2, California.

July 31, 1958.

Rehearing Denied Aug. 29, 1958.

Hearing Denied Sept. 24, 1958.

Defendant was convicted of illegal possession of marijuana. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., rendered judgment, and defendant appealed. The District Court of Appeal, Draper, J., held that search of defendant's home in quest of robbery suspect with defendant's consent or, at least, without objection from him was not unlawful, and that marijuana discovered in home as a result of such search was properly admitted in evidence in prosecution for illegal possession thereof over objection that such evidence had been obtained by unlawful search.

Judgment affirmed.

1. Arrest $\S$ 71

Legality of arrest is not necessarily determinative of the lawfulness of a search incident to such arrest.

2. Searches and Seizures $\S$ 3(1)

A search or seizure may be reasonable and justified and hence lawful in absence of a warrant, even though it is in no way related to an arrest.

3. Searches and Seizures $\S$ 3(1)

A valid search, justifiable without reference to an arrest, is not voided by the unlawfulness of arrest upon which such search does not depend.

4. Searches and Seizures $\S$ 7(27)

Where police officers, having reasonable cause to believe that robbery suspect might be there, searched defendant's home with his consent or, at least, without objection from him, such search was not unlawful and marijuana found in home as a result of search for robbery suspect was properly admitted in evidence in prosecution for illegal possession thereof, over objection that such evidence had been obtained by unlawful search.

5. Searches and Seizures $\S$ 3(1)

Where evidence was sufficient to support a finding that defendant had consented to search of home in which marijuana was found, on appeal from conviction for illegal possession of marijuana, trial court's statement that officers had right to search home, even though defendant had not consented to such search, should be construed as meaning that trial court found that defendant had consented to search but that, even if he had not, search was justified, in view of reasonable cause to believe that robbery suspect might be at defendant's home and defendant's failure to object to search.

6. Criminal Law $\S$ 394

Formal findings are not required in admitting evidence over objection that it was obtained by unlawful search.

7. Criminal Law $\S$ 254

Findings are to be construed to support a judgment.

8. Searches and Seizures $\S$ 7(10)

That search of home was continued or resumed by one of two officers a very few minutes after both officers and occupant had left home did not invalidate search.

9. Arrest $\S$ 66

Arrest made by city police officer outside his jurisdiction after discovery of marijuana in home of person arrested was not unlawful, since such arrest could have been made by any private citizen. West's Ann.Pen.Code, $\S$ 837.

Johnson, Thorne, Speed & Bamford, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

A jury found defendant guilty of possession of marijuana. He was admitted to probation on condition he serve 6 months in county jail. Defendant appeals, urging that the marijuana admitted in evidence was found in his home as the result of an illegal search.

An armed robbery occurred in San Jose at about 9:30 a. m. The police secured information leading them to believe that one Conrad Mallory was one of the three robbers and that Mallory might be at the home of defendant. At about 10:30 a. m., police officers of the San Jose and Campbell departments went to appellant's home in Campbell, seeking Mallory. A police sergeant from Campbell and one from San Jose knocked at appellant's door, and announced that they were policemen. Appellant opened the door. They asked "if Conrad Mallory was there and if we could come in and look around, at which time he replied yes, we could." The two officers entered the room. When appellant went back to bed, they asked him to arise and dress. They looked through the apartment and did not find Mallory. They, with appellant, went outside the house. About three minutes later, Sergeant Sims returned to the

house and saw a plastic bag protruding from a blanket on a shelf in an open cupboard. He looked at the bag, which proved to contain marijuana cigarettes. He went outside and arrested appellant for possession of narcotics. Appellant himself testified that he consented to the officers' search of his quarters, and that he had been with Mallory on the night preceding the holdup.

[1-3] Appellant argues that he was arrested when the officers asked him to get out of bed. He appears to contend that this "arrest" was unlawful and that this made the search illegal, even though it was otherwise reasonable and justified. But the very decision relied upon by appellant negatives his view. "[T]he legality of an arrest is not necessarily determinative of the lawfulness of a search incident thereto. * * * [S]ome searches may be reasonable and hence lawful in the absence of a warrant or an arrest * * *." *People v. Brown*, 45 Cal.2d 640, 643, 290 P.2d 528, 530. A search or seizure may be justified even though it is in no way related to an arrest. *People v. Roberts*, 47 Cal.2d 374, 303 P.2d 721; *People v. Wright*, 153 Cal.App.2d 35, 40, 313 P.2d 868. We know of no rule by which a valid search, justifiable without reference to an arrest, is voided by the unlawfulness of an arrest upon which the search does not depend. Thus it is unnecessary to pass upon the merits of appellant's contention that he was in fact arrested when the officers asked him to get out of bed.

[4] Appellant does not deny that the officers had reasonable cause for going to appellant's home in search of Mallory, the suspected robber. They entered the residence after informing appellant of their purpose, and at least without objection from him. Their discovery of the marijuana was but incidental to the search for Mallory. The case is strikingly similar to that considered in *Love v. United States*, 4 Cir., 170 F.2d 32, which has been cited with approval in California (*People v. Roberts*, supra, 47 Cal.2d 374, 303 P.2d 721; *People v. Ortiz*, 147 Cal.App.2d 248, 305

P.2d 145). In the *Love* case, officers went to defendant's home seeking one Foster, for whom they had a warrant of arrest. In searching for Foster in Love's home, which they had entered without objection, they found an illicit still, evidence of the existence of which was the basis of Love's conviction. The decision affirms denial of Love's motion to suppress the evidence concerning the still. The rule of that decision is fully applicable here, and sustains the validity of this search.

[5-7] Further, the search was justified by appellant's consent. *People v. Burke*, 47 Cal.2d 45, 301 P.2d 241; *People v. White*, 159 Cal.App.2d 586, 324 P.2d 296. Appellant apparently concedes that the evidence is sufficient to support a finding of consent to the search. He asserts, however, that no such finding was made. He quotes the statement of the trial judge: "Even though the defendant had not given permission to the officers to search the place, I think they still had a right to search it * * *," and argues that this amounts to a finding that no consent was given. In the light of appellant's own testimony, the construction he seeks to read into this language is difficult to sustain. It is much more reasonable to conclude that the trial court found that appellant had consented, but that even if he had not, the search was justified upon the grounds already discussed. While no formal findings are required in this situation, such construction is consistent with the established rule that findings are to be construed to support a judgment.

[8] The fact that the search was continued or resumed by one officer a very few minutes after the two officers and appellant had left the home does not invalidate it. *People v. Montes*, 146 Cal.App.2d 530, 533, 303 P.2d 1064.

[9] Appellant also contends that the arrest by Sergeant Sims was invalid because the officer was outside his jurisdiction, the City of San Jose. If this contention refers to the "arrest" inside the house, it is immaterial. As already pointed out, the invalidity of this claimed arrest, if any, could

not affect the lawfulness of the search. If the reference is to the arrest made after discovery of the marijuana, it is unavailing, since that arrest could have been made by any private citizen. Pen.Code, § 837.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



162 Cal.App.2d 279

Richard L. SCHUCH and Herbert P. Schuch, co-partners, dba under the name and style of **Vernon Refrigeration Company**, Plaintiffs and Appellants,

v.

NORTHRUP-JONES, INC., a California Corporation, dba under the name and style of **Coffee Club**, **El Royale Apartments**, a corporation, **John I**, **John II**, **John III**, **John IV**, **John V**, **John VI**, **John VII**, **John VIII**, **John IX**, **John X**; **John XI**, a corporation, **John XII**, a corporation, **John XIII**, a corporation, **John XIV**, a firm, association or partnership, **John XV**, a firm, association or partnership, **John XVI**, a firm, association or partnership, Defendants,

Charles H. Kaplan, **Lillian S. Kaplan**, **Justin G. Turner**, **Gertrude Turner**, **Maurice Turner** and **Rose Turner**, copartners doing business under the name and style of **Katy Building**, formerly also known as **El Royale Apartments**, Respondents.

Civ. 22626.

District Court of Appeal, Second District,
Division 3, California.

July 22, 1958.

Action in claim and delivery to recover possession of air conditioning and refrigeration equipment. The Superior Court of Los Angeles County, Clarence M. Hanson, J., rendered judgment in favor of defendants, and plaintiffs appealed. The District Court of Appeal, Patrosso, J. pro tem.,

held that under the circumstances the purported conditional sales agreement was void as to the buyer's creditors and its trustee in bankruptcy.

Affirmed.

1. Sales ⇨199

In determining when title to goods passes to buyer, actual intention of parties must govern where it can be ascertained, and no statutory presumption as to passing of title can arise except in those cases where the parties' intention is not manifest. West's Ann.Civ.Code, §§ 1738, 1739.

2. Sales ⇨218½

Evidence, disclosing that contracts of sale of air conditioning and cooling equipment contained no express reservation of title in sellers, and that substantial part of purchase price was paid by buyer at time and shortly following execution of contracts and that at the time of the execution of the contracts and the negotiations preceding them, there was no mention of a conditional sale and the reservation of title in the sellers, and that the sellers' purpose in requesting execution of conditional sales contract was to tie up the equipment for security, supported finding that sellers and buyer intended title to be passed on completion of installation of equipment in the buyer's premises.

3. Sales ⇨200(4)

The contractual requirement that seller of air conditioning and cooling equipment was to provide 90 day free service of equipment after completion of installation did not establish that equipment was not in a "deliverable state" at time of installation and delivery within statute providing that where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, where the service calls were made by the sellers from time to time to adjust the ducts and to regulate the distribution of air throughout the premises and equipment was not defective and

operated properly. West's Ann.Civ.Code, § 1739, rule 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Deliverable State".

4. Bankruptcy ⚡184(1)

Sales ⚡474(1)

Where title to air conditioning and cooling equipment passed prior to execution of conditional sales agreement, such agreement was void as to the buyer's creditors and the buyer's trustee in bankruptcy for thereby the parties purported to revest the title to the equipment in the sellers without immediate delivery or an actual and continued change of possession thereof, and such contract constituted only an agreement for security or a chattel mortgage and this was so even though the buyer's creditors may have had actual knowledge at the time of the attempted conditional sales agreement and even though such agreement might be regarded as a novation.

5. Chattel Mortgages ⚡155, 197(1)

An unrecorded chattel mortgage is nonetheless valid as to subsequent purchasers and encumbrancers with notice thereof and likewise as to general creditors not possessing a lien upon the mortgaged property by virtue of some legal proceedings or not armed with some process authorizing the seizure of the property.

6. Bankruptcy ⚡184(2)(8)

An unrecorded chattel mortgage executed by a bankrupt prior to bankruptcy is void as to trustee in bankruptcy even though it does not appear that there were creditors who had acquired a lien upon the mortgaged property by virtue of some legal proceeding or who had come armed with some process authorizing seizure of the property. Bankr.Act, § 70, subd. c. 11 U.S.C.A. § 110, sub. c.

7. Bankruptcy ⚡188(9)

A purported conditional sales contract which was merely a chattel mortgage which was void for want of acknowledgment and recordation did not constitute a valid lien against the buyer's bankrupt estate, and the bankruptcy trustee took title to the property

therein described free of any claim of lien of the sellers. Bankr.Act, § 70, sub. c, 11 U.S.C.A. § 110, sub. c.

8. Bankruptcy ⚡258

The bankruptcy court, before authorizing sale of bankrupt's property, is not obligated to determine the validity of any claim of ownership thereto or liens thereon, but is at liberty to authorize the sale subject to liens and encumbrancers thereon, leaving the validity of any such to be contested between the purchaser from the trustee and the third persons asserting the same.

9. Bankruptcy ⚡268

Where conditional sales contract was invalid as to bankruptcy trustee and the bankrupt estate of the buyer, the purchaser of the bankrupt's estate from the trustee took the title free of lien of conditional sales contract even though the trustees sold the assets subject to liens and encumbrances and even though such purchaser from the trustee had knowledge of the existence of such conditional sales contract.

10. Sales ⚡240

A bona fide purchaser may clothe his transferee with a good title regardless of whether the transferee had notice of adverse claims which were void or unenforceable against transferor.

11. Bankruptcy ⚡189

Trustee in bankruptcy takes property of bankrupt free and clear of any unrecorded liens thereon.

12. Bankruptcy ⚡262(3)

A bankruptcy trustee has no power to sell encumbered property free from liens without a special order directing such sale and only after notice and hearing.

13. Evidence ⚡471(25)

In action in claim and delivery to recover possession of air conditioning and refrigeration equipment, officer of corporate buyer, when asked if the installation of the equipment was acceptable to the buyer prior to the time that the buyer suspended business, could state the facts that occurred but could not state whether or not the installation was acceptable.

14. Bankruptcy ¶268

In action in claim and delivery to recover possession of air conditioning and refrigeration equipment, from purchasers of such equipment from the original buyer's bankruptcy trustee, objections to questions inquiring of officer of the original corporate buyer whether any creditor of the original corporate buyer or its trustee in bankruptcy ever instituted any proceedings to set aside conditional sales contract were properly sustained since the validity of the purported conditional sales contract was not dependent upon whether any creditor or the trustee instituted any proceedings to set it aside.

15. Sales ¶87(2)

In action in claim and delivery to recover possession of air conditioning and refrigeration equipment, where the contracts by their terms expressly required sellers to provide service for 90 days after completion of installation, the trial court properly sustained an objection to sellers' offer to prove that sellers did not consider the installation of equipment by them as complete until the 90 day period had expired.

Andrew J. Copp, Jr., and H. Dexter McKay, Los Angeles, for appellants.

Albert H. Allen, and Michael J. Fasman and Leonard S. Wolf, Beverly Hills, for respondents.

PATROSSO, Justice pro tem.

Plaintiffs instituted this action in claim and delivery to recover the possession of certain air conditioning and refrigeration equipment. Judgment was rendered in favor of the defendants and plaintiffs appeal.

The material facts are not in dispute. Respondents were the owners of a building in the city of Los Angeles and on July 29, 1954, they entered into a lease with Northrup-Jones, Inc.,¹ covering a portion of the ground floor space and part of the basement of said building for a term

of 10 years. The lessee took possession of the premises on September 14, 1954, and occupied the same until February 3, 1955. On September 14, 1954, appellants entered into a written agreement with Northrup-Jones wherein and whereby appellants agreed to sell to the latter and install in the leased premises, certain air conditioning and cooling equipment, in consideration of which Northrup-Jones agreed to pay appellants the sum of \$22,556.40, payable one-third upon the signing of the contract, one-third within 10 days after delivery of the equipment and the balance upon the completion of the work of installation, less 10 percent to be withheld pending the filing of the notice of completion. Pursuant to the terms of this contract, Northrup-Jones paid to appellants the following amounts: \$7,500 on September 17, 1954; \$7,537.50 on October 21, 1954, and \$5,518.90 on December 6, 1954, leaving a balance unpaid thereon of \$2,000.

On October 31, 1954, the same parties entered into a second contract whereby appellants agreed to furnish and install in the same premises certain described refrigeration equipment in consideration of which Northrup-Jones agreed to pay appellants the sum of \$9,787. On December 5, 1954, Northrup-Jones paid on account of its contract the sum of \$5,000, leaving a balance unpaid thereon, after certain adjustments, of \$4,837.39. Neither of these agreements contained a provision reserving title to the equipment in appellants.

The delivery of the equipment and the work of installing the same was completed by December 19, 1954, at which time the equipment was in working condition and it was used continuously thereafter by Northrup-Jones until February 3, 1955. On January 14, 1955, appellants requested payment of the balance due under the two contracts previously mentioned but were advised by Northrup-Jones that it was unable to make payment. Thereupon, as he testified, appellant Richard L. Schuch sug-

Northrup-Jones, Inc., and it is not concerned in this appeal.

1. Although originally named as a defendant, the action was later dismissed as to

gested the execution of a "conditional sales contract, whereby we could tie up the equipment installed for security, and which would allow me to sell the contract written to a bank and get my funds to be able to operate." Pursuant thereto a written agreement in the form of a conditional sales contract was prepared and executed by appellants as sellers and Northrup-Jones as purchaser. This agreement recites that the sellers sell and the purchaser purchase the equipment covered by and described in the two previous contracts for a total sum, including sales tax and installation, of \$32,416.40² "Less: Cash, receipt of which is hereby acknowledged" in the sum of \$25,579.01, plus a "time sales charge" of \$410.24. The amount shown as due thereunder, \$7,247.63, is provided to be paid in 12 monthly installments of \$604.07 on the first day of each month commencing February 1, 1955. The agreement recites that "Title to said property shall not pass to the Purchaser until all sums due under this contract are fully paid." There was no change of possession of the equipment at the time of or following the execution of this agreement, and the agreement was neither acknowledged nor recorded.

On February 3, 1955, Northrup-Jones filed a voluntary petition in bankruptcy and was thereafter adjudicated a bankrupt. The trustee in bankruptcy took possession of the assets of the bankrupt including the equipment here involved and thereafter sold the same and other property of the bankrupt to respondents, which sale was confirmed by the bankruptcy court on May 3, 1955. No proceedings were had in the bankruptcy court whereby appellants sought to reclaim the property in suit or wherein the validity of any right or claim of the appellants therein or thereto was adjudicated.

As reflected by its findings and conclusions of law, the trial court held that the

agreement of January 14, 1955, was not a valid conditional sales contract but was a chattel mortgage which was void as to the trustee in bankruptcy for want of acknowledgement and recordation, in consequence of which respondents acquired title to the property described therein, free of any claim of lien by the appellants.

The appellants contend (1) that the conditional sales agreement of January 14, 1955, was valid and (2) that if not, it was a chattel mortgage valid as between the parties and all persons having knowledge thereof, and that both the trustee in bankruptcy and respondents had such knowledge at the time the latter purchased the equipment from the trustee.

If, as the trial court found, the title to the equipment in question had passed to Northrup-Jones prior to January 14, 1955, the trial court was clearly right in concluding that the purported conditional sales agreement was void as to Northrup-Jones' creditors and its trustee in bankruptcy for thereby the parties purported to revest title to the property therein described in the appellants without immediate delivery or an actual and continued change of possession thereof. And this, notwithstanding the fact that any or all of the transferors' then creditors may have had actual knowledge thereof at the time of the attempted transfer. *Joseph Herspring Co. v. Jones*, 1921, 55 Cal.App. 620, 624, 203 P. 1038. And absent an actual change of possession the transfer must be deemed a mortgage. *Civil Code* § 2924; *Wehrle v. Marks*, 1933, 134 Cal.App. 141, 144, 25 P.2d 51; *Dennes v. Butts*, 9 Cir., 90 F.2d 522, 524.

Appellants, however, contend that the title to the equipment in question did not pass to Northrup-Jones prior to the time of the execution of the conditional sales contract. In support thereof appellants assert that the evidence is such as to compel the conclusion that the parties intended that

2. The evidence is to the effect that of this sum the market value of the equipment furnished by appellants under the previous sales contract which is described in the conditional sales contract

and here involved, was between \$18,000 and \$20,000, the balance of the contract price representing the charge for labor and materials used in installing the same.

the title to the property should remain in the appellants under the agreements pursuant to which it was sold and delivered to the purchaser Northrup-Jones until the price was fully paid and until the expiration of the 90-days' free service period following the completion of the installation, and that the trial court's finding to the contrary is erroneous.

[1] In determining when title to goods passes to the buyer the actual intention of the parties must govern where it can be ascertained, and no statutory presumption as to passing of title can arise except in those cases where the parties' intention is not manifest. *Goldberg v. Southwestern Metals Corp.*, 1949, 92 Cal.App.2d 819, 821, 208 P.2d 75, 76. As therein said:

"In the language of respondents' brief, 'the whole question as to when title or property in the goods passes is one of intention of the parties, * * * and the question is one of fact.' Section 1738 of the Civil Code provides that 'Where there is a contract to sell specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.' Section 1739 of the Civil Code, prescribing various 'Rules for ascertaining intention,' and relied upon by appellant, is called into operation 'Unless a different intention appears,' and then only."

[2] Contrary to appellants' contention, there was before the trial court substantial evidence which supports its finding that the parties intended title to the equipment to pass upon the completion of the installation of the equipment in the purchaser's premises. This consists of the following: (1) the contracts of sale contained no express reservation of title in the vendor; (2) a substantial part of the purchase price was paid by the purchaser at the time of and shortly following the execution of the contracts (*Woodbine v. Van Horn*, 1946, 29 Cal.2d 95, 107, 173 P.2d 17); (3) at the

time of the execution of the contracts and negotiations preceding the same, there was no mention of a conditional sale and the reservation of title in the appellants; (4) the testimony of appellant Richard L. Schuch previously mentioned to the effect that his purpose in requesting the execution of the conditional sales contract of February 14, 1955, was so that "we could tie up the equipment installed for security." It is hardly reasonable to believe that if, as appellants now contend, it was their original intention to retain title to the equipment and appellants so understood the effect of the previous contracts, they would at that late date be requesting the execution of an agreement whereunder title should be vested in the appellants by way of security for the payment of the balance of the purchase price.

[3] Civil Code section 1739 prescribes the rules for ascertaining the intention of the parties as to the time at which property in the goods is to pass to the buyer. Rule I thereof reads as follows: "Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery or both, be postponed." Appellants, in reliance upon this provision, contend that the equipment in suit was not in "deliverable state" on the date when the purported conditional sales contract was executed and hence that title did not then pass. This argument is rested upon the terms of the previous contracts which obligated the appellants to provide "ninety day free service" of the equipment after the installation thereof was completed. This fact, however, does not operate to establish that the equipment was not in a "deliverable state" at the time it was delivered and installed in the premises of the purchaser. The equipment was in actual operation for approximately a month before the conditional sales contract was executed. There is no claim or evidence to the effect that the equipment was defective or not properly operating. The only evidence

in the record is that service calls were made by the appellants from time to time to adjust the ducts and to regulate the distribution of air throughout the premises. Insofar as the record discloses, each item of equipment was a separate unit complete in and of itself and in a deliverable state. Nor is it without significance that, while appellants now contend that title to the equipment was not to pass to the purchaser until after the expiration of 90 days following the completion of its installation, appellants nonetheless billed the purchaser for the balance due upon both contracts on December 20, 1954, the day following completion of the installation.

Moreover, assuming without conceding, that the equipment was not in a "deliverable state" as appellants contend, it does not follow that because of this it is conclusively presumed, as appellants' argument implies, that title did not pass when the contracts were executed and the equipment delivered to the purchaser. This is clearly pointed out in *Woodbine v. Van Horn*, supra, 29 Cal.2d 95, 173 P.2d 17, 19. There, the plaintiff and defendant had entered into a contract whereby the latter agreed to sell to the former "all of the eucalyptus wood located on" certain described premises. The wood was to be cut in specific lengths and split by the defendant seller. The contract was silent as to when title to the wood should pass to the buyer. The trial court held that title passed upon the execution of the contract and there, as here, the seller contended that the goods were not in a "deliverable state" at the time of the execution of the contract by reason of the fact that the wood remained to be cut and split by the seller. In rejecting this contention the Supreme Court said (29 Cal.2d at page 107, 173 P.2d at page 24): "If, after the execution of an agreement, the seller is bound to do something to the specific goods, for the purpose of putting them into a deliverable state, a presumption arises that the parties did not intend that the property pass until such thing be done. Civ. Code, § 1739, Rule 2. Under the terms of the agreement, Van Horn, the seller, had

to cut the wood into certain lengths and split some of the wood before the goods would be in a deliverable state. *But this presumption is not conclusive if there is substantial evidence justifying a determination that the contract is one of sale.*

"The conduct of the parties frequently shows whether they regard the bargain as passing the property and the fact that part of the purchase price is paid by the buyer is evidence that the parties contemplate an immediate transference of the property in the goods. *Gianelli v. Globe etc. Co.*, supra, 48 Cal.App. [103] at page 106, 191 P. 720; see *Vold on Sales*, p. 131 and cases cited under note No. 31; 22 Cal.Jur. 955." (Emphasis added.)

[4] As an additional reason in support of their contention with respect to the validity of the conditional sales contract, appellants argue that this constituted a "novation" of the preceding sales contracts. If, however, as we have held, the trial court was warranted in finding that title to the equipment passed prior to the execution of the conditional sales agreement, the fact that the latter agreement might be regarded as a novation would not serve to make it a valid contract of conditional sale. Being an invalid attempted retransfer of title to the appellants, it was inoperative and void as against creditors of the transferor and the latter's trustee in bankruptcy because not accompanied by delivery and an immediate and continued change of possession of the equipment. Thus the trial court was warranted in concluding that the purported conditional sales contract constituted only an agreement for security or a chattel mortgage.

This brings us to appellants' second contention that, so considered, it was valid as against the trustee and the respondents although neither acknowledged or recorded, because (1) each had knowledge thereof prior to the sale of the equipment by the trustee and (2) the evidence fails to disclose that there were any creditors of the bankrupt who had a lien upon the equipment or were armed with process authorizing its seizure.

[5,6] It is undoubtedly true, as appellants contend, that an unrecorded mortgage is nonetheless valid as to subsequent purchasers and encumbrancers with notice thereof and likewise as to general creditors not possessing a lien upon the mortgaged property by virtue of some legal proceedings or not armed with some process authorizing the seizure of the property. *Lemon v. Wolff*, 1898, 121 Cal. 272, 275, 53 P. 801. From this premise appellants argue that, while it appears that the bankrupt had creditors, it does not appear that any of these possessed a lien upon the property or were armed with process authorizing its seizure, and conclude that the trustee took it subject to appellants' mortgage. They, however, overlook the fact that by virtue of the Bankruptcy Act (11 U.S.C.A. § 110, sub. c) a trustee in bankruptcy, as to all property of the bankrupt, is vested as of the date of bankruptcy with all the rights, remedies and powers of a creditor then holding a lien thereon, whether or not such a creditor exists. Thus an unrecorded chattel mortgage executed by a bankrupt prior to bankruptcy is void as to the trustee in bankruptcy even though it does not appear that there "were creditors who had acquired a lien upon the mortgaged property by virtue of some legal proceeding or who had come armed with some process authorizing seizure of the property". *Noyes v. Bank of Italy*, 1929, 206 Cal. 266, 269, 274 P. 68, 70; 6 Am.Jur. p. 1145, § 995.

[7] The Supreme Court of the United States has said that: "Claims which for want of record and for other reasons would not have been valid liens as against the claims of creditors of the bankrupt shall not be liens against his estate." *Moore v. Bay*, 1931, 284 U.S. 4, 52 S.Ct. 3, 4, 76 L.Ed. 133, 76 A.L.R. 1198. For a full discussion of this question see 6 American Jurisprudence page 1145, section 995. Thus it is clear that the purported conditional sales

contract being in effect but a chattel mortgage void for want of acknowledgement and recordation, did not constitute a valid lien against the bankrupt estate, and the trustee took title to the property therein described free of any claim of lien of appellants.

[8,9] Appellants further contend however, that despite the fact that the conditional sales contract was invalid as to the trustee and the bankrupt estate, the trustee, having sold the assets of the bankrupt's estate subject to liens and encumbrances thereon, the respondents, having knowledge of the existence thereof at the time they purchased the equipment in question from the trustee,³ took title thereto subject to the appellants' lien.

It is true that the trustee sold the equipment subject to liens and encumbrances thereon, but as previously indicated, no proceedings were had in the bankruptcy court whereby the validity of any claim of liens against the bankrupt property was litigated or determined. The bankruptcy court, before authorizing the sale of the bankrupt's property, was not obligated to determine the validity of any claim of ownership thereto or liens thereon. It was at liberty, as it did, to authorize the sale subject to liens and encumbrances thereon, leaving the validity of any such to be contested between the purchaser from the trustee and the third persons asserting the same (*Schmidt v. Ryon*, 3 Cir., 1922, 281 F. 790.) If the trustee's title to the assets of the bankrupt's estate is good as against unrecorded liens, upon principle it would seem to follow that the title of a purchaser from the trustee would not be encumbered thereby. While there appears to be a dearth of authority upon this precise point such authorities as we have been able to discover, with a single exception hereinafter noted, support this view. Thus in *Collier on Bank-*

3. While the trial court did not make a finding to the effect that the respondents had knowledge of appellants' claim to the equipment at the time they purchased the same from the trustee, there was

evidence to the effect that they had such knowledge and for the purposes of this discussion we shall assume that such was the case.

ruptcy (14th ed.) p. 1588, n. 14, we find this statement:

"Unless a sale of property free from all or specific liens and encumbrances is ordered and announced [see sec. 70.97, *supra*; sec. 70.99, *infra*], the trustee sells whatever interest the bankrupt had and subject to any liens or encumbrances *not invalidated under the Act*. See sec. 70.97, *supra*, nn. 14, 14a, and text accompanying." (Emphasis added.) To the same effect: *Hinton v. Williams*, 1915, 170 N.C. 115, 86 S.E. 994; *Lynch v. Johnson*, 1915, 170 N.C. 110, 86 S.E. 995.

In *General Motors Acceptance Corp. v. Raz Delivery*, 238 App.Div. 277, 264 N.Y.S. 412, it is held that where the bankrupt reacquired title to property through a sale thereof by the trustee in bankruptcy, he took title thereto free of unrecorded liens thereon created prior to bankruptcy by the bankrupt which were void as to the trustee in bankruptcy.

[10, 11] That the purchaser of property from a trustee in bankruptcy takes title thereto free of any liens or encumbrances thereon void as to the trustee, even though such purchaser may have knowledge thereof at the time he purchases the same, would appear to be but an application of the well-settled principle of law that a bona fide purchaser may clothe his transferee with a good title regardless of whether the transferee had notice of adverse claims which were void or unenforceable against the transferor. *March v. Pantaleo*, 1935, 4 Cal.2d 242, 244, 48 P.2d 29; *Jones v. Independent Title Co.*, 1944, 23 Cal.2d 859, 861, 147 P.2d 542. As we have seen, a trustee in bankruptcy with respect to the property of the bankrupt takes the same free and clear of any unrecorded liens thereon, and thus to all intents and purposes occupies the same position with respect thereto as a purchaser for value without notice of such unrecorded liens.

If, however, it were to be held, as appellants contend, that despite the fact that appellants' lien was invalid as to the trustee in bankruptcy, the respondents nonetheless

took title to the equipment subject to the lien because it was sold by the trustee subject to liens, it would avail the appellants naught. This is pointed out in *White v. Steinman*, 2 Cir., 1941, 120 F.2d 799, certiorari denied 314 U.S. 659, 62 S.Ct. 113, 86 L.Ed. 528. The facts there were these: One White sold to and installed certain equipment in the place of business of Manhattan Bakeries under a contract pursuant to which White retained title as conditional vendor. This contract was not recorded as required by the laws of New York in consequence of which it was void as to creditors of the purchaser. The purchaser, Manhattan Bakeries, defaulted in the payment of the balance of the purchase price of the equipment and was thereafter adjudicated a bankrupt. The receiver in bankruptcy took possession of the equipment and sold it to one Pearlstein subject to all liens and conditional sales contracts thereon. Pearlstein in turn transferred the property to a corporation which he caused to be organized under the name of Manhattan Bakeries. Later White, the conditional sales vendor, instituted an action in the State court against Pearlstein and his transferee to replevy the equipment. The trustee in bankruptcy thereupon filed a petition in the bankruptcy court and obtained an order staying White, Pearlstein, Manhattan Bakeries and the sheriff from taking any steps in connection with the disposition of the chattels and ordering them to show cause why the conditional sales agreement should not be held void and the lien preserved for the benefit of the bankrupt estate. Thereafter, following a hearing before the referee and the filing of his report the district court entered a decree that the conditional contract of sale was void as against the bankrupt estate but that the lien thereof was "preserved for the benefit of the estate as against" Pearlstein, the purchaser, and his transferee. In affirming the judgment upon appeal therefrom by White, the court speaking through Judge Augustus N. Hand said (120 F.2d at page 802): "If the conditional title of White was invalid as

against the bankrupt's creditors because of his failure to conform to the filing act, the interest in the chattels represented by his lien ought nevertheless to be preserved for the benefit of the bankrupt estate. White could not retain it because the irregular filing rendered it invalid against the bankrupt's creditors. The purchaser could not hold the chattels free from it because he had bought them subject to all liens."

And continuing at page 803 of 120 F.2d:

"In spite of the clear invalidity of White's lien as against the trustee in bankruptcy, he seeks to retain its value on the ground that the receiver parted with all interest in the res even though he did not sell the interest covered by White's lien. In other words White seeks to obtain a windfall regardless of the fact that the estate never received any equivalent for it by way of purchase money. This seems to us not only inequitable, but irrational, and we hold that such value as there was in the interest of White, had his lien been valid, remains an asset of the bankrupt estate. The provision of the order whereby the lien is preserved for the benefit of the estate as against Nathan Pearlstein, the purchaser from the receiver, and Manhattan Bakeries, Inc., is somewhat misleading but serves as a sufficient description of the interest retained by the trustee. Speaking accurately, what is preserved is not the lien of White but an interest in the chattels equivalent thereto which the bankruptcy court never sold."

[12] If, contrary to what has previously been said, the rule announced in the foregoing case is accepted as correct, it would seem that it would have been to the advantage of the bankrupt estate for the trustee to apply to the bankruptcy court for leave to sell the property free of liens⁴ in order to obtain the highest possible price, but the fact that he did not do so does not bear upon the instant litigation.

[13-15] Finally, appellants complain of the trial court's rulings with respect to the admissibility of evidence. The specific rulings are not precisely indicated in appellants' brief, but as we understand it they relate to the following: One of the officers of Northrup-Jones was asked if the installation of the equipment was acceptable to Northrup-Jones prior to the time that it suspended business. An objection to the question upon the ground, among others, that it called for the conclusion of the witness was sustained with the statement by the court: "You may state the facts that occurred, but don't say whether it is acceptable or not." The ruling was correct and it did not preclude evidence of any facts with reference to the manner of the operation of the equipment after its installation, with respect to which evidence was offered and received. The same witness was asked whether any creditor of Northrup-Jones or its trustee in bankruptcy ever instituted any proceedings to set aside the conditional sales contract in question. Objections to these questions were sustained and properly so. The validity of the purported conditional sales contract was not dependent upon whether any creditor or the trustee instituted any proceedings to set it aside. Moreover, it was admitted that no such proceedings were had. Complaint is also made of the court's action in sustaining an objection to appellants' offer to prove that appellants did not consider the installation of the equipment by them under a contract which called for 90 days' free service as complete until the 90-day period had expired and all services had been rendered which were required to place the same in first-class working condition. This ruling was also correct. The contracts by their terms expressly required appellants to provide service for 90 days after completion of the installation and obviously their obligation to do so was not discharged until the expiration of this period. The

4. A trustee has no power to sell encumbered property free from liens without a special order directing such sale, (8 C.J.S. Bankruptcy § 312, p. 1045) and

only after notice and hearing. (Id., p. 1043.) See to the same effect: 6 Am. Jur., p. 1274, sections 1214, 1215.

proffered testimony would have added nothing to what was apparent from a reading of the contracts.

The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



CITY LINCOLN-MERCURY COMPANY, a
California corporation, Plaintiff and
Respondent,
v.
L. V. LINDSEY, Defendant and Appellant.*
Civ. 22755.

District Court of Appeal, Second District,
 Division 3, California.

July 30, 1958.

Rehearing Granted Aug. 15, 1958.

Action by conditional seller of automobile to recover deficiency judgment against the conditional buyer wherein the buyer filed a cross-complaint to recover installments he had paid, plus the reasonable value of the automobile which he had traded in and wherein the seller filed a counterclaim. From a judgment of the Superior Court, Los Angeles County, Jerold E. Weil, J., in favor of plaintiff, defendant appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that the provisions of statute governing contracts for conditional sale of motor vehicles are mandatory, and since they are for benefit of the general public which the statute was designed to protect, buyer is not to be deemed to have been in pari delicto with seller and the latter's failure to comply with statute renders the contract unenforceable against him.

Reversed and directions.

* Opinion vacated 331 P.2d 759.

1. Sales ◯461

The purpose of statute requiring contracts for conditional sale of a motor vehicle to contain ten items relating to selling price is to protect purchasers of motor vehicles under conditional sale contracts against excessive charges by requiring full disclosure of all items of cost before contract is signed by the buyer. West's Ann. Civ.Code, § 2982(a).

2. Sales ◯461

The provisions of statute governing contracts for conditional sale of motor vehicles are mandatory, and since they are for benefit of the general public which the statute was designed to protect, buyer is not to be deemed to have been in pari delicto with seller and the latter's failure to comply with statute renders the contract unenforceable against him. West's Ann. Civ.Code, § 2982(a).

3. Contracts ◯105

A contract made in violation of a statute enacted for protection of the general public is void.

4. Contracts ◯138(4)

The doctrine of ratification has no application to a contract which violates an express mandate of a law that is designed to prevent fraudulent practices and such a contract is void in the sense that it cannot be enforced by holder or be asserted as a defense against liabilities which exist by reason of its invalidity.

5. Contracts ◯138(4)

Parties cannot breathe life into a contract which in content and manner of effective execution violates express statutory requirements.

6. Contracts ◯140

Where contract for conditional sale of automobile was void because it failed to contain items required by statute, fact that buyer received a copy of contract and entered into modification agreement with bank to which contract had been transferred by conditional seller, which modification expressly reaffirmed provisions that

were not modified, did not constitute ratification of the contract so as to preclude buyer from questioning its validity since the public policy as dictated in enactment of the statute forbade that its purpose could be thus defeated. West's Ann.Civ. Code, § 2982(a).

7. Contracts ⇨138(3)

A buyer of automobile who has made payments to seller under a conditional sales contract which does not conform with requirements of statute may recover such payments in action against seller but latter is entitled to an offset in amount representing the depreciation and value of the automobile occasioned by the use made of it by the buyer while in his possession, which right of offset is restricted to an amount not exceeding that which the buyer is entitled to recover. West's Ann.Civ. Code, § 2982(a).

8. Contracts ⇨138(3)

Where the total sum which buyer under conditional sale of automobile would have been entitled to recover against seller because contract was void was \$628.50, and depreciation in value of automobile attributable to buyer's use exceeded such sum, court properly refused to order seller to restore the consideration paid by the buyer. West's Ann.Civ.Code, § 2982(a).

9. Damages ⇨87(2)

Where there was no basis for a finding that party had suffered actual damage, an award of exemplary damages was properly denied.

Victor Bewley, Los Angeles, for appellant.

Delbridge, Hamblin & Linton, Pasadena, for respondent.

SHINN, Presiding Justice.

Plaintiff is an automobile dealer. On October 22, 1954, defendant went to plaintiff's new car agency in Pasadena and purchased a 1954 Lincoln coupe, giving as a trade-in a 1948 Packard sedan. The court found that Lindsey signed an uncompleted

purchase order and a conditional sales contract which was in blank, and took possession of the coupe. The court found that on October 26th plaintiff mailed Lindsey a copy of the contract, bearing the signatures of Lindsey and of plaintiff, by its president, which contained a complete statement of the terms of the sale. The evidence was sufficient to support these findings. In his testimony defendant did not deny that he had received a copy of the contract. On October 26th, plaintiff assigned the contract to a local bank, with recourse.

The contract provided that defendant was to pay a purchase price of \$6,047.38 for the Lincoln, less \$1,815, the agreed trade-in value of the Packard, plus a time price differential of \$770.12; the balance of \$5,002.50 was payable in 30 equal monthly installments of \$166.75, commencing November 22, 1954. After receiving a payment book from the bank, Lindsey asked that the payment date be changed to the 2nd of each month, beginning December 2nd; the bank consented, and on November 30th the bank and defendant entered into a written agreement, modifying the payment date in accordance with Lindsey's request, but specifically reaffirming the other provisions of the conditional sale contract.

Defendant paid the first two installments due under the contract and made a \$100 payment on account of the third installment. On March 19, 1955, he drove the coupe to plaintiff's place of business and left it and the car keys with an attendant. The bank reassigned the contract to plaintiff in April and the latter made minor repairs to the car, which cost \$61.89. Plaintiff resold the Lincoln for \$3,238 and sued Lindsey for a deficiency judgment; the complaint alleged that there was a balance due of \$1,352.20, principal and interest, plus attorney's fees. Plaintiff did not allege, nor is it contended, that the bank was a bona fide purchaser of the contract for value.

Lindsey answered and filed a cross-complaint wherein he sought to recover the installments he had paid to the bank and

the reasonable value of the Packard sedan, which he alleged to be \$2,000. His theory of recovery was that the conditional sale contract was void because it did not comply with Section 2982(a) of the Civil Code, and that he was entitled to recover the entire consideration he paid pursuant to the contract. Lindsey also sought an award of exemplary damages. The answer of plaintiff denied that the contract was void and alleged, as an affirmative defense, that defendant had waived his right to attack the validity of the contract. Plaintiff also filed a counterclaim for the reasonable rental value of the use of the Lincoln while it was in defendant's possession.

Trial was to the court, which made findings and awarded plaintiff a judgment in the sum of \$1,119.57, being the amount found to be due under the contract; also \$192.21 interest and \$116.74 as attorney's fees. The court also entered judgment in favor of plaintiff on the cross-complaint. Defendant appeals from the entire judgment.

We are of the opinion that the court erred in awarding plaintiff a judgment, but that it did not err in denying defendant relief on his cross-complaint.

Section 2982(a) of the Civil Code provides that every contract for the conditional sale of a motor vehicle shall be in writing and shall contain a complete statement of the terms of the contract. The statute also provides: "It [the contract] shall be signed by the buyer * * * and by the seller * * * and when so executed an exact copy thereof shall be delivered by the seller to the buyer at the time of its execution." There are ten items relating to the selling price of the vehicle which must be stated in the contract. It is unnecessary to set them forth since the form of contract contained none of them at the time Lindsey signed it.

[1,2] The obvious purpose of the statute is to protect purchasers of motor vehicles under conditional sale contracts against excessive charges by requiring full disclosure of all items of cost before the contract

is signed by the buyer. Lindsey signed the contract in blank, took possession of the car and drove it away. This was clearly a violation of the statute on the part of the seller. The provisions of Section 2982(a) are mandatory, and since they are for the benefit of the general public which the statute was designed to protect, the buyer is not to be deemed to have been in *pari delicto* with the seller and the latter's failure to comply with the statute renders the contract unenforceable against him. *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 203 P.2d 758.

Plaintiff argues that having received a copy of the contract Lindsey is presumed to have had knowledge of its terms, and that by entering into the modification agreement with the bank, which expressly reaffirmed the provisions that were not modified, Lindsey ratified the contract and may not be heard to question its validity. The court stated in its findings that by reason of the fact that Lindsey signed the proposed contract in blank it was unenforceable by plaintiff, but the basis of its decision was that the contract was validated by the subsequent modifying agreement between Lindsey and the bank. We are not in agreement with this conclusion.

[3,4] A contract made in violation of a statute enacted for the protection of the general public is void. *Levinson v. Boas*, 150 Cal. 185, 88 P. 825, 12 L.R.A.,N.S., 575. In *Levinson*, it was said (150 Cal. at page 193, 88 P. at page 828): "But it is to be noticed that every case from every court recognizes that when a statute has been made for the protection of the public, a contract in violation of its provisions is void. (Citations.)" See, also, *Smith v. Bach*, 183 Cal. 259, 191 P. 14; *Estrada v. Alvarez*, 38 Cal.2d 386, 240 P.2d 278. And it is settled that the doctrine of ratification has no application to a contract which violates an express mandate of a law that is designed to prevent fraudulent practices. *Walker v. Harbor Realty & Development Corp.*, 214 Cal. 46, 48, 3 P.2d 557; *Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal.2d 501, 524, 86 P.2d 102, and cases cited. Such a contract is void in the sense that it cannot be enforced by the hold-

er or be asserted as a defense against liabilities which exist by reason of its invalidity.

[5, 6] No question is presented as to the effect of the claimed ratification as between Lindsey and the bank. The contract came back into the hands of the wrongdoer after it had been disaffirmed by Lindsey. There was no new contract entered into, and nothing but an attempted ratification of the invalid one. It is not within the competency of the parties to breathe life into a contract which in content and manner of effective execution violates express statutory requirements. The public policy which dictated the enactment of Section 2982 of the Civil Code forbids that its purpose could be thus defeated.

[7] However, no error appears with respect to the denial of plaintiff's liability on the cross-complaint. A buyer who has made payments to the seller under a conditional sale contract which does not conform to the requirements of Civil Code, Section 2982(a), may recover such payments in an action against the seller. *Estrada v. Alvarez*, supra, 38 Cal.2d 386, 240 P.2d 278. But the latter is entitled to an offset in the amount representing the depreciation in the value of the car occasioned by the use made of it by the buyer while in his possession; the right of offset is restricted to an amount not exceeding that which the buyer is entitled to recover. *Williams v. Caruso Enterprises*, 140 Cal. App.2d Supp. 973, 295 P.2d 592.

[8] The installments paid by Lindsey on the contract amounted to \$433.50 and the court found the actual retail market value of his trade-in automobile to be \$195; the total sum which defendant would have been entitled to recover against plaintiff was therefore \$628.50. But the court also found that the depreciation in the value of the Lincoln that was attributable to defendant's use of the car exceeded \$628.50. This finding was supported by evidence that Lindsey had driven the Lincoln over 14,000 miles while it was in his possession and by the testimony of plaintiff's expert witness that, in his opinion, Lindsey's use of the car de-

preciated its original retail value by 30%. As plaintiff's offset was in excess of the sum which defendant was entitled to recover, the court did not err in refusing to order plaintiff to restore the consideration paid by Lindsey.

[9] Since there was no basis for a finding that Lindsey had suffered actual damage, an award of exemplary damages was properly denied. *Mother Cobb's Chicken Turnovers, Inc., v. Fox*, 10 Cal.2d 203, 73 P.2d 1185.

The judgment, insofar as it awards plaintiff a recovery against defendant, is reversed, and the court is directed to enter judgment that plaintiff recover nothing against defendant on its complaint, and that defendant recover nothing on his cross-complaint.

PARKER WOOD, J., and PATROSSO, J. pro tem., concur.



162 Cal.App.2d 350

Gwen ELLIOTT, Plaintiff and Respondent,
v.

Victor W. ELLIOTT, Defendant and
Appellant.
Civ. 22882.

District Court of Appeal, Second District,
Division 1, California.

July 28, 1958.

Rehearing Denied Aug. 18, 1958.

Hearing Denied Sept. 24, 1958.

Action by wife for divorce on ground of extreme cruelty wherein husband filed a cross-complaint seeking divorce on the same ground. From an interlocutory judgment of the Superior Court, Los Angeles County, Fred Miller, J., granting wife a divorce and awarding her custody of two children, the husband appealed. The District Court of Appeal, Lillie, J., held that where husband and wife were married in 1950 but because of the invalidity of mar-

riage due to wife's undissolved previous marriage, parties remarried in 1953, separate property of husband, which was greatly increased during putative marriage by his personal services, acquired a community nature, and court, with respect to community property, properly dealt with the matter as though there had been no impediment to such marriage and properly awarded wife one-half interest in such property upon divorce.

Judgment affirmed.

1. Appeal and Error ⚭1011(1)

Reviewing courts by constitutional mandate do not weigh conflicting evidence and they have no power to disturb a finding of trial judge if there is substantial evidence to support it.

2. Appeal and Error ⚭930(1)

Reviewing court must view evidence most strongly in favor of party prevailing in trial court.

3. Divorce ⚭129(16), 301

In action by wife for divorce on ground of extreme cruelty wherein husband filed cross-complaint for divorce on ground wife had abandoned him and had committed adultery, evidence sustained finding that wife was not guilty of adultery and that she was a proper person to have custody of children.

4. Infants ⚭19

While best interests of children are always of primary consideration, questions as to their custody are matters within sound discretion of trial judge who has an opportunity to observe parties and hear evidence, and his decision should not be disturbed by an appellate tribunal unless it clearly appears that there has been an abuse of discretion.

5. Divorce ⚭296

In action by wife for divorce on ground of extreme cruelty wherein husband filed a cross-complaint seeking divorce on same ground, trial court did not abuse its discretion in awarding to mother custody of

children, who were born in 1952 and 1953 and who had resided with their mother continuously since birth, when there was no evidence they had not received good care.

6. Divorce ⚭249(3)

Where husband and wife were married in 1950 but because of the invalidity of marriage due to wife's undissolved previous marriage parties remarried in 1953, separate property of husband, which was greatly increased during putative marriage by his personal services, acquired a community nature, and court, with respect to community property, properly dealt with the matter as though there had been no impediment to such marriage and properly awarded wife one-half interest in such property upon divorce.

7. Husband and Wife ⚭262(1)

There is a rebuttable presumption that property acquired on credit during marriage is community property, and in absence of evidence tending to prove that seller primarily relied upon purchaser's separate property in extending credit, trial court must find in accordance with the presumption.

8. Divorce ⚭249(3)

Where effect of execution of note by third person in favor of husband was to reduce value of community property, wife, upon divorce, was entitled to a one-half interest in the note.

9. Divorce ⚭235

Where husband had earnings and income from various sources and his wife was not in a position to secure gainful employment because of a health situation as well as requirements of children, award of \$200 per month to wife as alimony did not constitute an abuse of discretion. West's Ann.Civ.Code, § 139.

10. Divorce ⚭240(2)

In awarding alimony, court can properly consider not only husband's actual earnings, but also his ability to earn money. West's Ann.Civ.Code, § 139.

Wise, Kilpatrick & Pulley, Loyal C. Pulley, Long Beach, for appellant.

Raymond C. Simpson, Frederik W. Chel, Long Beach, for respondent.

LILLIE, Justice.

This appeal is from an interlocutory judgment granting a divorce on the ground of extreme cruelty to the wife and a divorce on the same ground to the husband on his cross-complaint. Custody of the two minor children was awarded to the wife and the husband was ordered to pay \$200 per month as alimony and \$80 per month for the support of each child. A partnership interest in a business known as Shrimp Processors was held to be community property in which the wife was awarded a one-half interest. She was also awarded the sum of \$7,509.78 representing one-half of the community interest (accretion) in MacLean's Frozen Pies, Inc., and \$1,438.88, representing one-half of the accretion to the husband's separate property, in the Royal Ice Cream Company. The judgment also gave her a one-half interest in an \$18,000 promissory note owned by the husband, and in certain other property.

Mr. and Mrs. Elliott participated in a marriage ceremony at Las Vegas, Nevada, on December 8, 1950. Because of the invalidity of this marriage due to the wife's undissolved previous marriage, the parties remarried at Long Beach, California, on April 7, 1953. Plaintiff and defendant lived together, cohabited as spouses and conducted themselves as man and wife from and after December 8, 1950, to the date of the remarriage on April 7, 1953.

Separation of the parties occurred on November 18, 1953, some seven months after their remarriage on April 7, 1953, and was preceded by an altercation. Although the parties did not thereafter reside in the same home, the husband continued to visit the wife every week or so and have intercourse with her until after the filing of her complaint for divorce.

The trial court found that both parties had been guilty of extreme cruelty. In

respect to the allegations in the husband's cross-complaint that the wife had abandoned him and had committed adultery, the trial judge found these charges not true.

The greater part of appellant's brief is concerned with the contention that the several findings of the trial court relating to the grounds for the wife's divorce and the status of certain property are not warranted by the evidence. To this end certain partisan references to the record have been made. This is particularly true in respect to the charge that the court erred in failing to find that the plaintiff and corespondent were guilty of adultery. It is quite true that the record reflects certain associations between Mrs. Elliott and the corespondent which might lead to a suspicion of improper intimacies, but it is also true that the wife offered evidence tending to negative such inferences. This, then, merely presents the usual picture of conflicting evidence which the trial court was called upon to evaluate.

[1] The rule of appellate review in such cases had been reiterated countless times. The court in the divorce case of *Gideon v. Gideon*, 153 Cal.App.2d 541, at page 543, 314 P.2d 1011, at page 1012, said: "These courts by constitutional mandate do not weigh conflicting evidence. The credit to be given to the testimony of any witness is solely for the trial tribunal. And this court has no power to disturb a finding of a trial judge if there is substantial evidence to support it. This rule applies to every kind of trial, criminal and civil." One quite obvious reason for the rule is that the trial judge is possessed of the opportunity to see and observe the witnesses and thus able to determine their credibility, whereas an appellate court has before it nothing more than a cold, printed record.

[2, 3] Viewing the evidence "most strongly favoring the respondent," as this court is compelled to do under the rule stated in *Stewart v. Stewart*, 130 Cal.App. 2d 186, 195, 278 P.2d 441, 446, the findings of the trial court must be deemed supported by substantial evidence. For example, in

reference to several of the incidents claimed by appellant to establish the charge of adultery, plaintiff wife's evidence showed she and the correspondent had gone dining and dancing together some two years after the separation, in some cases with other friends. On one occasion when the wife and the correspondent were deemed to have been together, according to the husband, there was evidence that the correspondent was in Utah visiting his daughter and therefore could not have been with Mrs. Elliott. Both the correspondent and Mrs. Elliott denied any wrongdoing. From such evidence in the record it can readily be ascertained that there was a direct and material conflict which the trial court resolved in favor of the wife.

The same thing is true in respect to appellant's contention that the trial court erred in finding that plaintiff was a proper person to have custody of the children. This contention is based upon the assumption that the evidence established improper conduct on the part of Mrs. Elliott—a view which cannot be accepted on this appeal since there is substantial evidence supporting the contrary finding of the trial court.

[4] While it is true that the best interests of the children are always of primary consideration, questions as to their custody "are matters within the sound discretion of the trial judge who has an opportunity to observe the parties and hear the evidence, and his decision should not be disturbed by an appellate tribunal unless it clearly appears that there has been an abuse of discretion." *Ward v. Ward*, 150 Cal. App.2d 438, 442, 309 P.2d 965, 968.

[5] The two young children whose custody is here involved, born February 1, 1952, and January 9, 1953, had resided with their mother continuously since birth and there was no evidence that they had not received good care. The trial court's decision granting custody to Mrs. Elliott cannot be deemed an abuse of discretion nor reversible error on any theory.

[6] Appellant's remaining contentions relate to findings concerning community

property and its division. The trial court was here confronted with a somewhat complicated financial situation involving substantial accretion to separate property owned by Mr. Elliott at the time of the first or putative marriage at Las Vegas in 1950. This separate property came to him largely as a result of a family arrangement, but was greatly increased during the putative marriage by Mr. Elliott's personal services, and thus acquired a community nature.

In respect to the various companies involved, it clearly appears from the record that the trial court gave due consideration to the evidence presented and arrived at a conclusion adequately supported by substantial evidence. The rule of appellate review hereinbefore referred to must again be applied with the result that this court will not disturb the findings. This opinion might well end with the general application of this rule; nevertheless, the specific contentions of appellant will be noted.

The trial court found that the parties had "in good faith, lived together and cohabited as spouses and conducted themselves as man and wife from December 8, 1950," the date of the putative Nevada marriage, to the date of the remarriage on April 7, 1953. In respect to the community property of the parties, the court then dealt with the matter as though there had been no impediment to such marriage. This was proper in view of authorities such as *Lazzarevich v. Lazzarevich*, 88 Cal.App.2d 708, 714, 200 P.2d 49, 53, holding that in such cases "a de facto spouse is entitled to the rights accorded a lawful spouse in the property acquired during the de facto marriage."

Shrimp Processors Company was a partnership organized in 1951 after the first or putative marriage; Mr. Elliott's father furnishing the necessary money for this venture with an agreement to be later reimbursed out of profits of the business. As to appellant's one-third interest, a certified public accountant confirmed the fact that the value of this interest was derived from his accumulated commissions converted into

a capital investment. In other words, by reason of appellant's services during the marriage, this interest had been built up and created and thus became community property. The trial court's finding to this effect is adequately supported by the evidence.

Closely related to the Shrimp Processors matter is the A & E Beverage Company, a partnership formed in 1955 in which appellant owned a one-half interest. This enterprise appears to have been started with \$25,000 capital borrowed from the Shrimp Processors Company. Mr. Elliott again invested nothing more than his time and effort; he testified that he generally worked six or seven days per week. It was claimed by appellant that both Shrimp Processors and A & E Beverage Company interests were acquired by credit advanced on reliance of his separate property and therefore were separate property. This theory quite evidently was not accepted by the trial court and the finding to the effect that these were community property interests is well supported by substantial evidence and legitimate inferences therefrom.

[7] Moreover, as stated in *Gudelj v. Gudelj*, 41 Cal.2d 202, 210, 259 P.2d 656, 661, "There is a rebuttable presumption that property acquired on credit during marriage is community property. * * * In the absence of evidence tending to prove that the seller primarily relied upon the purchaser's separate property in extending credit, the trial court must find in accordance with the presumption."

Appellant's interest in these and other enterprises formed a part of certain complicated family dealings and interlocking devices, the precise nature of which was difficult of ascertainment. For example, there was evidence which would support the inference that one company may have been fattened at the expense of another by reason of unusual discounts or otherwise, the net result of which would be a reduction of the community interest.

Also to be noted is appellant's claim that the trial court ignored alleged losses in

respect to certain other enterprises known as Signal Distributing Company, Royal Ice Cream Company and Chapman-Hill Ice Cream Company, which losses would tend to materially reduce the profits earned by MacLean's Frozen Pies.

Again, these matters involve questions of fact. Mr. Elliott was sales manager for MacLean's Frozen Pies. There is evidence that in December, 1952, his one-third interest in this company was worth \$6,507.09, and that in December, 1955, this same interest was valued at \$22,798.04. The trial court allowed appellant a 6% return on his separate property figure of \$6,507.09, and found the balance of his interest to be community property.

There is no indication that the trial court ignored any of the contentions made. On the contrary, it had before it, and duly considered all the various conflicting items of evidence pertaining to such matters and after a full presentation by briefs and otherwise, took the entire matter under submission and arrived at the conclusions evidenced by the findings and judgment. In so doing, the trial court was performing its normal and proper function of weighing the evidence and determining the credibility of the witnesses. From the record it is obvious that the conclusions reached by the trial judge are adequately supported by the evidence.

[8] What has already been said applies with equal force to other property items such as the award to the wife of a one-half interest in an \$18,000 promissory note executed by Ralph J. Cover in favor of the appellant husband. This, once more, represents one of the family transactions connected with MacLean's Frozen Pies and Shrimp Processors, the net effect of which was to reduce the value of the community property estate. The trial court was entitled to draw reasonable inferences from the evidence adverse to the appellant's contentions and did so. It was certainly in a better position to determine this abstruse controversy than any appellate court could possibly be.

[9,10] Nor is there merit to the contention that the court erred in awarding alimony to the plaintiff. The broad latitude of authority and discretion in such matters is recognized in both statutory and case law. Under section 139 of the Civil Code the trial court is empowered "to make such suitable allowance for support and maintenance * * * as the court may deem just." In view of the evidence as to Mr. Elliott's earnings and income from various sources, and the necessities of the wife who was not in a position to secure gainful employment because of a health situation, as well as the requirements of the children, the award of \$200 per month as alimony cannot be deemed to constitute an abuse of

discretion. Apropos this matter, it may be noted that the trial court could properly consider not only the husband's actual earnings, but also his ability to earn money. *Webber v. Webber*, 33 Cal.2d 153, 160, 199 P.2d 934.

The record discloses abundant evidentiary support for the findings and judgment of the trial court, that appellant has been accorded a full and fair trial of all pertinent issues and that no reversible error has been committed.

The judgment is affirmed.

WHITE, P. J., and FOUNTAIN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

50 Cal.2d 664

Eloyce DESHOTEL, Plaintiff and
Appellant,

v.

The ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY (a Corporation),
and William M. Floyd, Defendants and Re-
spondents.

S. F. 19912.

Supreme Court of California.

In Bank.

July 31, 1958.

Action by wife against railroad, taxicab company, train engineer, and cab driver, for loss of consortium allegedly resulting from negligence of such persons. The Superior Court, Alameda County, A. J. Woolsey, J., sustained the general demurrer by railroad and engineer without leave to amend, and the wife appealed. The Supreme Court, Gibson, C. J., held that wife, whose husband was injured in a train-taxicab collision as result of alleged negligence of railroad company, taxicab company, train engineer and taxicab driver, could not maintain an action against them for loss of consortium.

Judgment affirmed.

Carter, J., dissented.

Opinion, 319 P.2d 357, vacated.

Damages 37

Wife, whose husband was injured in a train-taxicab collision as result of alleged negligence of railroad company, taxicab company, train engineer and taxicab driver, could not maintain an action against them for loss of consortium.

James A. Myers and D. W. Brobst, Oakland, for appellant.

Robert W. Walker, Los Angeles, William J. Hayes; Hardin, Fletcher, Cook &

Hayes, Oakland, and Cyril Viadro, San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiff's husband was severely injured when a taxicab in which he was a passenger collided with a train. He sued the railway company, the taxicab company, the train engineer, and the cab driver, obtaining a judgment in the amount of \$290,000, which was affirmed on appeal (*Deshotel v. Atchison, Topeka, & Santa Fe Ry. Co.*, 144 Cal.App.2d 224, 300 P.2d 910). During the pendency of that action plaintiff brought this suit against the same defendants. She alleged that as a result of their negligence her husband was injured in such a manner that she "has been denied his care, protection, consideration, companionship, aid, and society" and that "by reason of the loss of the consortium of her husband" she has been damaged in the sum of \$100,000. A general demurrer by the railway company and the engineer was sustained without leave to amend, and plaintiff has appealed from the ensuing judgment.¹

The sole question presented is whether a wife whose husband has been injured as the result of the negligence of a third person may maintain an action for loss of "consortium," a term which is used in this opinion to refer to the noneconomic aspects of the marriage relation, including conjugal society, comfort, affection, and companionship. The question is one of first impression in this state, but it has been answered by the courts in many other jurisdictions. In England and in the vast majority of American jurisdictions the wife has been denied the right to recover for loss of consortium. *Best v. Samuel Fox & Co., Ltd.* [Eng.], (1952) A.C. 716; *Filice v. United States*, 9 Cir., 1954, 217 F.2d 515, 517; *Josewski v. Midland Constructors, Inc.*, D.C.1953, 117 F.Supp. 681; *Jeune v. Del E. Webb Const. Co.*, 1954, 77 Ariz. 226,

disclose the status of the case with respect to them.

1. The taxicab company and its driver are not mentioned in the judgment or the notice of appeal, and the record does not

269 P.2d 723; *Franzen v. Zimmerman*, 1953, 127 Colo. 381, 256 P.2d 897; *Giggey v. Gallagher Transp. Co.*, 1937, 101 Colo. 258, 72 P.2d 1100; *Ripley v. Ewell*, Fla. 1952, 61 So.2d 420; *Brown v. Kistleman*, 1912, 177 Ind. 692, 98 N.E. 631, 40 L.R.A., N.S., 236; *Cravens v. Louisville & N. R. Co.*, 1922, 195 Ky. 257, 242 S.W. 628; *Coastal Tank Lines v. Canoles*, 1955, 207 Md. 37, 113 A.2d 82, 86-88; *Emerson v. Taylor*, 1918, 133 Md. 192, 104 A. 538, 5 A.L.R. 1045; *Hartman v. Cold Spring Granite Co.*, 1956, 247 Minn. 515, 77 N.W.2d 651; *Stout v. Kansas City Terminal Ry. Co.*, 1913, 172 Mo.App. 113, 157 S.W. 1019; *Bernhardt v. Perry*, 1918, 276 Mo. 612, 208 S.W. 462, 13 A.L.R. 1320; *Larocca v. American Chain & Cable Co.*, App.Div. 1952, 23 N.J.Super. 195, 92 A.2d 811, 812-814; *Tobiassen v. Polley*, 1921, 96 N.J.L. 66, 114 A. 153; *Don v. Benjamin M. Knapp*, 1953, 281 App.Div. 893, 119 N.Y.S. 2d 801, affirmed 306 N.Y. 675, 117 N.E. 2d 128; *Smith v. Nicholas Bldg. Co.*, 1915, 93 Ohio St. 101, 112 N.E. 204, L.R.A. 1916E, 700; *Nelson v. A. M. Lockett & Co.*, 1952, 206 Okl. 334, 243 P.2d 719; *Howard v. Verdigris Valley Electric Co-operative, Inc.*, 1949, 201 Okl. 504, 207 P. 2d 784; *Garrett v. Reno Oil Co.*, Tex.Civ. App.1954, 271 S.W.2d 764; *Nickel v. Hardware Mutual Cas. Co.*, 1955, 269 Wis. 647, 70 N.W.2d 205. As noted in a large number of these cases, the withholding of such a right from the wife at common law was due to the fact that she was regarded as not having suffered a compensable injury rather than to her disqualification from suing in her own name, which was removed by passage of Married Women's Acts.

With the exception of a North Carolina decision, subsequently overruled (*Hipp v. E. I. Dupont de Nemours & Co.*, 182 N.C. 9, 108 S.E. 318, 18 A.L.R. 873, overruled by *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307, 37 A.L.R. 889), the right of the wife to recover for loss of

consortium caused by negligence was not recognized until 1950, when the case of *Hitaffer v. Argonne Co.*, 87 U.S.App.D.C. 57, 183 F.2d 811, 23 A.L.R.2d 1366, held she was entitled to relief.² A few decisions have followed the *Hitaffer* case. *Cooney v. Moomaw*, D.C., 109 F.Supp. 448; *Missouri Pacific Transp. Co. v. Miller*, 227 Ark. 351, 299 S.W.2d 41, 45 et seq.; *Brown v. Georgia-Tennessee Coaches*, 88 Ga.App. 519, 77 S.E.2d 24; *Acuff v. Schmit*, 248 Iowa 272, 78 N.W.2d 480. However, most courts which have considered the problem since 1950 have followed the majority rule and have refused to permit the wife to maintain an action of this type.

In a number of jurisdictions where the wife has not been allowed recovery, the husband is given such a right if his wife is negligently injured. See *Prosser on Torts* (2d ed. 1955) 701 et seq.; *Rest.*, *Torts*, § 693; 133 A.L.R. 1156, 1157; 23 A.L.R.2d 1378, 1380. Plaintiff argues, in effect, that the courts which withhold relief from the wife have relied upon medieval concepts of the marriage relation, that in modern times the marital status of the wife has changed, placing her in a position equal to that of her husband, and that there is no longer any reason to refuse her the kind of redress which he may obtain. Some jurisdictions, however, have denied recovery to the husband as well as to the wife. *Lockwood v. Wilson H. Lee Co.*, 144 Conn. 155, 128 A.2d 330, 331; *Bolger v. Boston Elevated Ry. Co.*, 205 Mass. 420, 91 N.E. 389; *Blair v. Seitner Dry Goods Co.*, 184 Mich. 304, 151 N.W. 724, 726-727, L.R.A. 1915D, 524; *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611, 613. The law in California with respect to the right of the husband is not settled. In *Meek v. Pacific Electric Ry. Co.*, 175 Cal. 53, 56, 164 P. 1117, 1118, it was said that damages could not be obtained by a husband for the loss of his wife's "society, or what is termed the *consortium*." This

2. The *Hitaffer* case was subsequently overruled on another point. *Smither &*

Co., Inc., v. Coles, 100 U.S.App.D.C. 68, 242 F.2d 220.

statement was rejected as "inadvertent dictum" in *Gist v. French*, 136 Cal.App.2d 247, 288 P.2d 1003, which held that a husband whose wife had been negligently injured could recover not only for the loss of services but also for the loss of cohabitation and society. We agree that the quoted statement in the *Meek* case is dictum, but a statement in the *Gist* case which indicates that the wife may recover for loss of consortium resulting from a negligent injury to her husband is also dictum (see 136 Cal.App.2d 247, 257, 288 P.2d 1003, 1009), and, for the reasons hereafter given, the language in the *Gist* case relating to the wife's rights is disapproved.

It is clear that the granting of relief to the wife for loss of consortium caused by negligent injury to her husband would constitute an extension of common law liability, and the courts are justifiably reluctant to depart from established limitations on recovery. Obviously, such an extension would also involve problems of policy or procedure. A judgment obtained by a husband after he is injured by a third person might include compensation for any impairment of his ability to participate in a normal married life, and, if his wife is allowed redress for loss of consortium in a separate action, there would be danger of double recovery. Any harm she sustains occurs only indirectly as a consequence of the defendant's wrong to the husband, and the measurement of damage for the loss of such things as companionship and society would involve conjecture since their value would be hard to fix in terms of money. Moreover, if a cause of action in the wife were recognized on the basis of the intimate relationship existing between her and her husband, other persons having a close relationship to the one injured, such as a child or parent, would likely seek to enforce similar claims, and the courts would be faced with the perplexing task of determining where to draw the line with respect to which claims should be upheld. Another difficulty is that judicial, as distinguished from statutory, recognition of the wife's cause of action

would operate retroactively and might work hardship upon persons who, in reliance upon the common law rule, have made settlement with the husband, believing that the wife could not sue.

In our view the Legislature rather than the courts can best deal with these problems. For example, the Legislature, if it found this type of suit to be desirable, could define the extent of the liability, designate who may maintain the action, and provide safeguards against the danger of double recovery, such as a requirement that there be a joinder of the person directly injured and the one consequentially harmed. The Legislature could also specify whether the proceeds should belong to the plaintiff alone or to both spouses. (Cf. Civ.Code, § 163.5, declaring that damages awarded a married person for personal injuries are the separate property of such person.) Some of the objections noted above with respect to an action by the wife apply with equal force to one brought by the husband, but a husband's claim is not before us, and we need not determine whether such a claim should be allowed. Clarification by statute as to both the husband and the wife would, of course, be preferable to piecemeal determination of the problems by judicial decision.

The cases of *Work v. Campbell*, 164 Cal. 343, 128 P. 943, 43 L.R.A.,N.S., 581, and *Follansbee v. Benzenberg*, 122 Cal.App.2d 466, 265 P.2d 183, 42 A.L.R.2d 832, are not inconsistent with our conclusions. In the *Work* case the defendant, with the intention of causing the plaintiff and her husband to separate, knowingly made false statements to the wife about the husband, inducing her to treat him harshly, with the result that he left her and she was permanently deprived of his society, affection, and support. The case thus did not concern negligent injury to the husband with indirect damage to the wife but, instead, involved conduct which was actionable because it was designed to inflict direct harm upon her. The *Follansbee* case is also readily distinguishable. The recovery there permitted was not for loss of consortium but for medical expenses which the plaintiff wife had paid when her

husband was negligently injured. The wife was obligated by statute to pay such expenses, and the relief granted was for a measurable economic loss that she was required to bear as a result of the defendant's wrong.

Nor are the decisions in point which hold that in an action for wrongful death loss of the decedent's society, comfort, and protection may be considered as a factor in determining damages. *Blackwell v. American Film Co.*, 189 Cal. 689, 700-701, 209 P. 999; *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20, 38-39; *Newton v. Thomas*, 137 Cal.App.2d 748, 769-770, 291 P.2d 503; *Burke v. City and County of San Francisco*, 111 Cal.App.2d 314, 322, 244 P.2d 708. These cases were decided under section 377 of the Code of Civil Procedure, which created a cause of action not recognized at common law. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, 81, 167 P. 513, L.R.A. 1918A, 997.

The Legislature has not seen fit to alter the common law rule that the wife cannot recover for the loss of consortium resulting from a negligent injury to her husband, and we are of the opinion that any departure from the overwhelming weight of authority in support of that rule should be left to legislative action.

The judgment is affirmed.

SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

The holding in the majority opinion that a wife may not recover for loss of consortium resulting from a negligent injury to her husband is a denial of equal protection of the laws.

It was held in *Gist v. French*, 136 Cal.App.2d 247, 288 P.2d 1003, that a husband may recover for loss of consortium resulting from a negligent injury to his wife. This court unanimously denied a hearing on December 14, 1955. The statement in the majority opinion that "The

law in California with respect to the right of the husband is not settled" would appear to ignore the very definite holding in the *Gist* case that the husband may recover for the loss of his wife's consortium since only the statement therein concerning the wife's cause of action for loss of her husband's consortium is disapproved.

There is no sound reason for denying either husband or wife a right of recovery for the loss of consortium of the spouse. "The parties to a marriage are each entitled to the comfort, companionship and affection of the other. Any interference with the right of either spouse to the enjoyment of the other is a violation of a natural right as well as a legal right arising from the marriage relation." *Gist v. French*, 136 Cal.App.2d 247, 257, 288 P.2d 1003, 1009. In California "A married woman may be sued without her husband being joined as a party, and may sue without her husband being joined as a party in all actions, including those for injury to her person. * * *" and for injury to her reputation, etc. (Code Civ.Proc., § 370.) The statement in the majority opinion that the "granting of relief to the wife for loss of consortium caused by negligent injury to her husband would constitute an extension of common law liability" ignores the present-day status of the wife and her emancipation from old-world concepts that the wife was but a chattel of the husband without either feelings to be injured or rights to be considered. That the plaintiff in the case at bar has suffered a complete loss of consortium there can be no doubt. She has been deprived of her husband's companionship, of his society as a husband, of her right to bear children. In place of a healthy, normal husband she now has a hopelessly bedridden invalid. Insofar as loss of consortium is concerned there appears to be very little difference, if any, from the wife's loss of her husband as set forth in *Work v. Campbell*, 164 Cal. 343, 128 P. 943, 43 L.R.A., N.S., 581. In the *Work* case the wife lost her husband because of false statements knowingly made by defendant to the wife about the

husband. This case is "distinguished" by the majority on the ground that "negligent injury" with "indirect damage" to the wife was not involved. It is interesting to note in this regard that this court, in the Work case, specifically noted (164 Cal. at page 346, 128 P. at page 945) that "The *direct cause* of her husband's departure was, of course, *her own conduct toward him*, and such departure was in no degree brought about by any statement or act of the defendant, except in so far as his statements and advice to the plaintiff influenced her conduct toward her husband, which was the *sole direct cause* of his leaving, and of any change in his feelings toward her." (Emphasis added.) It is clear that the defendant's conduct in the Work case only *indirectly* caused the wife to lose her husband's consortium. "As to those authorities which hold that the injury to the wife is not compensable because it is indirect, we simply state that if that be so then it would likewise be true in the husband's suit. But such is not the rule here. Invasion of the consortium is an independent wrong directly to the spouse so injured. The mere fact that the loss of one or the other of the elements thereof may have been indirectly redressed in another's suit, does not make the injury to the remaining elements any less direct.

"The argument that the injuries of which a wife complains are too remote and consequential fails for two reasons. In the first place, we are committed to the rule in negligence cases that where in the natural and continual sequence, unbroken by any intervening cause, any injury is produced which, but for the negligent act would not have occurred, the wrongdoer will be liable. And it makes no difference whether or not that particular result was foreseeable. Secondly, if such a rule were valid there could be no basis for distinguishing between an action by a husband and one by the wife. In both cases the damages for the sentimental elements would be too remote and consequential; and yet we do not apply such a rule in the

husband's action." *Hitafter v. Argonne Co.*, 87 U.S.App.D.C. 57, 183 F.2d 811, 815; and see, *Warner v. Santa Catalina Island Co.*, 44 Cal.2d 310, 319, 282 P.2d 12; *Stasulat v. Pacific Gas & Electric Co.*, 8 Cal.2d 631, 67 P.2d 678; *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872; *Sawyer v. Southern California Gas Co.*, 206 Cal. 366, 274 P. 544. There would seem to be no sound reason for distinguishing the two cases: In both the wife lost her husband and her right to his consortium. It is the injury which is the important thing and not the way in which it was caused by the defendant. If a wife's body is injured, she has a right of action for the negligent conduct of the defendant causing the injury. In the case at bar, the negligent conduct of the defendants caused her to lose all rights to her husband's consortium and the injury should be compensable. In *Hitafter v. Argonne Co.*, 87 U.S.App.D.C. 57, 183 F.2d 811, 817, the court said: "There can be no doubt, therefore, that if a cause of action in the wife for the loss of consortium from alienation of affections or criminal conversation is to be recognized it must be predicated on a legally protected interest. Now then, may we say that she has a legally protected and hence actionable interest in her consortium when it is injured from one of these so-called intentional invasions, and yet, when the very same interest is injured by a negligent defendant, deny her a right of action? It does not seem so to us. Such a result would be neither legal nor logical. On the contrary, it has already been held in this jurisdiction that her interest in the marriage relation is co-extensive with that of her husband, and that any interference therewith is a violation of her legal rights. When a legally protected interest of a person has been injured by the wrongful act of another, it is no less actionable because the invasion was negligent rather than intentional."

The reasoning found in the majority opinion concerning the "problems" of

policy or procedure which might arise is no less fallacious and unsound. Why should the injury suffered by the wife be any more difficult to compute in monetary damages than the same injury to the husband? "Like actions for pain and suffering, no definite rule can be prescribed for the measurement of the loss of his wife's society. The value of such loss must be determined by the triers of fact in the exercise of a sound discretion in the light of their own experience, observation and reflection. *Robison v. Lockridge*, 230 App. Div. 389, 244 N.Y.S. 663. See also *Hagy v. Allied Chemical & Dye Corp.*, 122 Cal. App.2d 361, 374, 265 P.2d 86; *Edminster v. Thorp*, 101 Cal.App.2d 756, 759, 226 P.2d 373." *Gist v. French*, 136 Cal.App.2d 247, 256, 288 P.2d 1003, 1009. "This result poses no problems in ascertaining the wife's damages. Simple mathematics will suffice to set the proper *quantum*. For inasmuch as it is our opinion that the husband in most cases does recover for any impairment of his duty to support his wife, and, since a compensable element of damages must be subject to measure, it is a simple matter to determine the damages to the wife's consortium in exactly the same way as those of the husband are measured in a similar action and subtract therefrom the value of any impairment of his duty of support." *Hitaffer v. Argonne Co.*, 87 U.S.App.D.C. 57, 183 F.2d 811, 819.

I am not impressed with the argument of the majority that if this court recognizes that the wife has a cause of action for the loss of her husband's consortium the parents or children might "seek to enforce similar claims." Consortium, as the term is known in the law, refers to the "conjugal fellowship of husband and wife, and the right of each to the company, co-operation, affection, and aid of the other in every conjugal relation." *Black's Law Dictionary*, Fourth Edition; *McMillan v. Smith*, 47 Ga.App. 646, 171 S.E. 169, 170; *Shedrick v. Lathrop*, 106 Vt. 311, 172 A. 630, 632; *Harris v. Kunkel*, 227 Wis. 435, 278 N.W. 868, 869; *Hitaffer v. Argonne Co.*, 87 U.S.App.D.C. 57, 183 F.2d 811; *Gist v.*

French, 136 Cal.App.2d 247, 288 P.2d 1003. It would seem, therefore, that neither a parent nor a child could seek to enforce the right of consortium.

I am also not impressed with the argument in the majority opinion that to allow the wife to recover for her right of consortium might "work hardship" upon persons who had made settlement with the husband "believing that the wife could not sue." Undoubtedly the applicable statute of limitation would take care of such "retroactive operation" so that those causing the injury to the wife's consortium would not be subjected to "hardship." Furthermore, the same argument could be made with respect to the husband's cause of action for the loss of his wife's consortium. Since in this state the wife has a right to sue for her own personal injuries and since she has the right to contract with others as if unmarried (Civ.Code, § 158) she, too, might agree to settle with the wrongdoer. No case has come to my attention where undue hardship, or any hardship for that matter, has been caused the wrongdoer since the decision in *Gist v. French*, 136 Cal.App.2d 247, 288 P.2d 1003, where the husband was permitted to recover for the loss of his wife's consortium.

The actual injury to the wife from loss of consortium, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives each the same rights in that regard. Each is entitled to the comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract (Civ.Code, § 155; *Follansbee v. Benzenberg*, 122 Cal.App.2d 466, 265 P.2d 183, 42 A.L.R.2d 832), are mutual in character, and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of natural right, but also of a legal right arising out of the marriage relation. Since the wrongs of the wife are the same

in principle, and are caused by acts of the same nature, as those of the husband, the remedy should be the same. *Hitafer v. Argonne Co.*, 87 U.S.App.D.C. 57, 183 F.2d 811, 816. It follows, logically and legally, that, since the husband and wife have equal rights in this state, if one has a remedy for the invasion of a right, the other should have the same remedy. To hold otherwise as does the majority is a denial of the equal protection of the laws guaranteed by both the federal and state Constitutions.

The reasoning in the majority opinion is neither logical nor sound, and the defendants' demurrer to plaintiff's complaint should be overruled.



162 Cal.App.2d 648

In the Matter of the Guardianship of Joyce Elaine DAVIS, a Minor.

Shirley BRICK, Petitioner and Appellant,

v.

Irene ZISSLER and Louis Zissler,
Respondents.

Civ. 17943.

District Court of Appeal, First District,
Division 2, California.

Aug. 8, 1958.

Proceeding by mother to terminate guardianship of child by others. The Superior Court, Alameda County, A. T. Shine, J., denied petition, and mother appealed. The District Court of Appeal, Draper, J., held that where mother had long history of placing child with others, retaking custody on little or no notice and failing to care properly for child, her present husband had a rather long criminal record, and there was question as to moral fitness of mother, trial court did not abuse its discretion or fail to exercise that discretion

in best interests of child in denying mother's petition to terminate guardianship of child by others.

Affirmed.

1. Trial ☞29(4)

Statement of judge in proceeding to terminate guardianship of minor that, after reading report of probation officer, he was inclined to permit child to remain with guardian, was proper tentative evaluation of report for benefit of counsel and did not show that trial court had prejudged case, especially where judge expressly called for further evidence and in no way limited introduction of evidence. *West's Ann. Prob.Code*, § 1580(8); *West's Ann. Welfare & Inst.Code*, § 638.1.

2. Guardian and Ward ☞25

Trial court had broad discretion in determining whether guardianship of child should be terminated. *West's Ann. Prob.Code*, § 1580(8); *West's Ann. Welfare & Inst.Code*, § 638.1.

3. Guardian and Ward ☞25

In proceeding by mother to terminate guardianship of her child by others, evidence sustained finding that mother was unfit to have custody of child. *West's Ann. Prob.Code*, § 1580(8); *West's Ann. Welfare & Inst.Code*, § 638.1.

4. Guardian and Ward ☞25

Where mother had long history of placing child with others, retaking custody on little or no notice and failing to care properly for child, her present husband had a rather long criminal record, and there was question as to moral fitness of mother, trial court did not abuse its discretion or fail to exercise that discretion in best interests of child in denying mother's petition to terminate guardianship of child by others. *West's Ann. Prob.Code*, § 1580(8); *West's Ann. Welfare & Inst.Code*, § 638.1.

James Martin MacInnis, Harry P. Glassman, San Francisco, for appellant.

H. A. Dannenbrink, Oakland, for respondents.

DRAPER, Justice.

This is a petition to terminate guardianship of the person of a minor. Joyce was born in 1946. Her parents were divorced in 1949, and custody of Joyce was awarded to her mother. In 1955 Mr. and Mrs. Zissler were appointed guardians, the mother consenting. Thirteen months later the mother filed this petition to terminate guardianship. Prob.Code, § 1580(8). The guardians opposed the petition and after hearing it was denied. Petitioner appeals.

[1] Before trial, the probation officer had, pursuant to order, investigated and prepared a report. Welf. & Inst.Code, § 638.1. At opening of the trial, both parties announced that they were offering that report in evidence. The court then said:

"I am inclined, after reading that,—so you may know where the guardianship stands—to permit the child to remain with the present guardian for the time being. Now, with that in mind, you can go into the case as far as you want."

Appellant contends that this statement shows that the trial court had prejudged the case, thus depriving her of a fair trial. Neither the statement nor the conduct of the remainder of the hearing support this claim. The court, having read a report covering the claims and many of the facts on both sides of the controversy, quite properly stated its evaluation of the report for the benefit of counsel. This evaluation was tentative only. The court expressly called for further evidence, and thereafter in no way limited the introduction of evidence. On the contrary, the court's conduct throughout indicated its desire to hear all the facts and to determine the issue only upon all the evidence which could be produced. These circumstances distinguish the cases relied upon by appellant. *Webber v. Webber*, 33 Cal.2d 153, 199 P.2d 934; *McVey v. McVey*, 132 Cal. App.2d 120, 281 P.2d 898; *Rosenfield v. Vosper*, 45 Cal.App.2d 365, 114 P.2d 29; *Shippey v. Shippey*, 58 Cal.App.2d 174, 136 P.2d 86.

[2-4] Appellant also asserts that the evidence is insufficient to support the findings. But the trial court has a broad discretion in this type of case. In *re Guardianship of White*, 84 Cal.App.2d 624, 191 P.2d 466. The record shows a long history of the mother's placing the child with others, retaking custody on little or no notice, and of her failure to care properly for her daughter. It shows also that her present husband, to whom she was married at the time she consented to the guardianship, has a rather long criminal record. There is evidence from which the trial court could seriously question the moral fitness of the mother. Thus the finding of the mother's unfitness, if it be essential (In *re Guardianship of Riley*, 72 Cal.App. 2d 742, 165 P.2d 555), is fully supported. There is no room for us to find that the trial court has abused its discretion, or has failed to exercise that discretion in the best interest of the child.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.



162 Cal.App.2d 400

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Charles R. WARFEL, Assignee for the benefit of creditors of Pacific Coast Tank & Mfg. Co., a Corporation, and as Assignee for the benefit of creditors of Paramount Steel Corporation, a Corporation, Defendant and Appellant.

Civ. 22757.

District Court of Appeal, Second District,
Division 2, California.

July 29, 1958.

Rehearing Denied Aug. 22, 1958.

Hearing Denied Sept. 24, 1958.

Proceeding on an assignment for the benefit of creditors. The Superior Court of

Los Angeles County, Burnett Wolfson, J., entered a judgment awarding the state recovery of interest and penalties upon certain tax obligations, though the interest and penalties accrued after assignment. The assignee appealed. The District Court of Appeal, Ashburn, J., held that under provisions of Revenue and Taxation Code, Unemployment Insurance Code, and Code of Civil Procedure relating to liability for taxes upon assignments for benefit of creditors, tax obligations have a preference as to principal, interest and penalties, right to such interest and penalties is not cut off by mere fact of assignment but continues as a prior right in State until all principal, interest and penalties, including interest and penalties accruing after the date of the assignment have been paid.

Affirmed.

1. Taxation ⚡501

A tax obligation is not a mere debt but it occupies a higher status, that of the governmental exaction which overrides private contracts and liens whenever the legislature has expressly or impliedly so declared. West's Ann.Rev. & Tax.Code, §§ 6005, 6591, 6756(a, b); West's Ann.Unempl.Ins.Code, §§ 1113, 1701(a, b), 1702; West's Ann.Code Civ.Proc. §§ 1204, 1206.

2. Assignments for Benefit of Creditors ⚡308(1)

Under provisions of Revenue and Taxation Code, Unemployment Insurance Code, and Code of Civil Procedure relating to liability for taxes upon assignments for benefit of creditors, tax obligations have a preference as to principal, interest and penalties, and right to such interest and penalties is not cut off by mere fact of assignment but continues as a prior right in state until all principal, interest and penalties, including interest and penalties accruing after the date of the assignment, have been paid. West's Ann.Rev. & Tax.Code, §§ 6005, 6591, 6756(a, b); West's Ann.Unempl.Ins.Code, §§ 1113, 1701(a, b), 1702; West's Ann.Code Civ.Proc. §§ 1204, 1206.

Gendel & Raskoff, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann and James C. Maupin, Deputies Atty. Gen., for respondent.

ASHBURN, Justice.

Appeal from judgment awarding to the State recovery from an assignee for benefit of creditors of interest and penalties upon certain tax obligations, which interest and penalties accrued after the assignment. The taxes in question became due and payable before the assignment in each instance; the assignee paid the principal amount of each, together with all interest and penalties accrued to date of assignment; he refused to pay any interest or penalty for any subsequent period. Hence this lawsuit and recovery by the State.

Appellant Warfel is assignee under two common law assignments. One of them was made by Pacific Coast Tank & Manufacturing Company on September 17, 1953, at which time it was obligated to the State for taxes under the Sales and Use Tax Law upon which interest and penalties had become payable. Paramount Steel Corporation made its assignment on April 29, 1950, it then being delinquent upon certain taxes, interest and penalties under the Sales and Use Tax Law, also upon certain unemployment insurance contributions due under the Unemployment Insurance Code.

As stated, the assignee paid everything due to the State by way of tax, penalties and interest on the day of each assignment, but, claiming that no further interest or penalties could accrue subsequent to assignment because of insufficiency of assets to pay creditors in full, he refused to make any further payment. The court rendered judgment for the State for the aggregate amount of interest and penalties which became due after date of assignment in each instance.

The facts are not in dispute and counsel stipulated below: "That the assignor of de-

defendant in each cause of action was insolvent and after the payment of dividends to creditors by the assignee no surplus remained for the benefit of the assignors in either cause of action." Also: "That the only issue for decision presented to the Court is whether the plaintiff is entitled to collect interest and penalties accruing subsequent to the date of the assignment for the benefit of creditors in the respective causes of action."

Section 6591, Revenue & Taxation Code, which is found in the same part of Division 2 as § 6756, provides that nonpayment of any tax when due shall entail a penalty of ten per cent of amount of tax, plus interest at one-half of one per cent per month from date when the tax became payable "until the date of payment."

Section 6756 of the same code provides:

"The amounts required to be paid by *any person* under this part *together with interest and penalties* shall be satisfied first in any of the following cases: (a) Whenever the person is insolvent. (b) Whenever the person makes a voluntary assignment of his assets. * * *

"This section does not give the State a preference over any recorded lien which attached prior to the date when the amounts required to be paid became a lien.

"The preference given to the State by this section shall be subordinate to the preferences given to claims for personal services by Sections 1204 and 1206 of the Code of Civil Procedure." (Emphasis added.)

Section 6005 defines "person" as including any "assignee for the benefit of creditors."

Section 1113 Unemployment Insurance Code says that any employer who fails to pay any contribution required of him within the time specified shall become liable for interest on same at the rate of one-half per cent per month "from and after the date of delinquency until paid."

Section 1701 of the same code: "The wage earner and employer contributions required to be paid by any employing unit under this division, together with interest and penalties, shall be satisfied first in any of the following cases: (a) Whenever the employing unit is insolvent. (b) Whenever the employing unit makes a voluntary assignment of its assets." Section 1702 says that the preference given by § 1701 does not apply to any recorded lien which attached prior to the time when the required contribution became a lien, or to preferences given to claims for personal services by §§ 1204 and 1206, Code of Civil Procedure.

For present purposes the provisions of the two codes appear to be substantially identical, and broadly speaking the preference afforded by the statute does not apply to preexisting liens (see *People v. Biscailuz*, 95 Cal.App.2d 635, 642, 213 P.2d 753; *Durkin v. Durkin*, 133 Cal.App.2d 283, 286, 284 P.2d 185); but the present case does not present any problem of priority between liens, only the question of whether the State's right to collect interest and penalties in preference to other creditors ceases with the fact of assignment and upon its date.

The meaning of §§ 6756 and 1701, *supra*, seems clear upon their face, but appellant would read into the phrase "together with interest and penalties" an implied condition that such items must accrue before the making of an assignment in order to have preferential status.

[1] In this State a tax obligation is not a mere debt (*Courtney v. Byram*, 54 Cal.App.2d 769, 771, 129 P.2d 721); it occupies a higher status, that of a governmental exaction which overrides private contracts and liens whenever the legislature has expressly or impliedly so declared. "By statutory provision, as indeed by the harsh law of necessity, taxes have been made a first lien upon property. They are a primary obligation of the citizen, and the flow of this 'life blood of government' may not be interrupted. Generally, there-

fore, the obligation to pay taxes is superior to the obligation of private debts." Courtney. Byram, supra, 54 Cal.App.2d at page 772, 129 P.2d at page 72).

That this State has not recognized any cessation of interest under circumstances such as presented by an assignment for benefit of creditors is attested by *People v. Richardson*, 37 Cal.App.2d 275, 99 P.2d 366. While Bank of San Pedro was being liquidated by the Banking Department, certain franchise taxes accrued and were not paid. The State sued and recovered judgment. The Superintendent of Banks appealed, urging three grounds for reversal, the last of which presented the question "whether interest and penalties were chargeable during the period of operation by the conservator." 37 Cal.App.2d at page 278, 99 P.2d at page 367. The court said, 37 Cal.App.2d at page 279, 99 P.2d at page 367: "As to the third question stated by appellant, the argument is that since the affairs of the bank were *in custodia legis* the judgment erroneously includes interest and penalties on the unpaid tax. * * * Here the statute is plain. Section 24, subdivision (c) [Deering's Gen.Laws], Act 8488, reads: 'If the tax imposed by this act (whether determined by the commissioner or the taxpayer) or any installment or portion thereof is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax interest upon such unpaid amount at the rate of six per cent per year from the date prescribed for its payment until it is paid.' The answer to appellant's inquiry as to interest is found in the statute; hence, authorities from other jurisdictions condemning the practice of charging interest are not controlling." This case is highly persuasive of the conclusion that the statutes here under consideration mean just what they say on their face, and that they carry no latent exception as to post-assignment interest and penalties. "The priority need not be declared in express terms. It is enough if the intent to postpone contract liens appear by reasonable inference from the provisions of the act. But the author-

ization for displacing the earlier lien must, under all the decisions, be found in the statute." *Guinn v. McReynolds*, 177 Cal. 230, 232, 170 P. 421, 422.

The bases upon which such interest and penalties are disallowed in some jurisdictions are (a) that interest is a charge for delay in payment and in the case of an assignment for creditors any delay is due to the act of the law, the property being *in custodia legis*; that the reason for interest therefore ceases and with it the obligation to pay same; (b) that equality is equity and in insolvency proceedings that maxim brings preferred and nonpreferred creditors onto a plane of equality.

Concerning the first proposition, our courts have recognized it to be a general rule of liquidation proceedings "that one creditor is not entitled to payment of interest on his claim in receivership, bankruptcy, or other form of liquidation, *after* the commencement thereof, where the assets are not sufficient to pay the principal of all claims in full. See, *Greva v. Rainey*, 2 Cal.2d 338, 41 P.2d 328; *Glenn on Liquidation*, secs. 488, 510." In re Pacific Coast Bldg.-Loan Ass'n, 15 Cal.2d 134, 147, 99 P.2d 251, 257. This rule was stated and applied in a case where "[a]s to interest the statute is silent." 15 Cal.2d at page 146, 99 P.2d at page 256.

The cited case of *Greva v. Rainey*, 2 Cal. 2d 338, 41 P.2d 328, likewise dealt with a statute which was silent on the subject of interest during liquidation. The general rule was stated to be "that after property of an insolvent is *in custodia legis* interest thereafter accruing will not be allowed." 2 Cal.2d at page 343, 41 P.2d at page 330. But the court held it not applicable where assets are sufficient to pay all claims in full, saying further that the general rule exists "not because the claims were considered to have lost their interest-bearing quality, but because in the great majority of cases the assets were insufficient to pay both the principal and the interest which would otherwise become due [2 Cal.2d at page 343, 31 P.2d at page 330]; * * * all creditors are entitled to equal considera-

tion except where the statute expressly provides otherwise, and then only to the extent provided." (2 Cal.2d at page 346, 41 P.2d at page 331.) Applied to the case at bar this means that the taxes have not lost their interest bearing quality, and that, as the statute has expressly provided a preference as to interest and penalties as well as principal, the statute governs and there is no room for implied conditions or qualifications.

It was said in *California Loan & Trust Co. v. Weis*, 118 Cal. 489, 492, 50 P. 697, a case which was concerned with priority of a tax lien: "The power of the legislature to make the lien of taxes paramount to all other liens upon the land, so that when sale is made the purchaser takes title freed from incumbrance, is not questioned. 'It is within the constitutional power of the legislature to enact that the purchaser at tax sales shall acquire a new, independent, and unincumbered title.' Black, Tax Titles, § 231. 'It is not only competent,' says Judge Cooley, 'for the state thus to charge the land with the tax, but the legislature may, if it shall deem it proper or necessary to do so, make the lien a first claim on the property, with precedence of all other claims and liens whatsoever whether created by judgment, mortgage, execution, or otherwise, and whether arising before or after the assessment of the tax.' Cooley, Tax'n, p. 445." At page 493 of 118 Cal., at page 698 of 50 P.: "As this matter, the power being conceded, depends for its determination entirely upon statutory enactment, adjudications in sister states will be of little value, unless based upon identical laws."

This last remark is pertinent to the case of *Pavone Textile Corp. v. Bloom*, 302 N.Y. 206, 97 N.E.2d 755, upon which appellant principally relies. The problem was thus stated: "In this proceeding, in which the assignor made a general assignment for the benefit of creditors, the only issue presented to us for determination is whether the respondents, the United States of America and the State of New York, are entitled to interest on their tax claims to

the date on which the assignment was filed or to the date of payment of such claims. The claim of the United States is for social security and withholding taxes, and that of New York for unemployment insurance taxes." And the essential ruling: "The general rule is well settled that creditors are not entitled to post-assignment interest where the proceeds are insufficient to pay all creditors in full, because the 'delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate'; this general rule applies as between preferred and unpreferred creditors." 97 N.E.2d at page 755. The court, as appears from the above quotation, applied the *in custodia legis* concept, also the federal bankruptcy rule and the federal priority statute which was said to incorporate by implication the bankruptcy rule. This disallowance of post-assignment interest also rests upon an interpretation of a local statute whose terms are substantially different from ours. The United States Supreme Court affirmed the Pavone ruling, sub nom., *United States v. Bloom*, 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682, by mere reference to *City of New York v. Saper*, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710. That case holds that there can be no interest allowed after date of bankruptcy upon a government claim for taxes; this was said to be "a fundamental principle of the English bankruptcy system which we copied." 336 U.S. at page 330, 69 S.Ct. at page 555.

Not only was the statute involved in Pavone, supra, substantially different from ours, but it also appears that the court there dealt with a statutory assignment for creditors, which fact lay back of the statement that any delays in administration were those of the law. At bar we deal with common law assignments; they do not in any sense place the property *in custodia legis*. The administration of such an assignment is not subject to court control except through a plenary equity case. "[In receiverships] the estate is in the hands of a court-appointed and supervised individual acting as an arm of the court. Such is

not true of the common law assignee. No matter how salutary the practice of assignments for creditors, it must be conceded that as an individual engaged in private enterprise, the assignee is for practical purposes outside the control and supervision of the court." Division of Labor Law Enforcement, v. Stanley Restaurants, 9 Cir., 228 F.2d 420, 424. Authorities resting upon the *in custodia legis* theory are not applicable here. However, we do not wish this discussion of statutory and common law assignments to be understood as indicating that our decision rests upon that narrow distinction.

The argument that equality is equity and that this is true of both preferred and non-preferred claimants in an insolvency proceeding does not appeal to us as sound when urged with respect to a statute which expressly declares the State to have preference in an insolvency situation. The purpose of a preference is protection of the holder against the claims of less fortunate creditors in those situations where the assets are insufficient to pay all the creditors in full—the ordinary insolvency proceeding. To say that the preference declared by statute in case of insolvency, or the making of an assignment for creditors, ceases to prevail as soon as such an assignment is made is to emasculate the statute and render its declaration of preference meaningless. Concerning the application of the "general rule" to such a situation the Fifth Circuit Court of Appeals said, in First Nat. Bank of Houston v. Ewing, 103 F. 168, 190:

"It is further contended by the appellees that in no event should interest, penalties, and costs accruing upon the claim for taxes be allowed. In Thomas v. Western Car Co., 149 U.S. [95] 116, 117, 13 S.Ct. [824] 833, 37 L.Ed. [663] 671, it was said by the court: 'As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law. It is a necessary incident to the settle-

ment of the estate. [Citations.] We see no reason in departing from this rule in a case like the present, where such a claim would be paid out of moneys that fall far short of paying the mortgage debt.'

"The general rule announced by the supreme court is applicable to cases where the fund is to be shared by creditors without liens, or by those having liens of equal and common rank. But where there are claims of several classes, with liens of different priorities, the holders thereof are entitled to interest down to the date of the decree. [Citations.] As we have shown, the lien for taxes is superior to all other claims, except for judicial costs, and practically constitutes a class of its own. There being in the registry of the court more than a sufficient amount to pay the state and municipal taxes and judicial costs, the accrued interest, penalties, and costs should be allowed." American Iron & Steel Mfg. Co. v. Seaboard Air Line R. Co., 233 U.S. 261, 267, 34 S.Ct. 502, 505, 58 L.Ed. 949: "[P]rincipal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full. * * * For, manifestly, the law does not contemplate that either the debtor or the trustees can, by securing the appointment of receiver, stop the running of interest on claims of the highest dignity." See, also, Marshall v. People of State of New York, 254 U.S. 380, 385-386, 41 S.Ct. 143, 65 L.Ed. 315; American Surety Co. v. Carbon Timber Co., 10 Cir., 263 F. 295, 303.

[2] We conclude that the statutes governing this case express a legislative intent that these tax obligations shall be preferred as to principal, interest and penalties in all cases of assignment for benefit of creditors; that the right to interest and penalties is not cut off by the mere fact of assignment, but continues as a prior right

in the State until all principal, interest and penalties have been actually paid.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



162 Cal.App.2d 738

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

George STERLING, Jr., Defendant and
Appellant.

Cr. 3462.

District Court of Appeal, First District,
Division 1, California.

Aug. 13, 1958.

Hearing Denied Oct. 10, 1958.

Defendant was convicted of the sales of heroin. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered judgment, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that officer, as buyer of heroin from defendant, was not defendant's accomplice, and consequently independent corroboration of officer's testimony was not essential.

Affirmed.

1. Criminal Law ⇨1159(5)

In prosecution for sales of heroin, whether officer's testimony as to details of his purchases was inherently improbable because officer was relatively inexperienced in narcotic enforcement and in police work generally and whether it was likely that defendant, who had twice previously been convicted of narcotic violations, would have delivered narcotics in a public place, as narrated by officer, to one reputed to be an officer, were questions for triers of fact.

2. Criminal Law ⇨507(4)

An officer, as buyer of heroin from defendant, was not defendant's accomplice,

and consequently independent corroboration of officer's testimony was not essential.

C. Richard Walker, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted upon two counts charging the sale of heroin defendant claims the evidence insufficient to support either verdict.

[1] His argument is that the officer who made the purchases and testified fully and in detail in respect to each, gave testimony not worthy of belief because this officer was relatively inexperienced, having worked for the state Bureau of Narcotic Enforcement slightly more than a month, and, previously, had had less than one and a half years of any kind of police experience. Defendant further contends that it is not at all likely that the defendant, twice previously convicted of narcotic violations, would have delivered narcotics in a public place as narrated by the officer, especially in view of evidence that this officer, although an undercover agent, was reputed to be an officer. These are arguments appropriate for consideration only by the triers of the facts. We perceive in the officer's testimony nothing suggestive of inherent improbability. *People v. Ashley*, 42 Cal.2d 246, 266-267, 267 P.2d 271.

[2] Defendant also claims insufficiency of evidence predicated upon lack of corroboration of the officer who made the purchases. The officer as buyer was not an accomplice of defendant, the seller; hence, independent corroboration is not essential. *People v. Abair*, 102 Cal.App.2d 765, 772-773, 228 P.2d 336; *People v. Mimms*, 110 Cal.App.2d 310, 314, 242 P.2d 331; *People v. Candelario*, 126 Cal.App.2d 408, 409, 272 P.2d 62.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

162 Cal.App.2d 126

Virginia Harris DE SANTO, Plaintiff,
Cross-Defendant and Appellant,

v.

Dominic Anthony DE SANTO, Defendant,
Cross-Complainant and Respondent.

Civ. 5809.

District Court of Appeal, Fourth District,
 California.

July 14, 1958.

Action by wife for divorce. The husband filed cross-complaint. The judgment of the Superior Court of San Diego County, C. M. Monroe, J., granted each party a divorce and awarded alimony and child support to the wife and entered a decree affecting the residence. The wife appealed from portions of the judgment. The District Court of Appeal, Griffin, J., held that award of alimony in amount of \$125 monthly for wife and \$125 monthly for support of each of three children was not abuse of discretion, notwithstanding that husband had net take-home income ranging from \$27,500 to \$47,000 over four year period, where wife was awarded in excess of \$80,000 as community personal and real property, including possible return of \$22,500 from sale of real property, less incumbrances, in addition to free living quarters for 60-day period.

Affirmed.

1. Divorce $\S$ 235

In a divorce action the trial court has wide discretion in determining amount of alimony to be awarded to wife, having regard for the circumstances of the respective parties; this is true even when a divorce is granted to both parties.

2. Divorce $\S$ 286

A reviewing court is limited to the question whether the trial court abused its discretion in determining the amount of alimony to be awarded to divorced wife.

3. Divorce $\S$ 231, 238

In divorce action, alimony may be awarded to either party and the com-

parative guilt of the respective individuals may have an important bearing on whether or not either should be granted relief. West's Ann.Civ.Code, $\S$ 139.

4. Divorce $\S$ 240(4)

Award of alimony in amount of \$125 monthly for wife and \$125 monthly for support of each of three children whose custody was awarded to wife who was granted divorce was not abuse of discretion, notwithstanding that husband, who was also awarded divorce, had net take-home income ranging from \$27,500 to \$47,000 over four year period, where wife was awarded in excess of \$80,000 as community personal and real property, including possible return of \$22,500 from sale of real property, less incumbrances, in addition to free living quarters for 60-day period.

5. Divorce $\S$ 253

In divorce action, record disclosed that the refusal to set aside the home property as a homestead for the benefit of wife and the children and the ordering of a sale thereof was justified.

Shera, Mallory & Kelley, Los Angeles,
 for appellant.

Donnelley, MacNulty & Butler, San
 Diego, for respondent.

GRIFFIN, Justice.

Plaintiff-appellant brought an action for divorce, on the ground of extreme cruelty, against her husband. She sought alimony, child support and distribution of community property. Defendant and respondent, in turn by cross-complaint, sought a divorce, custody of the children and a division of the community property. After trial, the court granted each a divorce. Defendant was ordered to pay plaintiff as alimony \$125 per month plus \$125 per month each for the support of the three minor children. It found certain listed property to be separate property of each; that the net value of the real and personal community property was in excess

of \$160,000, and attempted to divide it equally between the parties. They jointly owned a large family residence in La Jolla. Plaintiff asked that a homestead be impressed on that property for the benefit of herself and the children. Instead, the court allowed plaintiff and the children to remain therein for a 60-day period, rent free, and ordered defendant to maintain it and make the necessary payments thereon. It then gave the parties 60 days to determine between themselves whether or not they wished to accept said home property at a value of \$45,000 less the principal amount of balance on a note secured by a trust deed, and that if neither party desired to accept said property, it should be sold at private sale and the net proceeds divided equally between them. It was appraised at \$52,000. Custody of the three children was awarded to plaintiff.

Plaintiff appealed from three portions of said interlocutory decree: (1) the amount of alimony; (2) the amount of child support; and (3) the judgment affecting the residence. As to the first and second claims, plaintiff contends the award of \$125 per month to her and \$125 per month each to the children, was inadequate to maintain her and the children in the manner to which she and they were accustomed, when considered in connection with defendant's earnings.

Defendant is a medical doctor. There is evidence that in 1953 his gross receipts were approximately \$83,000; in 1954 \$74,000; and in 1955 about \$95,000; in 1956 about \$104,000; and that his anticipated gross income per year would be about \$90,000; that in 1955, after federal taxes were paid, his net take-home or in expendable income for the family was approximately \$47,000; in 1953 \$27,500; in 1954 \$33,500; and in 1956 \$34,000. Some of this included income from securities of Mrs. De Santo. Plaintiff claimed her necessary living expenses for herself and three minor children would be about \$2,000 per month.

The parties were married February 24, 1946. As to the childrens' ages at the time of trial, the twins were 6½ years old and the other child was 2 years old. She had one child by a previous marriage. They employed a permanent nurse for the care of the children, who lived in the home, as well as a gardener for the yards, and part-time housemaid. Two of her children go to a private school and require special speech work and training for articulation, and they take dancing lessons. She alleges that \$100 per month is necessary for her to carry on her social entertainment. Defendant testified he paid all the household expenses; that he was sending some money to his parents in aid of their support; and that he attended medical meetings and conventions costing at least \$3,000 per year.

Plaintiff's accountant calculated that plaintiff should receive about \$1,500 per month alimony and \$1,000 for the children, and that if defendant retained the same amount he would have a net take-home pay equal to that of Mrs. De Santo and the children. The three children have savings accounts of their own totaling in excess of \$2,400, and bonds totaling \$6,450 face value. The parties agreed that these accounts and bonds belong to said children. Lists of stock of each of the parties were received in evidence, together with the amount of dividends received therefrom.

[1-3] It is the general rule that in a divorce action the trial court is given a wide discretion in determining the amount of alimony to be awarded to the wife, having regard for the circumstances of the respective parties, and a reviewing court is limited to the question whether the trial court abused its discretion in making the order. This is true, even when a divorce is granted to both parties. Alimony may be awarded to either party and the comparative guilt of the respective individuals may have an important bearing on whether or not either should be granted relief. *Sawyer v. Saw-*

yer, 57 Cal.App.2d 582, 584, 134 P.2d 868; De Burgh v. De Burgh, 39 Cal.2d 858, 874, 250 P.2d 598; Mueller v. Mueller, 44 Cal.2d 527, 530, 282 P.2d 869; Diamond v. Diamond, 149 Cal.App.2d 788, 308 P.2d 909; Bowman v. Bowman, 29 Cal.2d 808, 811, 178 P.2d 751, 170 A.L.R. 246; Lamborn v. Lamborn, 80 Cal.App. 494, 499, 251 P. 943; Civ.Code, Sec. 139.

Plaintiff cites Barham v. Barham, 33 Cal.2d 416, 202 P.2d 289, as authority for holding that a monthly allowance of \$600 was not excessive where the husband's annual income exceeded \$85,000; and Winn v. Winn, 143 Cal.App.2d 184, 299 P.2d 721, holding, in respect to determining a suitable allowance for the support and maintenance of children, that the trial court must consider, above all else, the welfare of the children, their station in life, and the ability of the father to pay. Plaintiff claims they were entitled to be supported in the manner in which they had been supported during the marriage. See also Merritt v. Merritt, 106 Cal.App. 234, 289 P. 240; Sigismund v. Sigismund, 115 Cal.App.2d 628, 631, 252 P.2d 713; and Huntington v. Huntington, 120 Cal.App.2d 705, 713, 262 P.2d 104.

[4] Without the distribution of the community property, which was apparently made on an equal basis, it might well appear that the award of alimony, when considered in connection with defendant's net income, would be inadequate. Here, plaintiff was awarded in excess of \$80,000 in community personal and real property, including the possible return of \$22,500 from the sale of the real property, less incumbrances, in addition to free living quarters for a 60-day period. If we consider the award of alimony, and award of support money for the three children during their tender years, and the possibility of their allowance being increased as the children grow older and their expenses of maintenance and education grow greater, it cannot be said, as a matter of law, that the trial court abused its discretion in respect to these orders, par-

ticularly when it is considered in connection with the community property allowance.

[5] The refusal to set aside the home property as a homestead for the benefit of plaintiff and the children and ordering the sale thereof was justified. McKannay v. McKannay, 68 Cal.App. 701, 230 P. 214; LeFiell v. LeFiell, 108 Cal.App.2d 321, 239 P.2d 61; 16 Cal.Jur.2d p. 584, Sec. 287; 16 Cal.Jur.2d pp. 574-575, Secs. 279-280.

The portion of the judgment from which this appeal has been perfected is affirmed.

MUSSELL, Acting P. J., and McCABE, J. pro tem., concur.



162 Cal.App.2d 235

**Matter of the Application of J. W. BREEN,
for a Writ of Habeas Corpus.**

Cr. 2869.

District Court of Appeal, Third District,
California.

July 18, 1958.

Habeas Corpus proceedings by petitioner, who after conviction of forgery charge, was placed upon probation the term of which was extended and finally revoked. The District Court of Appeal held that where record disclosed that plea of guilty to charge of forgery was entered by defendant's counsel, statute requiring that plea be put in by defendant himself was violated and judgment of conviction as well as subsequent proceedings were invalid.

Writ discharged and petitioner remanded for further proceedings.

I. Criminal Law § 273

Where record disclosed that defendant's plea of guilty was entered by his

counsel, statute requiring that plea be entered by defendant himself was violated and rendered judgment of conviction as well as subsequent proceedings respecting probation invalid. West's Ann.Pen.Code, § 1018.

2. Habeas Corpus ⇨4

Where proceedings were brought by defendant for writ of habeas corpus and an appeal was also pending from the order revoking defendant's probation, since it appeared without dispute that reversal of conviction must result because of invalidity of judgment, District Court of Appeal would grant relief even though matters complained of might be reviewed under pending appeal.

3. Habeas Corpus ⇨109

Where habeas corpus proceedings were brought to procure defendant's release from illegal confinement because of invalid judgment of conviction five years previously, petitioner would be remanded to custody of sheriff in order to allow trial court to pass on contention that discharge was proper because long lapse of time made it impossible to accord petitioner a fair trial on charges against him.

J. W. Breen in pro. per.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PER CURIAM.

On September 5, 1953, petitioner herein, responsive to an information charging him with forgery, was arraigned in the Superior Court in Napa County. He was represented by counsel who announced that a plea would be entered at that time. The following occurred: "The Court: What is your plea? Mr. Shifflett [Counsel for Defendant]: The defendant pleads guilty, your Honor. The Court: The Clerk will please enter a plea of guilty. Do you move for probation? Mr. Shifflett: We would like to at this time move for probation." The matter was referred to the probation

officer and thereafter probation was granted for a term of two years and the pronouncement of judgment was suspended. Prior to the expiration of the term of probation the probation officer moved the court that probation be revoked. This motion was denied, but an added period of two years' probation was ordered, petitioner was incarcerated in the county jail for four months, and was ordered to pay a fine. Prior to the expiration of the extended period the probation officer again moved the court that probation be revoked for violation. This motion was also denied. A third time the probation officer moved for revocation and this time the court revoked probation and proceeded to sentence petitioner to the Department of Corrections for the period prescribed by law. Petitioner is presently confined pursuant to that judgment, but has taken an appeal therefrom which is pending in this court.

It appearing from the petition herein and the return to the order to show cause that petitioner's plea to the charge of forgery was not entered by himself personally but by counsel, this court issued its writ and the matter has been heard.

[1] The foregoing recitals of the proceedings on arraignment are conceded to be true, with the result that the provisions of Section 1018 of the Penal Code were violated in that the plea was not put in by the defendant himself. *In re Brain*, 70 Cal. App. 334, 233 P. 390; *People v. Wills*, 159 Cal.App.2d 171, 323 P.2d 470. The result is that the judgment was invalid as were all proceedings subsequent to the entry of the plea by counsel.

[2,3] The Attorney General urges us to discharge the writ, denying all relief, arguing that the matters complained of may be reviewed under the pending appeal. But since it appears without dispute that reversal must result and that the present detention is illegal we see no reason to delay. The Attorney General further argues that under the authority of *In re McCoy*, 32 Cal.2d 73, 194 P.2d 531, petitioner is not entitled to discharge and should be re-

manded for further proceedings in the trial court under the information on file therein. For petitioner it is argued that in this case discharge is proper because the long lapse of time has made it impossible to now accord petitioner a fair trial on charges against him. This argument is persuasive, but not convincing. We think such contention can best be presented to, and passed on by the trial court.

Accordingly, the writ is discharged and the petitioner is remanded to the custody of the Sheriff of Napa County for further proceedings in accordance herewith.



162 Cal.App.2d 196

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Eugene LaRue PRICE, Defendant and
Appellant.

Cr. 6180.

District Court of Appeal, Second District,
Division 2, California.

July 17, 1958.

Proceeding on petition for writ of error coram nobis. From an order of the Superior Court, Los Angeles County, Beach Vasey, J., denying the petition, the petitioner appealed. The District Court of Appeal, Herndon, J., held that defendant's delay of more than 18 months in presenting petition for writ of error coram nobis based upon alleged perjury of prosecuting witness in denying that he had been convicted of a felony without any sufficient or substantial explanation as to reason for delay justified denial of petition.

Order affirmed.

1. Criminal Law ⇨997(6)

Applicant for writ of error coram nobis must show that facts upon which he relies

were not known to him, and could not, in exercise of due diligence, have been discovered by him at any time substantially earlier than time of his motion for writ.

2. Criminal Law ⇨997(2)

Writ of error coram nobis is available only in absence of any other adequate remedy and it is not available to correct an error or irregularity occurring at trial which could be corrected on motion for new trial or by appeal.

3. Criminal Law ⇨997(12)

Unreasonable and unexplained delay in presenting a petition for writ of error coram nobis affords sufficient ground for its denial.

4. Criminal Law ⇨997(12)

Defendant's delay of more than 18 months in presenting petition for writ of error coram nobis, based upon alleged perjury of prosecuting witness in denying that he had been convicted of a felony, without any sufficient or substantial explanation as to reason for delay justified denial of the petition. West's Ann.Pen.Code, § 337a.

Eugene LaRue Price, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

Appeal from an order denying a petition for the writ of error *coram nobis*. As respondent correctly comments, "[t]he instant appeal is another contribution to the swelling stream of such applications which engage the attention of our trial and appellate courts." Manifestly, defendant has misconceived the scope and function of the writ.

On May 7, 1956, after a jury trial in which defendant was found guilty of first degree burglary, he was sentenced to state prison. He at first denied, but subsequently admitted, that he had served four successive prison terms, after as many prior convictions, in California and Nevada. On December 2, 1957, more than eighteen months after judgment, the instant petition was filed

in the trial court. The petition rests solely upon allegations to the effect that a prosecution witness (the victim of the burglary with which defendant was charged) had been convicted of a felony, to wit, a violation of Penal Code section 337a, and that said witness committed perjury in answering negatively when asked whether he previously had been convicted of a felony.

Defendant alleges that "at the time of a motion for a new trial and at the time of filing a motion of appeal" he was unaware of the alleged previous conviction of the prosecution witness. This allegation, however, is completely contradicted by other allegations to the effect that the trial judge had sustained the prosecutor's objections when defendant's counsel sought further to interrogate the witness with specific reference to the alleged conviction on the book-making charge. Since it is alleged that the prosecution witness had been convicted in the same court as that in which defendant was tried in the instant case, and since defendant obviously had information concerning the matter at the time of his trial, any criminal record involving the witness obviously was available both at the trial and on new trial proceedings.

[1-4]. The applicant for the writ must show that the facts upon which he relies were not known to him, and could not, in the exercise of due diligence, have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise, he has stated no ground for relief. *People v. Shorts*, 32 Cal.2d 502, 513, 197 P.2d 330; *People v. Adamson*, 34 Cal.2d 320, 326-327, 210 P.2d 13; *People v. Ayala*, 138 Cal.App.2d 243, 246, 291 P.2d 517. The writ is not available to correct an error or irregularity occurring at the trial which could be corrected on motion for new trial or by an appeal; it is available only in the absence of any other adequate remedy. *People v. Ayala*, supra, 138 Cal.App.2d 243, 246, 291 P.2d 517; *People v. Martinez*, 88 Cal.App.2d 767, 774, 199 P.2d 375; *People v. Martinelli*, 118 Cal.App.2d 94, 96, 257 P.2d 37. Unreasonable and unexplained delay in presenting a petition

for the writ affords sufficient ground for its denial. *People v. Tucker*, 154 Cal.App.2d 359, 362-363, 316 P.2d 417; *People v. Flores*, 147 Cal.App.2d 243, 247, 305 P.2d 90; *People v. Krout*, 90 Cal.App.2d 205, 209, 202 P.2d 635. Defendant's delay of more than eighteen months in the instant case is without any sufficient or substantial explanation.

The order is affirmed.

FOX, P. J., and ASHBURN, J., concur.



162 Cal.App.2d 632

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Donald Delbert MADLUNG, Defendant
and Appellant.

Cr. 6099.

District Court of Appeal, Second District,
Division 3, California.

Aug. 6, 1958.

Defendant was convicted, in a jury trial, of first degree robbery. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment, and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Parker Wood, J., held that under the circumstances the defendant was not denied due process of law on any theory that the record furnished the reviewing court was deficient.

Judgment and order affirmed.

I. Constitutional Law ☞271

Where defendant's request was for the normal record on appeal, and reporter's transcript was approved by judge and was filed, and clerk's transcript containing copies

of information, verdicts, notice of appeal, request for records and minutes was filed, and reporter's supplemental transcript containing opening statement and prosecution's arguments to jury was filed, and original file of Superior Court was transferred to District Court of Appeal, and there was no error in instructing jury, and defendant did not point to any evidence in support of his claim of omission of evidence from record, defendant was not denied due process of law on any theory that record of entire case, including the evidence, was not furnished to him. West's Ann.Rules on Appeal, rule 33.

2. Criminal Law ☞698(1)

In first degree robbery prosecution, admission of testimony regarding statements made by defendant when officers asked him if he wanted to discuss robbery was not error in absence of any objection at trial to admission of such testimony.

3. Criminal Law ☞720(8), 728(2)

In first degree robbery prosecution, deputy district attorney's argument to jury that defendant did not conduct himself as an innocent man when he stated to arresting and investigating officers that he did not want to talk about any robbery and wanted to talk to an attorney did not constitute misconduct where argument was based on testimony received without objection, argument was not objected to at trial and argument was of minor significance in view of strong direct evidence identifying defendant as robber and weakness of alibi testimony.

4. Criminal Law ☞641(1)

The request in opening brief of defendant who then represented himself that District Court of Appeal appoint counsel to file supplemental brief for defendant was denied where defendant's opening and closing briefs adequately presented and discussed issues of appeal.

PARKER WOOD, Justice.

Defendant was convicted, in a jury trial, of first degree robbery. The jury found that he was armed with a revolver at the time the robbery was committed. Defendant admitted an allegation of the information that he had previously been convicted of grand theft. He appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that a record of the entire cause was not furnished to him; and that the deputy district attorney was guilty of misconduct.

On December 28, 1956, about 8 p. m., while Melba Hurley was on duty as a checker at the cash register in a grocery market, a man went to the front of the line of customers at the register, opened a paper sack, pointed a revolver at the checker, and said: "Open the register and give me the money and don't make a move or I will let you have it." The man held the sack open, and the checker put approximately \$300 in it. The man ran out the side door and across the parking lot, entered an automobile, and went away. The automobile was driven by another man. When the robber ran out the door, the checker, a customer (Mr. Waring), and the proprietor of the market, ran after him. The customer and the proprietor saw the robber enter the automobile, which was a 1951 Studebaker with license number GLL 203. The left taillight of the automobile was out, and the left fender had been smashed. The proprietor entered his own automobile and followed the Studebaker for several blocks. At one place, while the proprietor was pursuing the robber, the two automobiles were "bumper to bumper" by reason of traffic congestion, and at that time the proprietor saw the profile of the robber. When the Studebaker entered a dead-end street (during the pursuit), the proprietor drove into a nearby driveway and lay in the seat of his automobile. As the Studebaker was coming out of that street gunshots were fired by someone who was in that automobile.

Donald Delbert Madlung, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

On the evening of said December 28, Officer Strohmman traced the license number GLL 203 "to the suspect [defendant]," and found that the number was the license number of a 1951 Studebaker automobile. The officers saw defendant at the Hob Nob Cafe, about 1:30 a. m. (on December 29), and they asked him if he owned a 1951 Studebaker. He replied in the affirmative. When the officers and defendant were at defendant's residence, which was two doors from the cafe, the officer asked him where his car was. Defendant (accompanied by the officers) went to a place between his residence and the cafe, and then he said, "Well, that's where I left it, I don't know where it is now." The officers said that he was under arrest for robbery at a market, that his car had been identified by license number, and that the description of the robber fitted him. They asked him if he wanted to tell "them about it, and he said no, that he didn't want to talk about it." After they had taken him to the sheriff's station, they took some keys (Exhibit 1) from his pocket.

Officer Weyant, one of the investigating officers, saw a 1951 Studebaker automobile, bearing license number GLL 203, in a police garage in Lynwood. The left rear fender and the left taillight of that automobile had been damaged. One of the keys from Exhibit 1 fitted the ignition lock of the automobile, and another of those keys fitted the lock of the glove compartment.

The checker (cashier), at the market, testified that the defendant was the man who robbed her at the market at said time.

Mr. Waring testified that on said December 28, about 8 p. m., as he (witness) went to the check stand in the market, the defendant went ahead of him; he (witness), while standing by the side of defendant, saw defendant "holding a gun on the cashier" and he saw the cashier put money "in a paper bag for him."

The proprietor of the market testified that when he was pursuing the Studebaker automobile he saw the "defendant by profile" in the passenger side of the Studebaker.

Officer Weyant testified that he and another officer had a conversation with defendant in the forenoon of December 29 at the sheriff's station; he told defendant that the officers wanted to talk to him about a robbery in a market in Downey the previous evening, that defendant had been identified by two persons, and also that defendant's car had been identified; he (witness) asked defendant if he wished to discuss the robbery; defendant replied that he did not want to talk about any robbery and that all he wanted to do was to talk to an attorney; the officer said: "That is your constitutional right. However, in fairness to you, I want you to know what you are accused of, and want you to have the opportunity to tell us if you want to"; defendant replied: "I don't want to talk about this robbery or any other robbery. I just want an attorney"; the officer asked defendant if he wanted to account for his activities on the preceding evening; defendant said, "I don't know"; the officer asked him if he meant that he did not know where he was or he meant that he did not know whether he wanted to tell about it; defendant replied that he did not want to talk about it.

Defendant testified that he did not commit the robbery; he was not in that market on said December 28 at 8 p. m.; he was in the Hob Nob Cafe on said December 28, from approximately 5:30 p. m. until approximately 8:45 p. m., at which time he and one "Smitty" left the cafe; he and Lois Aho went to that cafe on said day about 5:30 p. m.; Lois left the cafe a little after 8 p. m. Defendant also testified that he had been convicted of a felony, grand theft; he told Officer Weyant where he was about 8 p. m. on said December 28.

Lois Aho testified that she and defendant went to the Hob Nob Cafe about 5:30 p. m. on said December 28; she left the cafe a little after 8 p. m.; defendant was in the cafe while she was there.

Joe Gillette and Jesse Smith, called as witnesses by defendant, testified that they saw defendant in the Hob Nob Cafe on said

December 28, from approximately 7:45 p. m. to 8:45 p. m. Russell Julian, called by defendant, testified that he was the bartender at the Hob Nob Cafe; he saw defendant at the cafe on said December 28, from approximately 6 p. m. until approximately 8:30 p. m.

Officer Weyant testified, on rebuttal, that the market where the robbery occurred was about two and one-half miles from the Hob Nob Cafe; that on December 29 he asked Julian, the bartender (one of defendant's witnesses), what time defendant came to the cafe on December 28; Julian replied that it was in the evening and he "didn't pay any attention to the exact time, but he paid the bill, \$4 or \$5 that he owed me"; the officer asked Julian how long the defendant stayed there; he replied, "I don't know, I didn't pay any particular attention to him, but later on he left with this fellow named Smith."

[1] Appellant asserts in effect that he has been denied due process of law because a record of the entire cause, including the evidence, was not furnished to him. He does not refer to, or indicate in any way, any evidence which he claims was omitted from the record. A reporter's transcript, duly certified by the official shorthand reporter as a full, true and correct transcript of the proceedings had and testimony taken in this cause, has been filed herein. A certificate made by the judge, and attached to the reporter's transcript, states that no objection was made to the reporter's transcript and that said transcript was approved by the judge. A clerk's transcript, duly certified by the county clerk as containing copies of the Information, Verdicts, Notice of Appeal and Request for Records on Appeal, and Minutes, has been filed herein. A certificate made by the trial judge, and attached to the clerk's transcript, states that no objection was made to the clerk's transcript and that said transcript was approved by the judge. Appellant states that he received those transcripts. The request of appellant for preparation of record on appeal was as follows: "[T]hat the record

on Appeal and the Clerk's and reporter's transcript be prepared and transmitted to the Appellate Court forthwith, and that I be advised of said action." It thus appears that such request was for the "normal record" on appeal, as designated in the Rules on Appeal (Rule 33). Thereafter appellant filed herein a request for augmentation of the record to include: all instructions and written opinions; the opening statement of the prosecution; and the arguments to the jury. An order was made that the county clerk transmit to this court a reporter's supplemental transcript containing the opening statement of the prosecution and the arguments to the jury at the close of the case. A reporter's supplemental transcript was filed herein—containing the prosecution's opening statement and the prosecution's arguments to the jury. Appellant's brief shows that he received a copy of that transcript. At the time of ruling on the request for augmentation, this court notified appellant that the original file of the superior court would be transmitted to this court. That file has been so transmitted, and all the instructions given are before this court. It does not appear that any requested instruction was refused. The only instruction requested by defendant was given. That instruction defined "alibi," and stated that an alibi, if proved, was a complete defense, and "If, after a consideration of all the evidence, you have a reasonable doubt whether or not the defendant was present at the time the crime was committed, he is entitled to an acquittal." All the instructions have been considered by this court. The instructions were adequate, and there was no error in instructing the jury. Defendant was not denied due process of law.

[2] Appellant asserts further that the court should not have received the testimony regarding the statements made by defendant when the officers asked him if he wanted to discuss the robbery. One of those statements of defendant was made at defendant's residence, soon after he had been apprehended. At that time the arresting officers asked him if he wanted to tell

about the robbery, and he replied that he did not want to talk about it. The other statements of defendant were made at the sheriff's station, the day after the robbery. At that time the investigating officers asked him if he wanted to discuss the robbery, and he replied to the effect that he did not want to talk about any robbery, but wanted to talk to an attorney. No objection was made, at the trial, to that testimony. Defendant was represented at the trial by the public defender. The court did not err in receiving the testimony to which no objection was made.

[3] Appellant asserts that the deputy district attorney was guilty of misconduct by reason of certain statements made in his argument to the jury. One of the statements, so referred to, was: "Officer Strohmman testified first he went into the bar, he told the defendant what the care [charge] was and the defendant had nothing to say. Now, when any person is accused of a crime that they know nothing about, that they claim they didn't commit, I should think the normal reaction would be to say that they didn't know anything about it, not to say: 'I don't want to talk about it, I want to see an attorney'; the normal reaction would be to say, 'I don't know anything about this, I didn't do it, I am innocent, I don't know what you are talking about.' But not this defendant, he says he doesn't want to talk about it, he wants to see a lawyer."

Another of those statements was: "The next morning, 10:00 o'clock, the witnesses were brought down [to sheriff's station] * * * they positively identified the defendant. * * * [T]hen Officer Weyant talked to the defendant, told him he had been identified, told him he was charged with armed robbery and told him everything the defendant should know about the case and said, 'What do you want to tell us about the case?' and the defendant's reaction was, 'I don't want to say anything, I want to talk to a lawyer.' They asked him if he wanted to account for his time the preceding night and the defendant

said he didn't want to, he wants to talk to his attorney. This, I submit, is not the answer of an innocent man. This defendant had a free opportunity to account for his time, had an opportunity to mention the names of the people that were purportedly with him at 8:00 o'clock, but all the defendant was interested in doing was talking to his attorney; it certainly isn't the attitude of an innocent man."

Those statements of the deputy district attorney were based on testimony that had been received without objection. No objection, or assignment of misconduct, was made at the trial regarding the statements. Apparently, at the time of trial, the defendant did not regard the testimony concerning the conversations as incompetent, and did not regard the argument based thereon as misconduct. The statements of the deputy district attorney should not be regarded as misconduct. Furthermore, it is reasonable to assume that the statements were of minor significance, in view of the strong direct evidence identifying defendant as the perpetrator of the crime, and in view of the alibi testimony wherein the "approximations" as to time might not be inconsistent with defendant's presence at the market which was a short distance from the cafe.

[4] In the last paragraph of appellant's 17-page opening brief he asks this court to appoint counsel for him, and that such counsel be given ample time in which to file a supplemental brief. Appellant states in his opening brief that "although it is his desire to proceed in propria persona the circumstances occasioned by the denial of a complete record preclude him from doing so." Also, in the last paragraph of appellant's 10-page closing brief he asks for the appointment of counsel. It thus appears that appellant, who desired to represent himself, reserved his request for appointment of counsel until after he had filed his opening brief. Thereafter he continued to represent himself and filed his closing brief. It seems that he desired to represent himself and to be represented also by counsel. The briefs filed by appellant indicate that

the person who prepared the briefs has had experience in brief writing. Appellant's briefs adequately present and discuss the issues on appeal. Under such circumstances, this court should not appoint counsel.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and PATROSSO, J. pro tem., concur.



162 Cal.App.2d 207

Peter T. RISHWAIN, Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL of the State of California; The Alcoholic Beverage Control Appeals Board of the State of California; Ralph J. McGill, Chairman; Donald H. Bonar and Coleman E. Stewart, as Members of the Alcoholic Beverage Control Appeals Board of the State of California; and C. Hazelhurst, Respondents.

Civ. 9443.

District Court of Appeal, Third District, California.

July 17, 1958.

Applicant for transfer of off-sale general liquor license filed petition for writ of mandate to reverse decision of the Department of Alcoholic Beverage Control which denied the application. The Superior Court, San Joaquin County, Thomas B. Quinn, J., entered judgment denying the petition for writ of mandate, and the applicant appealed. The District Court of Appeal, Warne, J. pro tem., held that where department on May 15 filed decision denying application and mailed decision to applicant on same day, and on June 13 applicant filed petition with department for reconsideration of its decision, and on June 18 department denied

petition for reconsideration, and on June 28 department filed amended order reaffirming order denying petition for reconsideration, proceedings on reconsideration did not extend time for appeal, and therefore applicant's appeal to board on July 1 was not timely.

Judgment affirmed.

Intoxicating Liquors §103

Where Department of Alcoholic Beverage Control on May 15 filed decision denying application of applicant for transfer of off-sale general liquor license and mailed decision to applicant on same day, and on June 13 applicant filed petition with department for reconsideration of its decision, and on June 18 department denied petition for reconsideration, and on June 28 department filed amended order reaffirming order denying petition for reconsideration, proceedings on reconsideration did not extend the 40 day limitation for appeal, and therefore applicant's appeal to board on July 1 was not timely. West's Ann.Bus. & Prof. Code, § 23081.

Michael & Papas, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., by E. G. Funke, Asst. Atty. Gen., and James B. Davis, Deputy Atty. Gen., for respondents.

WARNE, Justice pro tem.

This is an appeal from a judgment denying a petition for a writ of mandate sought to reverse the decision of the Department of Alcoholic Beverage Control which denied appellant's application for a transfer of an off-sale liquor license.

On May 16, 1957, the Department of Alcoholic Beverage Control filed its decision denying appellant's application for a transfer of an off-sale general liquor license and on the same day mailed the decision to the appellant.

On June 13, 1957, appellant filed a petition with the said board for reconsideration of its decision which was denied by an order reading: "On June 18, 1957, the Department

of Alcoholic Beverage Control reconsidered its decision in the above entitled matter by ordering that reconsideration be denied." And on June 28, 1957, the department filed an amended order reaffirming said order as follows: "On June 18, 1957, the Department of Alcoholic Beverage Control acted upon the petition of Peter T. Rishwain, for reconsideration of the Department's decision in the above matter by ordering that reconsideration be denied."

Thereafter, on July 1, 1957, appellant filed an appeal from the decision on the merits with the Alcoholic Beverage Control Appeals Board, which was dismissed by said Appeals Board on July 25, 1957, on the ground that the Appeals Board had no jurisdiction to entertain the appeal since it had not been filed within the 40 day period provided by section 23081 of the Business and Professions Code.

Section 23081 provides: "Within 40 days after the decision of the department is delivered or mailed to the parties, any party aggrieved by the final decision of the department may appeal to the board from such decision. * * *

Following the dismissal of the appeal by the Alcoholic Beverage Control Appeals Board, appellant filed a petition for a writ of mandate to compel both the department and the Appeals Board to annul their decisions in the instant matter and issue said license to appellant. The petition was denied and this appeal followed.

The decision of the trial court was based on a finding that appellant had not exhausted his administrative remedies as he did not file a timely appeal to the Appeals Board from the department's decision.

The sole question presented on this appeal is whether the proceedings on reconsideration extended the time for appeal as limited by the quoted provision of section 23081 of the Business and Professions Code.

We do not deem it necessary to detail the various arguments of the respective parties as the issue has been settled by the decision in *Hollywood Circle, Inc., v. Department of Alcoholic Beverage Control*, 153 Cal.App.

2d 523, 314 P.2d 1007 (petition for hearing by Supreme Court denied, and petition for Writ of Certiorari denied by United States Supreme Court, 356 U.S. 902, 78 S.Ct. 562, 2 L.Ed.2d 580). In that case, which cannot be distinguished from this case, the court held that proceedings for reconsideration did not affect the time for filing the notice of appeal.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



162 Cal.App.2d 184

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Henry F. CANNON, Defendant and
Appellant.
Cr. 3509.

District Court of Appeal, First District,
Division 2, California.

July 17, 1958.

Rehearing Denied Aug. 15, 1958.

Hearing Denied Sept. 10, 1958.

Proceeding on motion for revocation of defendant's probation after conviction of bookmaking. The Superior Court, City and County of San Francisco, Raymond J. Arata, J., entered order revoking probation and defendant appealed. The District Court of Appeal, Dooling, J., held that where court concluded that defendant had violated probation by reason of violation of municipal ordinance, trial court was entitled to consider defendant's previous criminal record as one of the factors in disposing of motion to revoke probation.

Affirmed.

I. Criminal Law 982

Where trial court had concluded that defendant had violated probation by rea-

son of violation of municipal ordinance, he was entitled to consider defendant's previous criminal record as one of factors in disposing of motion to revoke probation.

2. Criminal Law Ⓒ163

Where defendant, convicted of bookmaking after his plea of guilty, was placed on probation and later was charged with violation of municipal ordinance which case was dismissed for failure to bring to trial within 30 days, while dismissal was bar to subsequent prosecution for that offense, it did not mean that court in basing revocation of probation on facts involved in such offense, placed defendant twice in jeopardy for same offense, since inquiry was to determine whether defendant had violated his probation and not to punish him for offense. West's Ann.Pen. Code, §§ 337a, 1387.

3. Criminal Law Ⓒ204

Once in jeopardy must be expressly pleaded or it is waived.

4. Criminal Law Ⓒ982

Where defendant after judgment of conviction was placed upon probation and during period of probation was charged with violation of municipal ordinance and brought before court on matter of whether or not probation should be revoked, and defendant was represented by counsel and allowed to produce evidence to contradict charges, absence of formal written charge of probation violation was not necessary, especially when no complaint was made that formal charges had not been filed and no continuance asked to produce further evidence. West's Ann.Pen.Code, § 1203.2.

Kenneth C. Zwerin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendant has appealed from an order revoking his probation. Appellant pleaded

guilty to the crime of bookmaking (Penal Code, § 337a). He was placed on probation for two years on condition that he serve six months in the county jail and make restitution in the sum of \$500.

After he had completed the term in jail and commenced to satisfy the order for \$500 restitution he was arrested for the violation of a municipal ordinance (arranging for another to have an act of sexual intercourse). Thereupon an assistant probation officer had a motion to revoke appellant's probation in this matter placed on the calendar of the superior court. After some continuances on January 17, 1958, the adult probation officer withdrew his motion to revoke probation and at the same time the district attorney made a motion to revoke appellant's probation. The matter was continued to January 31, 1958, at which time the probation officer joined in the district attorney's motion. A hearing was held in which witnesses including the appellant were sworn and testified. Upon the conclusion of this hearing the court revoked its order of probation and sentenced appellant to the state prison for the term prescribed by law.

At the hearing evidence was produced by a police officer that fully supported the trial court's finding that appellant arranged to and did supply him with a woman for the purpose of prostitution in a hotel of which he was manager. Appellant denied this but the resolution of the conflicting evidence was for the trial court.

[1] Appellant complains that in passing on the motion to revoke his probation the trial court was influenced by his previous criminal record. Having concluded that appellant had violated his probation by the conduct above outlined the trial court was entitled to consider appellant's previous criminal record as one of the factors in disposing of the motion to revoke his probation.

[2] Before the motion was heard and decided the charge of violating the ordinance had been dismissed for failure to

bring it to trial in 30 days. Appellant claims that in basing the revocation of his probation on the same facts involved in the criminal charge which had been so dismissed appellant was placed twice in jeopardy for the same offense. The dismissal was a bar to a subsequent prosecution for that offense (Penal Code, § 1387) but the inquiry here was to determine whether appellant had violated his probation, not to punish him for the substantive offense. He could as well have been charged with violating his probation without filing any complaint for violating the ordinance and the fact that that charge was not prosecuted against him in the municipal court seems immaterial. If he had been acquitted of the charge in the municipal court after a trial it might be argued that that judgment would be *res judicata*, but he was not acquitted. The dismissal while it technically prevented his trial for the misdemeanor was not *res judicata* in this collateral inquiry.

[3] Additionally once in jeopardy must be expressly pleaded or it is waived. 14 Cal.Jur.2d, Criminal Law, § 195, p. 441. The record does not show that this question was presented in the trial court.

[4] Appellant also complains that the matter was not brought before the court in the manner provided by Penal Code, section 1203.2. That section provides that during the period of probation any probation or peace officer may without warrant re-arrest the defendant and bring him before the court, or the court may issue a warrant for his re-arrest, and in either event may revoke his probation "if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is * * * engaging in criminal practices * * *."

Here appellant had been arrested on another charge and was brought before the court without necessity of re-arrest for that reason. He complains that no formal written charge of probation violation was filed. The section requires none and appel-

lant was afforded a hearing at which he was represented by counsel and produced evidence to contradict the charges. No complaint was made that formal charges were not filed and no continuance was asked to produce further evidence once that against him was fully developed. Without conceding that any formal charge is required, appellant has shown no prejudice in this case by the failure to file a formal charge.

The section provides in the alternative that the court may revoke probation if the court has reason to believe that the probationer is engaging in criminal practices "from the report of the probation officer, or otherwise". The report of the probation officer is not required if the criminal activity is *otherwise* shown. Here it was shown by sworn testimony in open court in the presence of appellant and his counsel, who was allowed full opportunity to controvert it. The section was fully complied with.

Order affirmed.

KAUFMAN, P. J., and DRAPER, J.,
concur.



162 Cal.App.2d 710

Nathaniel CASTIEL, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Civ. 18182.

District Court of Appeal, First District,
Division 2, California.

Aug. 12, 1958.

Rehearing Denied Sept. 11, 1958.

Hearing Denied Oct. 10, 1958.

Proceeding on petition for writ of mandate compelling disclosure of name of informer and of his present whereabouts. The District Court of Appeal, Dooling, J., held that where District Court of Appeal

reversed conviction on ground that defendant was entitled to disclosure of name of informer, who had been a participant in crimes which defendant was charged with committing, defendant, in advance of second trial, was entitled to disclosure of the informer's identity and as to his whereabouts.

Writ issued.

1. Courts ⇐99(1)

Where Supreme Court denied a hearing on appeal from judgment of District Court of Appeal reversing conviction, opinion of District Court of Appeal became law of case.

2. Witnesses ⇐216

Where District Court of Appeal reversed conviction on ground that defendant was entitled to disclosure of name of informer, who had been a participant in crimes which defendant was charged with committing, defendant, in advance of second trial, was entitled to disclosure of informer's identity and as to his whereabouts.

3. Criminal Law ⇐627½

In a proper case, disclosure of matters which are material and substantial to preparation of an adequate defense may be compelled in advance of trial.

Harry P. Glassman, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., Cecil Poole, Deputy Dist. Atty., San Francisco, for respondent.

DOOLING, Justice.

[1] Petitioner is the defendant in the case in which a previous judgment of conviction was reversed by this court in *People v. Castiel*, 153 Cal.App.2d 653, 315 P.2d 79. The conviction in that case was reversed on the sole ground that the defendant (petitioner herein) is entitled to the disclosure of the

name of the informer who had been a participant in the crimes which petitioner was charged with committing. The Supreme Court denied a hearing in that appeal and our opinion has now become the law of the case, establishing that petitioner is entitled to the disclosure of the unidentified informer's name and cannot be legally convicted if that information is denied to him.

[2] The case was set for a second trial. In advance of the trial the petitioner made a motion before the trial court that the court order the district attorney to disclose the name and present whereabouts of the informer. The court denied this motion and petitioner filed his petition for writ of mandate in this court.

It is conceded by counsel for the respondent that under our previous decision the identity of the informer must be disclosed at the time of trial if the petitioner is brought to trial again. Theirs is a delaying action only, designed to conceal from petitioner the information to which he is admittedly entitled to the last possible moment and thus to handicap him as much as possible in the preparation of his defense.

[3] It is now well settled that in a proper case the disclosure of matters which are material and substantial to the preparation of an adequate defense may be compelled in advance of the trial. *Powell v. Superior Court*, 48 Cal.2d 704, 312 P.2d 698; *Walker v. Superior Court*, 155 Cal.App.2d 134, 317 P.2d 130; *Cordry v. Superior Court*, 161 Cal.App.2d 267, 326 P.2d 222. Herein it has become the law of the case by our previous decision that the disclosure of this informer's identity is material and substantial to an adequate defense. Under the circumstances of this case, and we need not and do not go beyond the circumstances of the precise case before us, with petitioner's right to the disclosure of the informer's identity established by our earlier decision as a matter of law, we would stultify ourselves and make a mockery of petitioner's judicially established right by holding that he is not now entitled to the information

that he seeks in order to adequately prepare his defense.

The writ of mandate will issue as prayed.

KAUFMAN, P. J., and DRAPER, J.,
concur.



162 Cal.App.2d 365

In the Matter of the ESTATE of Max L.
SCHECHTMAN, Deceased.

Harold B. STONE, Executor of the Estate of
Frances B. Schechtman, Deceased,
Contestant and Appellant,

v.

Abraham SCHECHTMAN and Leo Schecht-
man, Petitioners and Respondents,

Barker Bros., a Corporation, Contestant and
Respondent.

Civ. 22997.

District Court of Appeal, Second District,
Division 2, California.

July 28, 1958.

Rehearing Denied August 22, 1958.

Hearing Denied Sept. 24, 1958.

Proceeding on a petition to remove executors, and on petition to settle their final account. The Superior Court, Los Angeles County, Newcomb Condee, J., entered orders denying the petition to remove the executors, and settled their final account, and appeals were taken from such orders. The District Court of Appeal, Herndon, J., held that evidence sustained finding that at time of decedent's death he was not the beneficial owner of an interest in certain parcels of realty, record title to which stood variously in the names of decedent's three sons.

Orders affirmed.

I. Courts ⇨202(5)

In probate proceedings, as in civil cases generally, findings of the trier of the facts

supported by substantial evidence may not be set aside by the reviewing court, although such court may believe the great preponderance of the evidence was the other way.

2. Deeds ⇨110

Whether the execution, delivery and recordation of a deed was intended to convey the beneficial interest of the grantor is a question of fact for the trial court.

3. Trusts ⇨86

There is a strong presumption that the holder of legal title to realty owns the beneficial interest therein, and evidence to overcome such presumption and establish that the property is held in trust must be clear and convincing.

4. Trusts ⇨86

No implication of a trust arises from a parent's purchase of property in the name of his child, but such a purchase is presumptively a gift or an advancement.

5. Trusts ⇨89(1)

In proceeding on a petition to remove executors and to upset their final account, evidence sustained finding that at time of decedent's death he was not the beneficial owner of interest in certain parcels of realty, record title to which stood variously in the names of decedent's three sons.

6. Executors and Administrators ⇨221(6)

Evidence, including testimony that funeral expenses of decedent were originally paid by checks drawn against a joint bank account maintained by decedent and his son, and that decedent had overdrawn his interest in the account so that the entire balance of the account belonged to son when funeral expenses were paid, afforded substantial support for a finding that son paid such funeral expenses out of his own funds and that executors were therefore justified in paying creditor's claim filed by son for such expenses.

Nathan L. Schoichet, Beverly Hills, for appellant.

Harry A. Franklin, Los Angeles, for respondents Abraham Schechtman and Leo Schechtman.

Musick, Peeler & Garrett, Los Angeles, for respondent Barker Bros.

HERNDON, Justice.

The controlling question on this appeal from an order denying a petition to remove executors and from an order settling their final account is the sufficiency of the evidence to support the findings of fact upon which the challenged orders rest. Appellant's case is founded upon contentions that this court must hold *as a matter of law* (1) that the decedent, at the time of his death, was the beneficial owner of interests in certain parcels of real property, the record title to which stood variously in the names of decedent's three sons; and (2) that the executors (two of said sons) wrongfully had failed and refused to inventory and account for these properties as assets of the estate. More specifically, therefore, the basic issue is the sufficiency of the evidence to support findings to the effect that decedent had no interest in any of said properties which could survive his death to become a part of his probate estate.

Max Schechtman, generally referred to herein as "the decedent", died on February 10, 1952. Ten years previously he had married Frances Stone. At the time of this marriage, Frances was a widow with two adult sons, Harold and Paul Stone, and decedent was a widower with three adult sons named Leo, Abraham and Jack. The latter had changed his name to Shepley. Upon decedent's death, Leo and Abraham were appointed executors of his will.

Frances survived the decedent exactly three years, her death occurring on February 10, 1955. Her son Harold Stone (appellant herein) was appointed executor of her will. It was in his capacity as executor of his mother's will that appellant objected to the account of Leo and Abraham and sought their removal as executors of their father's will. Appellant's asserted interest in the estate of Max

Schechtman is predicated upon contentions that the disputed property interests allegedly owned by Max vested in Frances upon his death, and became a part of her estate.

On April 13, 1942, the day of his marriage to Frances, decedent transferred to his three sons a very substantial part of the real and personal property which he then owned. He had made other similar transfers a short time previously. These conveyances were without consideration. There is testimony in the record concerning decedent's contemporaneous declarations to the effect that his purpose in making these conveyances in contemplation of his marriage to Frances was to safeguard the separate status of the property, and to make certain the effectuation of his desire that his sons should have the property upon his death.

During the ten-year period beginning with his marriage to Frances and ending with his death decedent was actively engaged in buying, improving, managing, and selling real property. At decedent's direction, title to property purchased during this period was placed in the name of one or another of decedent's sons.

It would serve no useful purpose to detail here the tangled web of transactions described in the voluminous record. It is sufficient to note that decedent's real estate operations were uniformly profitable; that when a piece of property was sold, the proceeds would be used to acquire, or to improve, other property, and that decedent paid the taxes on the properties, attended to the making of repairs and improvements, collected rentals, and otherwise exercised dominion and control. Generally speaking, decedent reported in his income tax returns the income and the capital gains on sales as though the properties were his own. The sons cooperated in the operations by executing such deeds, powers of attorney and other documents as were needed from time to time to effectuate transactions arranged by decedent, and to facilitate the exercise of his powers of management and control.

Appellant earnestly contends that there is no substantial evidence in the record to rebut the inferences reasonably to be drawn from the evidence above summarized to the effect that decedent was the beneficial owner and that the sons were holders of nothing more than bare legal title to the properties in question. This contention, however, runs counter to numerous precedents involving very similar factual situations, and it is defeated by the application of well settled principles limiting the powers of appellate courts in the review of factual determinations.

[1] In probate proceedings, as in civil cases generally, the findings of the trier of the facts supported by substantial evidence may not be set aside by the reviewing court "although said court may believe the great preponderance of the evidence was the other way." In re Estate of Trefren, 86 Cal.App. 2d 139, 141, 194 P.2d 574, 575; In re Estate of Weber, 113 Cal.App.2d 160, 165, 247 P.2d 939; In re Estate of Bristol, 23 Cal. 2d 221, 223, 143 P.2d 689.

[2] Whether the execution, delivery and recordation of a deed was intended to convey the beneficial interest of the grantor is a question of fact for the trial court. In re Estate of Filippi, 9 Cal.App.2d 407, 49 P.2d 892; Cirimele v. Lucchesi, 100 Cal.App.2d 371, 375, 223 P.2d 681. In Longley v. Brooks, 13 Cal.2d 754, 762, 92 P.2d 394, 399, the contentions of the appealing party were quite similar to those advanced by appellant in the case at bar. In sustaining the findings of the trial court, the Supreme Court stated as follows: "Neither can it be said there is merit in the contention of appellants that after the asserted delivery of the deed, certain acts of the grantor allegedly showing an exercise by her of dominion or control over the property conclusively negatived an intent on her part to have transferred title to the ranch by the delivery of the deed. In view of the many circumstances which showed an intention on the part of Marcia Brooks to part with title to the land, neither the fact that after the alleged delivery of the deed to Emery Brooks the taxes on the property continued to be assessed to her,

nor that, personally, she rented the property and collected the rentals therefrom, and personally attended to other business matters relating to the property, is sufficient to overcome an inference of delivery of the deed and consequent transfer of title which was deducible from other evidence."

[3] There is a strong presumption that the holder of the legal title owns the full beneficial interest in the property. Glasgow v. Andrews, 129 Cal.App.2d 660, 664, 277 P.2d 400. The evidence to overcome this presumption and establish that the property is held in trust must be clear and convincing. Rench v. McMullen, 82 Cal.App.2d 872, 874, 187 P.2d 111; G. R. Holcomb Estate Co. v. Burke, 4 Cal.2d 289, 299, 48 P.2d 669; McQuin v. Rice, 88 Cal.App.2d 914, 918, 199 P.2d 742. And the question whether the evidence possessed that quality was for the trial judge. Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583.

[4] No implication of a trust arises from a parent's purchase of property in the name of his child. Such a purchase is presumptively a gift or an advancement. Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, 250, 196 P. 884; Gomez v. Cecena, 15 Cal.2d 363, 367, 101 P.2d 477; Quinn v. Reilly, 198 Cal. 465, 467-468, 245 P. 1091; Daniel v. Sisnero, 109 Cal.App. 8, 10-11, 292 P. 518, 519. In the last cited case, the real property in question had been purchased in the name of the son with money furnished by the father. Notwithstanding direct testimony that no gift or advancement was intended, the trial court found that the son was the beneficial owner. In affirming the judgment of the trial court, the reviewing court commented: "On the other hand, there is a presumption of law that, where a father pays the consideration, and title to property is taken in the name of the son, a gift, advancement, or bounty is intended. Quinn v. Reilly, 198 Cal. 465, 245 P. 1091; Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, 196 P. 884. This presumption was, in the instant case, sufficient to sustain the action of the trial court."

In Altramano v. Swan, 20 Cal.2d 622, at page 628, 128 P.2d 353, 356, section 442 of

the Restatement of Trusts is quoted with approval as follows: "Where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial interest in the property."

In *Quinn v. Reilly*, supra, 198 Cal. 465, 467-468, 245 P. 1091, 1092, the rule is stated as follows: "Section 853 of the Civil Code is but a formal declaration of the old and well-established doctrine of equity that a resulting trust arises in favor of a purchaser who pays the consideration money and takes the conveyance in the name of a third person. There are, however, exceptions to this doctrine. It is well settled that one exception to the rule is found in transactions between parent and child. *Russ v. Mebius*, 16 Cal. 350; *Hamilton v. Hubbard*, 134 Cal. 603, 65 P. 321, 66 P. 860; *Elliott v. Merchants Bank etc. Co.*, 21 Cal.App. 536-541, 132 P. 280. These transactions are presumed to be in the nature of gifts, advancements, or bounties. In short, the existence of the relationship of parent and child is a circumstance which *prima facie* establishes the presumption of an advancement and thereby rebuts the presumption of a resulting trust."

[5] As we have pointed out, there is substantial evidence in the record from which the trial court reasonably could infer that decedent's purpose in making the conveyances to his sons immediately prior to his marriage to Frances, and in handling subsequent transactions as he did, was to insure against any possible future claim by Frances that his separate property or its avails or transmutations had become commingled with community property. In the circumstances here presented, it was entirely reasonable for the trial court to apply the presumption that in causing title to the

disputed properties to be conveyed to his children, decedent intended to make advancements to them. Indeed, it is not unreasonable to suppose that it was decedent's purpose to insure against the very type of claim that is here asserted by his widow's successor in interest.

It may be conceded, as appellant argues, that some of decedent's actions with reference to the properties, including his payment of income taxes on capital gains from sales, and his various acts of dominion and control in the management of the properties, appear to be inconsistent with an intent or belief that actual ownership resided in the sons. Such concession, however, is only a concession that the evidence was conflicting and subject to divergent and conflicting inferences.

[6] In concluding that we cannot properly disturb the trial court's findings with respect to the beneficial ownership of the properties with which appellant unsuccessfully sought to charge the executors, we have disposed of the principal ground upon which appellant sought to remove them from office. However, appellant also contends that the executors were guilty of a fraud in allowing and paying a creditor's claim filed by Leo Schechtman for funeral expenses in the amount of \$540. The propriety of the presentation and allowance of this claim depends upon the sufficiency of the evidence to support a finding that Leo had paid these expenses out of his own funds. The funeral expenses were originally paid by checks drawn against a joint bank account maintained by Leo and the decedent. Leo testified that the decedent had overdrawn his interest in the account so that the entire balance of the account belonged to Leo when the funeral expenses were paid. This testimony afforded substantial support for a finding in accord therewith.

The orders appealed from are affirmed.

FOX, P. J., and ASHBURN, J., concur.

162 Cal.App.2d 182

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Kenneth CARPENTER, Defendant,
Petitioner and Appellant.

Cr. 3493.

District Court of Appeal, First District,
Division 2, California.

July 17, 1958.

Proceeding for writ of error coram nobis, sought on ground that conviction had been obtained by perjured testimony. The Superior Court, San Mateo County, A. R. Cotton, J., denied writ, and petitioner appealed. The District Court of Appeal, Dooling, J., held that evidence supported finding that officers had not known of or suspected alleged perjury.

Order affirmed.

1. Criminal Law §919(1)

Knowing use by officers of perjured testimony to secure a conviction entitles the defendant to a new trial, but the use must be knowing.

2. Criminal Law §997(15)

In proceeding for writ of error coram nobis, sought on ground that conviction had been secured by knowing use of perjured testimony, evidence supported finding that officers had not known of or suspected alleged perjury.

James Martin MacInnis, Harry P. Glassman, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

This is an appeal from an order denying a writ of error coram nobis after a hearing on the merits. Appellant was convicted of a robbery in which two men participated, one Negro and the other white. Appellant, who is white, was identified at the trial by

his victim. One Bryant, a prisoner at San Quentin, also testified for the prosecution that he was the Negro who participated in the robbery and identified appellant as the other participant.

The writ was sought on the ground that the conviction was secured by the knowing use by the public officers of San Mateo County of the perjured testimony of Bryant. At the hearing on coram nobis Bryant testified that his evidence against appellant had been false and that he had in fact not participated in the robbery and knew nothing of it.

The officers denied any knowledge that Bryant's testimony was false at or before the time of trial, and Bryant's own testimony was that he had told the officers who prosecuted appellant that he participated with appellant in the robbery and that he had done this without threat or inducement made to him by such officers. He testified that officers of other counties had harassed him over a period of time and that he had admitted his connection with this particular offense and implicated appellant because of this, but he brought no knowledge of this home to the officers of San Mateo County.

[1] The knowing use by officers of perjured testimony to secure a conviction entitles the defendant to a new trial. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; *In re Mooney*, 10 Cal.2d 1, 15, 73 P.2d 554; *In re De La Roi*, 28 Cal.2d 264, 269, 169 P.2d 363; *In re Lindley*, 29 Cal.2d 709, 722, 177 P.2d 918; *In re Mitchell*, 35 Cal.2d 849, 856, 221 P.2d 689; *People v. Sutton*, 115 Cal.App.2d 751, 252 P.2d 633. An essential element stated in all of the cited cases is that the officers *knowingly used* the perjured testimony.

[2] Whether or not the trial judge believed that Bryant was testifying truthfully when he repudiated his testimony given at the trial, the evidence not only supports the conclusion that the officers did not know or suspect that Bryant was not testifying to the truth at the original trial, but establishes that fact to a point where it may be doubted that an inference to the con-

trary would find any support in the evidence.

Order affirmed.

KAUFMAN, P. J., and DRAPER, J.,
concur.



162 Cal.App.2d 248

The PEOPLE of the State of California,
Plaintiff,

v.

Theodore MONROE, Defendant.

Cr. 3486.

District Court of Appeal, First District,
Division 2, California.

July 21, 1958.

Hearing Denied Sept. 19, 1958.

Defendant was convicted of armed robbery. The Superior Court, Santa Clara County, William F. James, J., rendered judgment and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that evidence on the issue of the identification of the defendant was sufficient to support conviction.

Affirmed.

1. Criminal Law Ⓒ572

Robbery Ⓒ24(3)

Evidence, in prosecution for armed robbery of grocery store, was sufficient on issue of identification of defendant to sustain conviction and overcome his alibi.

2. Criminal Law Ⓒ742(1)

Even though a defendant's own testimony exculpates him, it is for the jury to decide whether he will be believed.

3. Criminal Law Ⓒ938(1)

Motion for new trial on ground of newly discovered evidence is addressed to sound discretion of trial court.

4. Criminal Law Ⓒ959

Record failed to reveal that trial court had abused discretion in denying new trial

in armed robbery prosecution on ground of newly discovered evidence consisting of codefendant's statement, after jury returned verdict convicting defendant and codefendant, that codefendant was guilty but that defendant was not guilty but rather revealed that trial court acted with commendable fairness in postponing hearing on motion until it had investigated matter and convinced itself of falsity of codefendant's statement.

5. Constitutional Law Ⓒ268

Where defendant chose to be represented by same counsel as codefendant, there was no conflict of interest between them, and record indicated that such counsel did not know that, after verdict was returned, codefendant would make statement confessing his guilt but denying defendant's guilt, fact that defendant was represented by same counsel as such codefendant did not constitute a denial of due process of law to defendant.

6. Criminal Law Ⓒ1030(2)

Contention that defendant was denied due process of law with respect to representation by counsel should be raised in the trial court and not initially on appeal.

Duncan Davidson, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

By an information dated October 11, 1957, Theodore Monroe and Artis Allen Falkner were charged with armed robbery. The information also charged that each of them had previously been convicted of robbery in the first degree and had served a term therefor in the State Prison. Both defendants entered a plea of not guilty. A jury trial resulted in a verdict of guilty. This appeal is taken only by the defendant Theodore Monroe from the judgment of conviction and from the order denying his motion for a new trial. Monroe contends

that: 1) The evidence was insufficient to support the verdict; 2) The evidence was insufficient to prove his identification so as to overcome his alibi; 3) The trial court should have granted his motion for a new trial based on newly discovered evidence when Falkner stated that he committed the robbery but that Monroe did not; 4) He was denied due process of law because he was represented by the same attorney as the defendant Falkner who confessed the crime.

The record discloses the following facts: On Sunday, September 22, 1957, William A. Floren, age 17, and his grandfather, Gustave Floren, arrived at the family grocery store, Gail's Market, at a few minutes before 9 a. m. to open the store for business. Gail's Market is located on the corner of Tenth and Keyes Streets in San Jose, California. William took approximately \$450 out of the floor safe and placed it on one of the three cash registers in the front of the store. He then turned his back to the door and began putting the Sunday papers together for sale. Suddenly he heard someone say, "This is a stick up". He turned toward the door and saw a Negro dressed in dark clothes, a dark blue baseball cap and dark glasses with a gun in his hand. Meanwhile, Gustave Floren, had gone to the rear of the store near the butcher's section to get the carton in which the butcher's money was kept on Sundays. He was bringing this carton to the front of the store. As he stooped down to pick up some scrap paper, he saw the gunman. The gunman forced both Mr. Floren and his grandson to go to the icebox in the rear of the store. As they got to the rear of the store, a second Negro appeared. This man was bare headed, dressed in a light colored sport coat or jacket and had a white handkerchief over the lower part of his face. His right hand was in his jacket pocket but the victims did not see a gun. The second man told them to get into the icebox, take their aprons off, and kneel down and put their hands behind their backs. He followed them into the icebox, tied them up. The second man asked William if he knew the combination to the safe. When William

replied that he did not know it, the man replied, "Well, you're going to learn it." Then the second man left and tried to lock the door. Shortly thereafter, an elderly customer who had entered the store was shoved into the icebox.

William looked through the glass door of the icebox and saw that the men had gone. He loosened his bonds and untied his grandfather. He ran out, saw that all the money was missing from the cash register, and called the police. The police arrived at the market at about 9:30 a. m. Walter Hinds, who lived across the street from Gail's Market, told the police that at about 9 a. m. he had bought a newspaper from the Floren's immediately after they drove up. As he walked home he noticed a Maroon Ford with its motor running parked near Gail's Market. There were two Negroes in the front seat of the car. Hinds went home and sat on the front porch reading the newspaper. He noticed that the car was backing up towards the "Trading Post", a second hand store located at 11th and Keyes Streets, one block from Gail's Market, where Hinds worked. Thinking that the occupants of the car might be potential Trading Post customers, Hinds continued to watch the car. The actions of the car's occupants struck Hinds as peculiar; one of them left while the other appeared to be changing clothes. After the second occupant had walked away across Eleventh Street toward Gail's Market, Hinds then crossed the street to the car. Hinds noticed a big bump on the left side of the car, a colored quilt on the front seat, and that the vehicle had no license plate but only a temporary license in the window. Hinds entered the Trading Post and wrote the make, color and temporary license number of the car on a tag. With this information the police found the car in about 20 minutes at 7th and Julian Streets in San Jose. The owner of the car was the defendant Falkner who lived nearby.

William A. Floren further testified that after the robbery, Gail's Market remained open. About one-half to two hours after

the robbery, a Negro customer entered. He was dressed in light colored clothes. An ivy league hat was pulled down over his hair line. He also wore glasses. He made about \$3 worth of purchases and wanted to cash a payroll check for \$10.30. William told him that they had just been robbed and he didn't know if they had enough money on hand to cash the check. The customer asked some questions about the robbery and then took the check to William's father. William's father okayed the check and William cashed it. William thought there was something funny about the customer, that he had never seen him in the store and that the customer was acting "real strange" when he walked into the store, but did not attach any particular significance on the matter at the time.

On the day after the robbery, William and his grandfather identified the defendant Artis Falkner as the first robber with the gun. On the next day, September 24, William picked the defendant Monroe's picture as that of the second robber. Monroe was arrested. At Monroe's home the police found a dark blue baseball cap and sun glasses. The same day, both William and his grandfather again went to the police department and positively identified the defendant Monroe as the second robber. On September 30, 1957, both of the victims attended another police line-up and again identified Falkner and Monroe as the two robbers.

Both defendants took the stand, denied the crime, and offered the defense of alibi. The appellant testified that he lived at a boardinghouse at 1197 North First Street. On the Sunday in question he got up about 9:15 or 9:30 a. m. and put on light colored clothes. He went to Gail's Market in a taxi about 10 a. m. to make some purchases for Miss Williams and Mrs. Lankford who lived at the same boarding house. He stated that although he usually shopped at a market which was nearer, on that day he went to Gail's Market which was four miles away from the boarding house because prices at the local store were too high, and because Mrs. Lankford had told

him to go there after he had told her the local meat market was not open on Sunday.

Miss Williams testified that she had asked the appellant to make some purchases; that the appellant left the boarding house at about 10:00 a. m. and was gone about one hour, but that she did not know when he had gotten up or where he had been from 9 to 9:30 a. m. Mrs. Lankford testified that she asked the appellant to make some purchases for her a little before or after 9 a. m. and that he left about 10 a. m. by cab to go to Gail's Market. The cab driver testified that he had picked up the appellant about 10 a. m., took him to Gail's Market, a twelve minute drive and back, and that the fare was \$2.30.

At the trial, both defendants had the same private counsel of their choice. After the verdict was returned, the defendant Falkner asked permission to address the court. He stated:

"Your Honor, at this time I want to inform the jury, the District Attorney and my counsel too that, well, as the District Attorney pointed out to the jury this afternoon, no one actually knows what went on there except the individuals that was there. And I was there. But I can't see an innocent man go to prison with me. And Mr. Monroe wasn't there. There was three of us but he was not there. I thought that I could beat this charge and I tried, took it as far as it would go even to a verdict that was brought in but I can't take an innocent man with me and I want to let the jury and everyone know at this time. Thank you."

The Court replied:

"You two defendants have been very well represented. Your attorney has tried the case with a great degree of skill and understanding. The jury will now be discharged. The court stands adjourned. Goodnight."

Appellant's attorney moved for a new trial on the basis of Falkner's statement. The court postponed the hearing on the motion and sentencing for several weeks, and then stated:

"Upon evidence as submitted here, the Court was under some question in its own mind because at the time of the return of the verdict of the jury, your fellow defendant arose and addressed the court and admitted his own guilt but stated to the Court at that time that you were not present at the offense and were not guilty of that offense. I could not pass sentence on you even with the verdict of guilty from the jury's hands until in my own mind I was satisfied where the truth lay. So that I have continued the matter for several weeks during which time I have had a very careful investigation made as to what the real truth of the matter is. I have been convinced beyond a reasonable doubt that the statement of your fellow defendant that you were not involved in this event was not true. And I am satisfied beyond a reasonable doubt that you were there and that you did engage in this offense and that you were equally guilty with him. The only difference between you was that he had a gun and you didn't."

[1] Appellant's first contention on appeal is that the evidence is insufficient to support the verdict as it was inherently improbable that he would re-enter the store so soon after the robbery and that it was inherently improbable for the victim not to identify him so soon after the crime, but to be able to do so a few days later. Appellant's testimony and that of his witnesses indicated that it was the first time he had shopped at Gail's Market, that in order to effectuate a saving on the purchase of groceries he spent an almost equal amount in cab fare. The victims testified that during the robbery the appellant's head was bare and his face covered up to his nose, while when he later returned to make the purchases and cash the check, his face was bare, but his head was covered to the hairline with a hat. The victim also stated that appellant's conduct in the store was rather strange. It was for the jury to weigh the above evidence (*People v. Ashley*, 42 Cal.8d 246, 267 P.2d 271), and the

verdict indicates that they found appellant's reasons for going to Gail's Market less credible than the victim's reasons for the failure to identify the appellant immediately after the robbery.

[2] Appellant's second contention on appeal is that the evidence as to the identification of the appellant was insufficient to overcome his alibi. The only question is whether there is substantial evidence to support the judgment. Before a judgment of conviction is set aside, it must appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support it. *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778. Both of the victims identified the appellant several times, from photographs, from hearing his voice, from a line-up. Neither one of the appellant's alibi witnesses could account for his whereabouts between 9 and 9:30 a. m. Even though the appellant's own testimony exculpates him, it is up to the jury to decide whether he will be believed. *People v. Borrego*, 211 Cal. 759, 297 P. 17. We think there is ample evidence to support the judgment of conviction.

[3, 4] Appellant next contends that the trial court abused its discretion in failing to grant his motion for a new trial after Falkner's statement that the appellant was not one of the three robbers. A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court. *People v. Greenwood*, 47 Cal.2d 819, 306 P.2d 427. In view of the pleas of not guilty entered by both defendants and the uncontroverted evidence that there were two robbers and not three, we do not think that the trial court erred. Rather, the record indicates that the trial court acted with commendable fairness in postponing the hearing on the motion in order to further investigate the matter. *People v. Shepherd*, 14 Cal.App.2d 513, 58 P.2d 970, relied upon by the appellant is readily distinguishable, as there the complaining witness was in doubt as to the identity of the defendant and the State admitted doubt. *People v. Greenwood*, 47 Cal.2d 819, at page 822, 306 P.2d 427, at page 430. Falkner did not exculpate the appellant when he took the stand, but wait-

ed until after verdict. The jury did not believe Falkner's testimony as to his own innocence and alibi. It is useless for the appellant to argue that if Falkner had spoken before the verdict, a different verdict would have been reached in view of the victim's positive and repeated identification of the appellant.

[5, 6] Appellant's final contention is that he was denied due process of law because he was represented by the same attorney as Falkner, who confessed the crime. As pointed out above, appellant's counsel was of his own choosing. The record indicates that appellant's counsel did not know Falkner would make the statement. Nor is there here any conflict of interest as was the case in *Craig v. U. S.*, 6 Cir., 217 F.2d 355. Furthermore, this issue should have been raised below. *People v. Meacham*, 84 Cal.App.2d 193, 190 P.2d 262.

We conclude that the verdict, judgment and order denying the motion for new trial are all amply supported by the record before us.

Judgment and order denying motion for new trial affirmed.

DOOLING and DRAPER, JJ., concur.



162 Cal.App.2d 391

**Shirley S. GALPER, Plaintiff and
Respondent,**

v.

**Murray GALPER, Defendant and
Appellant.**
Civ. 22920.

District Court of Appeal, Second District,
Division 1, California.

July 29, 1958.

Rehearing Denied Aug. 18, 1958.

Hearing Denied Sept. 24, 1958.

Wife brought suit for divorce and obtained a default judgment. More than nine months after entry of default judg-

ment the husband filed a motion to vacate and set aside the judgment. The Superior Court of Los Angeles County, William E. Fox, J., entered an order denying the motion to set aside entry of default and default judgment, and the husband appealed. The District Court of Appeal, Lillie, J., held that where husband, fully advised, and after due consideration, agreed with his lawyer to proceed by way of default in divorce suit, and husband then later changed his mind, but not decisively or diligently enough to prevent default from being entered, Superior Court did not abuse its discretion in denying husband's motion, made more than nine months after entry of default, to vacate and set aside the default judgment.

Order affirmed.

1. Appeal and Error ⇨920(1)

In considering appeal from order, which is made on motion based on affidavits, and which involves determination of question of fact, if there is any conflict therein, those facts favoring respondent are accepted by reviewing court as true, and since all intendments are in favor of ruling of lower court, affidavits in behalf of successful party are deemed not only to establish facts directly stated therein, but all facts reasonably to be inferred from those stated.

2. Judgment ⇨139

Motion to set aside default judgment is addressed to sound discretion of trial court.

3. Appeal and Error ⇨957(1)

In absence of clear showing of abuse by trial court in exercise of its sound discretion with respect to motion to set aside default judgment, reviewing court will not disturb trial court's order.

4. Judgment ⇨435

Though extrinsic accident and mistake of fact may, in some situations, be a proper basis for exercise of court's equitable jurisdiction to vacate default judgment more than six months after entry of default,

question whether such condition exists is a question of fact depending entirely on particular circumstances in each case.

5. Divorce ⇨165(4)

Where divorce has been procured by extrinsic fraud, trial court has inherent power and jurisdiction, notwithstanding lapse of statutory time prescribed in Code of Civil Procedure to purge its records of the fraud by setting aside former decree. West's Ann.Code Civ.Proc. § 473.

6. Appeal and Error ⇨948

On appeal from order denying motion of defendant to vacate default judgment, burden of showing abuse of discretion or error rests on appealing defendants.

7. Divorce ⇨161

Where defendant, fully advised, and after due consideration, agreed with his lawyer to proceed by way of default in divorce suit, and defendant then later changed his mind, but not decisively or diligently enough to prevent default from being entered, trial court did not abuse its discretion in denying defendant's motion, made more than nine months after entry of default, to vacate and set aside the default judgment.

Alex Goldberg, Los Angeles, for appellant.

No appearance for respondent.

LILLIE, Justice.

On February 3, 1956 plaintiff filed an action for divorce. Defendant was personally served with a copy of the summons and complaint but failed to appear although represented by counsel. Default was entered against him on July 25, 1956. On August 21, 1956, the matter was heard as a default and on August 31, 1956, the court entered an interlocutory decree awarding plaintiff a divorce and, among other things, support for the minor child.

More than 9 months after the entry of default, defendant on May 11, 1957, filed a motion to vacate and set aside the inter-

locutory judgment and entry of default, alleging that a denial thereof would result in "a grave miscarriage of justice due to the connivance of his (defendant's) attorney or said attorney's gross neglect or misconduct in representing the defendant." As a condition to the granting of the motion defendant agreed to submit to a blood grouping test. Accompanying the motion was defendant's proposed answer denying paternity of the child and a cross-complaint for annulment. From the order denying the motion defendant appeals.

[1] The motion was heard entirely on affidavits and counteraffidavits. In considering an appeal from an order made on a motion based on affidavits, and which involves the determination of a question of fact, if there is any conflict therein, those facts favoring the respondent are accepted by the reviewing court as true, and since all intendments are in favor of the ruling of the lower court, the affidavits in behalf of the successful party are deemed not only to establish the facts directly stated therein, but all facts reasonably to be inferred from those stated. *DeWit v. Glazier*, 149 Cal.App.2d 75, 307 P.2d 1031; *Doak v. Bruson*, 152 Cal. 17, 91 P. 1001; *West Coast Securities Co. v. Kilbourn*, 110 Cal.App. 293, 294 P. 57.

With this rule in mind the following are the pertinent facts relating to defendant's failure to appear in the divorce action and file his motion to vacate within six months after entry of default.

The parties were married December 17, 1955. Plaintiff claimed to be pregnant by defendant who was then a member of the armed forces, but whose permanent residence was in New York. They separated January 31, 1956. In January, defendant's parents visited Los Angeles, and with them, defendant consulted Seymour Mandel, esq., whom defendant retained to represent him in the divorce matter. Shortly after separation and on February 3, 1956, Mr. Mandel, defendant, plaintiff, her father and her counsel, conferred in the latter's office where defendant was served with a

copy of summons and complaint and order to show cause.

On numerous occasions defendant and his parents consulted with Mr. Mandel, on some defendant was alone. At all times they discussed the divorce, the child not yet born, and the defendant's rights in the matter. On some occasions they talked about the paternity of the child. After discussing at length with defendant and his parents the facts and the law in the matter, Mandel told them it would be "very difficult for defendant to prove that he was not the father of the child" and to do so would require considerable funds for investigation, the expenditure of which he thought would be wasted. He further advised them that from the facts they gave him plaintiff was entitled to a divorce, defendant was not, and unless an investigation uncovered facts showing otherwise, the court would hold defendant to be the father of the child and that once the court made such a finding it would be virtually impossible to obtain a change in the court's decision. Defendant and his parents told Mandel "they knew of no facts which would show that the defendant was not the father of the child." Defendant told him he had intercourse with plaintiff on more than one occasion at or about the time the child was conceived and "did not know that anyone else had had sexual intercourse with plaintiff." After numerous consultations and extended discussions defendant instructed Mr. Mandel to allow his default to be entered, of which defendant's parents approved, and Mr. Mandel proceeded accordingly. On February 28, 1956, defendant and Mr. Mandel appeared at the hearing on the order to show cause and stipulated that the court order defendant to pay, among other things, \$40 per month for plaintiff's support and a further sum to be fixed by the court upon the birth of the child.

Shortly thereafter, defendant was discharged from military service and returned to his home in New York on March 6, 1956. In May, defendant contacted a New York lawyer, Jack Pearl, whom he did not

retain and who acted only as a friend, who requested information from Mandel concerning the case; and on May 25, 1956, Mandel advised him of the status of the litigation. On July 20, 1956, Mr. Mandel wrote to defendant that the child had been born on July 3, 1956; informed him that plaintiff planned to proceed with the interlocutory decree "at which time the judge will set the support amount payable by you" and requested defendant write him the amount he would be willing to pay; and advised him to pay up the arrearage that he might be in a better position in the eyes of the court. Defendant at no time personally answered this letter.

Having already known, of his own knowledge, that defendant had been discharged from military service before he left Los Angeles, Mandel wrote him on July 9, 1956, asking him to confirm the fact so he could execute an affidavit of military service accordingly. Defendant did so and on July 19, 1956, Mandel executed the same. Default was entered on July 25, 1956.

Pearl wrote Mandel on July 27, 1956, that defendant was barely able to support himself, discussed further the matter of paternity, the expense involved in trying the issue and the fact that defendant would be subjecting himself to the jurisdiction of the court if he appeared, and asked his opinion in the matter. Mandel replied on August 7, 1956, that the default divorce trial was set for hearing on August 21, 1956, at which time defendant would "have no status inasmuch as we have defaulted." He explained that when defendant and his parents were in California they decided the solution to defendant's problem was a dissolution of the marriage even though defendant would be required to support the child through minority. Mandel advised Pearl that from the facts defendant gave him a blood test would be a waste of money; that he estimated it would cost him \$500 in attorney's fees to litigate the paternity issue, \$300 for the blood tests and an additional sum for plaintiff's attorney's fees, and that strong evidence would be

needed to overcome the presumption of legitimacy under section 193 of the Civil Code of the State of California.

On August 16, 1956, Pearl answered Mandel that defendant could pay no more support than \$5 per week; that defendant continued to question the paternity of the child but could not afford to litigate the issue and questioned Mandel's estimate of costs.

Realizing that defendant was becoming increasingly dissatisfied with the disposition of the case, and to protect him to the best of his ability, Mandel appeared at the default divorce hearing on August 21, 1956. He informed the court that at the time defendant consulted with him it was agreed to let the matter go by default, of which course defendant approved, but since, he has become dissatisfied and asked the court for a continuance to permit defendant to obtain other counsel. The court denied the motion and granted a divorce to plaintiff, ordering defendant to pay \$50 a month each for the support of mother and child. The interlocutory decree was entered August 30, 1956.

Immediately after the hearing on August 21st, Mandel wrote to Pearl informing him what had taken place and that, in denying his motion for continuance, the judge had stated "that new counsel could move to set aside the interlocutory judgment of divorce within six months from the date of judgment." He advised Pearl that had defendant had his present point of view when he was in Los Angeles he would not have undertaken to represent him, and that in his opinion his (Mandel's) method of representation was the best and correct one.

The record discloses that defendant's first attempt to retain local counsel to set aside the default was sometime in December, 1956. Pearl contacted several local counsel who would, or could, not accept the case and on January 28, 1957, defendant finally retained Alex Goldberg, his present counsel, who did not file his motion to vacate the default until May 11, 1957.

There does not appear in appellant's brief a clear and succinct statement of his contention on appeal, but from a reading thereof we believe his claim to be that the trial court erred in denying the motion to set aside the judgment because the action of defendant's counsel leading up to the default was such as to prevent him through "extrinsic accident and mistake" from being heard. By implication appellant abandons any claim to extrinsic fraud, as indeed he should, since it is obvious from the record that such evidence is entirely lacking. If appellant is to prevail on this appeal, he must show an abuse of discretion on the part of the trial court in holding that the facts were not sufficient to justify an exercise of its "inherent power" to vacate the judgment.

[2-5] A motion to set aside a default judgment is addressed to the sound discretion of the trial court and, in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below. *Stub v. Harrison*, 35 Cal.App.2d 685, 96 P.2d 979. In the main, appellant relies upon the language of the court in *Dei Tos v. Dei Tos*, 105 Cal.App.2d 81, 232 P.2d 873, to point up the power of the court to vacate a default judgment when a condition not amounting to fraud occurs preventing defendant, through no fault of his, from having his day in court. A reading of the authorities upon which the court there relied, and the cases of *Hallett v. Slaughter*, 22 Cal.2d 552, 140 P.2d 3 and *Bartell v. Johnson*, 60 Cal.App.2d 432, 140 P.2d 878, cited by appellant, convinces us that although "extrinsic accident and mistake of fact" may, in some situations, be a proper basis for the exercise of the court's equitable jurisdiction to vacate a default judgment more than six months after entry of default, whether such a condition exists is a question of fact depending entirely upon the particular circumstances in each case. See, also, *Larrabee v. Tracy*, 21 Cal.2d 645, 134 P.2d 265. The case of *McGuinness v. Superior Court*, 196 Cal. 222, 237 P. 42, 48, 40 A.L.R. 1110,

establishes the rule in California that where a divorce has been procured by extrinsic fraud the trial court has "inherent power" and jurisdiction notwithstanding the lapse of the statutory time prescribed in section 473 of the Code of Civil Procedure to purge its records of the fraud by setting aside the former decree. However, realizing that circumstances not amounting to extrinsic fraud, but of a serious nature for which defendant was not responsible and which prevented him from being heard, may exist to create an injustice, our courts in a limited number of situations have exercised their "inherent power and jurisdiction" to relieve the defaulting party from a judgment where it is probable that an injustice has resulted. The courts have labeled such situations "extrinsic accident" and "mistake of fact" but in doing so, have made it plain that the lack of vigilance on the part of the person seeking to be relieved must be such as would not have occurred with a man of ordinary care and prudence under the circumstances. *Hallett v. Slaughter*, 22 Cal.2d 552, 140 P.2d 3, 6; *Soule v. Bacon*, 150 Cal. 495, 89 P. 324; *Bartell v. Johnson*, 60 Cal.App.2d 432, 140 P.2d 878. Thus, independent of section 473 of the Code of Civil Procedure, the courts have set aside judgments rendered, for example, against an incompetent. This was done in the *Dei Tos* case. There, defendant was insane at the time the default decree was entered and remained incompetent for approximately three years. Long after the statutory period of 6 months, he moved to set aside the default on the ground that the action of respondent in procuring the interlocutory and final decrees, knowing he was mentally incompetent, was a fraud on the court. The court therein said, 105 Cal.App.2d at page 83, 232 P.2d at page 875: "It would be more accurate to say that mistake, rather than fraud occurred, when the plaintiff failed to have a guardian appointed to appear and defend the action," and again at page 85 of 105 Cal.App.2d, at page 876 of 232 P.2d: "* * * defendant was

not given his day in court. Whether this was by fraudulent design or by mere mistake or inadvertence on the part of the plaintiff makes no difference. The principle of law involved is that, through no fault of his, the defendant was not permitted to participate in the proceedings." Neither this case nor any other authority we have found throws open the doors of "extrinsic accident" or "extrinsic mistake" to any and all conduct which may have caused one to default and which might justify the court, independent of section 473 of the Code of Civil Procedure, in exercising its inherent power and jurisdiction, to vacate a judgment rendered against him.

We have quite a different situation in the case at bar from those found in the cases cited by appellant. Pure and simple, the instant case is one in which defendant, fully advised, and after due consideration, agreed with his lawyer to proceed by way of default, and then later changed his mind—but not decisively or diligently enough to prevent the default from being entered. Even under section 473 of the Code of Civil Procedure a change of mind is not a ground for vacating a judgment. *Elms v. Elms*, 72 Cal.App.2d 508, 164 P.2d 936. It may be true that defendant always questioned paternity of the child in his own mind and wanted to litigate the issue, but it is clear that despite these feelings defendant nevertheless, fully advised in the matter, accepted his counsel's advice and agreed to the method of procedure taken. Defendant knew and understood the nature of the proceedings; was fully advised concerning his rights in the matter; agreed to let the case, including the issue of paternity, go by default and was at all times informed of the status of the litigation. We find no advantage taken of defendant by plaintiff, her counsel, his own counsel, or the court. The record shows defendant was not only dilatory in making known his dissatisfaction with the representation Mr. Mandel had given him, but at no time personally so advised him. After defendant left for New York,

with the exception of his letter concerning his military status, he at no time personally communicated with his counsel. He did not answer his letters and requests. However, as soon as counsel was convinced of defendant's attitude in the matter (through indirect means) he immediately did all he could to protect his client by appearing in a proceeding in which defendant had no standing, to ask the court for a continuance. We fail to see wherein defendant's counsel "connived" or with whom. Nor does there appear to be gross or any "neglect" or "misconduct" on his part in the representation of his client. The trial court could find no justification for vacating the default judgment, nor from the record can we.

Appellant seeks to excuse his failure to file the motion to vacate within six months of entry of default to bring it within the provisions of section 473 of the Code of Civil Procedure, because of "a series of misunderstandings, misinformation and erroneous advice." He claims that he relied upon a statement in counsel's letter of August 21, 1956; that the trial judge, in denying his motion for continuance, told him "that new counsel could move to set aside the interlocutory judgment of divorce within six months from the date of the judgment" which would give appellant until February 21, 1957; whereas, in fact, he had only until January 25, 1957. Regardless of any misunderstanding in this regard, the record shows that defendant again was dilatory. His first effort after August 21, 1956, to contact local counsel was not until the first part of December. Although present counsel was not retained until January 28, 1957, it is interesting to note that he did not file his motion until May 11, 1957.

[6,7] On appeal the burden of showing abuse of discretion or error rests on the appellant. *Stevens v. Stevens*, 129 Cal.App.2d 19, 276 P.2d 139; *Hayden v. Hatch*, 134 Cal.App.2d 765, 286 P.2d 541. No abuse of discretion is manifest in this record. In view of a lack of showing of

such abuse on the part of the trial court in denying the motion to vacate, we make no comment upon the matter of blood tests.

Order affirmed.

WHITE, P. J., and FOURT, J., concur.



162 Cal.App.2d 790

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Melvin Herman BURTON, Defendant and
Appellant.**

Cr. 6220.

**District Court of Appeal, Second District,
Division 2, California.**

Aug. 15, 1958.

Prosecution for assault with a deadly weapon. The Superior Court, Los Angeles County, LeRoy Dawson, J., rendered judgment, and defendant appealed. The District Court of Appeal, Herndon, J., held that in prosecution for assault with a deadly weapon evidence supported implied finding that a reasonable man in defendant's position would not have been warranted in believing that such excessive force as was used was necessary in order to prevent bodily harm to himself.

Judgment affirmed.

I. Assault and Battery ☞92

In prosecution for assault with a deadly weapon, evidence supported implied finding that a reasonable man in defendant's position would not have been warranted in believing that such excessive force as was used was necessary in order to prevent bodily harm to himself.

2. Criminal Law ☞741(1), 742(1)

It was for trier of fact to pass upon credibility of witnesses and weight to be accorded evidence.

3. Criminal Law — 938(1)

In prosecution for assault with a deadly weapon, wherein the proffered newly-discovered evidence was merely cumulative and there was no showing of the exercise of reasonable diligence to discover and produce such at trial, denial of motion for new trial was not abuse of discretion.

Clifton D. Klahs, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., John A. Vander Lans, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

Convicted of assault with a deadly weapon by the trial court sitting without a jury, defendant appeals from the judgment of conviction and from the order denying his motion for a new trial. Defendant contends (1) that the evidence does not support the conviction in that "the evidence clearly shows the right of self defense" and (2) that the trial court abused its discretion in denying his motion for a new trial on the ground of certain newly discovered evidence, the substance of which was set forth in supporting affidavits. We have concluded that neither of these contentions is meritorious.

It is undisputed that a rather sordid quarrel developed between defendant and Pearl Mitchell, the complaining witness, and that this quarrel was abruptly and decisively terminated when defendant felled Mrs. Mitchell with a well-aimed brickbat¹ hurled from a distance of some fifteen feet. A lengthy exposition of the sharply conflicting testimony would constitute no worthwhile contribution to legal literature.

Defendant relies upon testimony given by defense witnesses to the effect that Mrs. Mitchell was reputed to have a violent disposition, a fact known to the defendant; that she approached defendant in a threatening manner with her hand in the pocket

of her dress uttering menacing words, and that when she fell to the ground a pair of scissors slipped from her pocket. Defendant contends in effect that this court must hold as a matter of law that he acted in justifiable self-defense. The contention is without merit.

[1, 2] Each recited item of testimony favorable to defendant's theory is directly controverted by the testimony of the witnesses for the prosecution. Unquestionably, there was ample evidence to support the implied finding of the trial judge that a reasonable man in defendant's position would not have been warranted in believing that such an excessive use of force was necessary in order to prevent bodily harm to himself. *People v. Fisher*, 86 Cal.App.2d 24, 34, 194 P.2d 116. It was for the trier of the facts to pass upon the credibility of the witnesses and the weight to be accorded the evidence. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778; *People v. Franklin*, 153 Cal.App.2d 795, 798, 314 P.2d 983; *People v. Searcy*, 153 Cal.App.2d 799, 802, 314 P.2d 1002.

[3] The showing made in support of the motion for a new trial was clearly insufficient. It consisted of two affidavits. One Paul Perry deposed that Mrs. Mitchell bore a reputation as a person of violent disposition and one Bliding Bryant, identifying himself as an eyewitness to the occurrence, gave an affidavit which generally corroborated defendant's version of the facts. The evidence concerning the reputation of the complaining witness appeared to be only cumulative. There is no showing that defendant exercised reasonable diligence to discover and produce such testimony at the trial. *People v. McGarry*, 42 Cal.2d 429, 432-433, 267 P.2d 254. There was no abuse of discretion in the denial of the motion for a new trial. *People v. Miller*, 41 Cal.App.2d 252, 259, 106 P.2d 239.

The judgment and order are affirmed.

FOX, P. J., and ASHBURN, J., concur.

1. "A piece or fragment of a brick; properly, according to Gwilt, less than one half of its length. It is the typical ready

missile, where stones are scarce." The Oxford English Dictionary, Vol. I, page 1094.

162 Cal.App.2d 661

William Edward MAERTINS, Plaintiff and Appellant,

v.

KAISER FOUNDATION HOSPITALS, a corporation; Permanente Medical Group, a co-partnership; Kaiser Foundation Health Plan, a non-profit trust, Defendants and Respondents.

Civ. 17892.

District Court of Appeal, First District,
Division 2, California.

Aug. 11, 1958.

Rehearing Denied Sept. 10, 1958.

Hearing Denied Oct. 10, 1958.

Action for damages for failure to diagnose and treat tubercular condition. The Superior Court, County of Contra Costa, Hugh H. Donovan, J., rendered judgment on verdict for defendants, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that where person who was charged with negligence did not appear at trial, but no excuse was offered except that person's statement that appearance was impossible, it was improper to instruct that this person was entitled to presumption of care.

Judgment reversed.

1. Negligence Ⓒ138(2)

Generally, it is improper to instruct that a person charged with negligence is presumably careful and free from fault where there is evidence of negligence, although exceptions are made at least where the person whose negligence in question is dead or unable to testify because of loss of memory.

2. Courts Ⓒ92

Where person who was charged with negligence was dead, so that instruction on presumption of due care was permissible, statement by court that such an instruction is permissible where a person has died or for some other reason is unable to testify was, as respects the other reasons, dictum.

3. Negligence Ⓒ138(2)

Where person who was charged with negligence did not appear at trial, but no

excuse was offered except the person's statement that appearance was impossible, it was improper to instruct that this person was entitled to presumption of care.

4. Trial Ⓒ251(1)

Where a defense is neither raised by the pleadings nor on trial, it is error to instruct the jury on it.

5. Negligence Ⓒ82

Even where plaintiff's negligence is proved, it must be a proximate cause of the injuries to be a defense.

6. Physicians and Surgeons Ⓒ18(10)

In action for damages for failure to diagnose tuberculous condition, wherein only evidence of contributory negligence was plaintiff's failure to keep an appointment after the allegedly faulty diagnosis, it was not shown that this failure in any way affected the earlier diagnosis, and defense of contributory negligence was neither pleaded nor raised at trial, giving of instruction on contributory negligence was error.

7. Trial Ⓒ252(8)

In action for damages for failure to diagnose tuberculous condition, an instruction on unavoidable accident was error where there was no evidence justifying it.

8. Appeal and Error Ⓒ1064(1)

Where negligence action depended upon resolution of sharply conflicting expert testimony, and jury was divided, cumulative effect of erroneous instructions was held prejudicial.

9. Physicians and Surgeons Ⓒ18(10)

In action for damages for failure to diagnose tuberculous condition, wherein the proof depended on testimony of experts, plaintiff was not entitled to instruction that jury could determine question of negligence from common knowledge, or instruction on *res ipsa loquitur*.

Edises, Treuhaft, Grossman & Grogan, Oakland, Henry M. Elson, Berkeley, for appellant.

Carlson, Collins, Gordon & Bold, John Ormasa, Richmond, for respondents.

DOOLING, Justice.

Plaintiff brought this malpractice action alleging failure of Dr. Paul Pfeiffer to discover and treat a tubercular condition in his left lung. Plaintiff was a subscriber to the respondent Kaiser Foundation Health Plan, a non-profit trust which collects premiums for prepaid medical care by respondent Permanente Medical Group, a partnership of doctors, at hospitals owned and maintained by respondent Kaiser Foundation Hospitals, a corporation.

This is an appeal from a judgment for defendants.

In December of 1952 appellant failed to pass an Army induction physical because of a heart murmur. He was advised at that time to have this heart condition evaluated and he made an appointment to see Dr. Pfeiffer, an internist specializing in the field of cardiology at respondent hospital.

On January 9, 1953, Dr. Pfeiffer took appellant's medical history, examined him, fluoroscoped him and sent him to the x-ray department for a chest film. A written interpretation of this x-ray by Dr. Ethel Stuteville, a radiologist, stated:

"Views of the chest show the heart normal in size, shape and position. The lung fields show an area of infiltration in the mid-lung zone on the right. It is suggested that the patient be evaluated for possible lung disease, and if necessary, that serial films be made, taken at intervals of approximately 3 months governed by the clinical findings." Although Dr. Pfeiffer noted that the fluoroscopy revealed that "hilar markings appear accentuated," he made no comments about the radiologist's report. Dr. Bolomy, chief of the Department of Cardiology at the Kaiser Foundation Hospital and chief of the cardiovascular clinic of the Permanente Medical Group in Oakland, testified: "Automatically, in the cardiovascular department, whenever a patient has an appointment on any particular day, his entire x-ray file is sent to the cardiovascular department for the cardiologist to see." Appellant was not advised of the radiologist's findings and no tests for lung disease were made.

Appellant next saw Dr. Pfeiffer on March 13, 1953. A notation in his medical record indicates that he failed to keep an appointment on March 6. At this time the heart murmur was noted as being "much less noticeable" and that appellant had a "slight degree of sternal depression." There was also the notation "3 mos." which was interpreted by respondents' witnesses to mean that appellant was to return in 3 months but appellant testified that he had no recollection of being told to return in 3 months.

Dr. Pfeiffer next saw appellant on October 30, 1953. At this time appellant was told that his heart murmur was "hardly noticeable." The medical record contains the notation: "murmur as before." An x-ray was taken. The written interpretation by the radiologist of this film states: "Re-ray of the chest shows the heart normal in size, shape and position. Infiltration previously reported in the right mid-lung zone has been almost completely cleared."

On December 11, 1953, appellant was again examined by Dr. Pfeiffer and was told that his heart murmur was functional and not congenital. A notation in appellant's medical record states, "Doing well. Murmur very insignif. * * * Probably no heart disease." At this time appellant was told to return if he developed a bad cold.

In late December 1953, appellant developed a cold and returned to see Dr. Pfeiffer on January 15, 1954. He had a cough, a sore throat and was running a temperature and had lost weight. A diagnosis of bronchitis was made and another x-ray was ordered by Dr. Pfeiffer. Appellant was examined by Dr. Pfeiffer on January 22, 1954, and a notation was made that his temperature was 100 degrees and that he "had a cough productive of a little phlegm a few days ago, none now."

On January 25, 1954, appellant was referred to Dr. Donald Ash, a chest specialist at the Kaiser Foundation Hospital in Richmond. Dr. Ash ordered a tuberculin skin test and other laboratory tests. His diagnosis was that appellant had tuberculosis. Using the classifications of the National Tuberculosis Association as to the severity

of appellant's tubercular condition (minimal, moderately advanced and far advanced), Dr. Ash stated that appellant "was at least moderately advanced" in January of 1954.

As to whether appellant had tuberculosis in January 1953, Dr. Ash testified: "I cannot answer that question yes or no. As I look at the film, I personally become suspicious of the possibility of tuberculosis * * *. Looking at the entire picture from this date, January 9, '53, to this morning, sure, I think most everyone could be persuaded that he might very well have been carrying his infection at that time. But I cannot prove that." Dr. Ash also testified that if appellant had active tuberculosis in January 1953, it was a minimal case.

Dr. Epstein, an expert witness for appellant, testified that in his opinion appellant had active tuberculosis in January 1953. He further testified that the tuberculosis was of minimal severity both in January and October of 1953. In January of 1954 the disease was, in Dr. Epstein's opinion, "within the classification of moderately advanced diseases." This doctor testified that it was standard medical practice in 1953 in the Bay Area, when an x-ray film was reported as showing an infiltration in the mid-lung area, to make every effort to establish a diagnosis. To make this diagnosis requires a full history from the patient, "looking especially for a history of contacts with possible cases of tuberculosis." After this the diagnosis requires a complete physical examination with whatever laboratory work seems to be indicated.

Dr. Pfeiffer was at the time of the trial practicing medicine in Maine and there was testimony that it was "impossible" for him to come to California for the trial. The medical witnesses were agreed that Dr. Pfeiffer was possessed of the knowledge, training and skill of a competent and qualified internist specializing in cardiology in the area. There was also testimony that the field of chest x-ray interpretation is not an exact science and it was agreed that no diagnosis of tuberculosis could be made on the basis of the January 9, 1953, x-ray alone without further tests. Testimony was giv-

en by experts for defendants that the x-ray of January 1953 would raise no suspicion of tuberculosis and that Dr. Pfeiffer did all that a prudent practitioner in the community would have done.

Appellant was hospitalized for 19 months, had lung surgery and surgery to correct a hernia caused by tuberculosis therapy. He was unable to work for 25 months and was still under medical care at the time of trial. There was evidence that necessity of medical care would continue indefinitely.

There was also testimony that if treatment had been instituted in January 1953, appellant's hospitalization would probably have been shorter and lung surgery would probably not have been required.

The jury returned a 9 to 3 verdict for respondents.

Appellant complains that certain instructions given by the court were prejudicially erroneous and after an examination of the record we are satisfied that this complaint is justified.

The court instructed that "the law presumes that Doctor Paul Pfeiffer acted in a careful manner, and was free from fault, and that said doctor was not, or is not responsible for the injuries sustained by plaintiff, if any, and this presumption follows the doctor through the entire case, unless and until overcome by evidence to the contrary."

[1,2] It is ordinarily error to give such an instruction where evidence is produced by the defendant as to the circumstances of his conduct which is alleged to be negligent. *Speck v. Sarver*, 20 Cal.2d 585, 587-588, 128 P.2d 16; *Rozzen v. Blumenfeld*, 117 Cal.App.2d 285, 287, 255 P.2d 850; *Wertheim v. Mears*, 104 Cal. App.2d 120, 231 P.2d 89. Respondents argue that because of the testimony that it was impossible for Dr. Pfeiffer to appear as a witness the exception to this rule stated in such cases as *Scott v. Burke*, 39 Cal.2d 388, 394, 247 P.2d 313, should apply. The exception has so far only been applied where the person whose negligence is in question is either dead or unable

to testify because of loss of memory. *Gigliotti v. Nunes*, 45 Cal.2d 85, 93, 286 P.2d 809, and cases there cited. Respondents quote the language of *Kellogg v. Gaynor*, 134 Cal.App.2d 288, 291, 285 P.2d 288, 290: "Where a party has died or *for some other reason is unable to testify* as to his acts which it is claimed were negligently performed, there is a presumption that his acts were performed with a degree of skill and care which was commensurate with his duty, provided that the party claiming the benefit of the presumption has not introduced evidence of conduct wholly irreconcilable with the exercise of due care." (Emphasis ours.) The emphasized language, relied on by respondents, was dictum since the party whose conduct was in question in that case was in fact dead.

No court in this state has been called upon to decide whether a living party without loss of memory who has found it impossible to appear as a witness is entitled to the benefit of the presumption. We have grave doubt if the presumption should extend to such a case but we do not feel called upon to decide the question. The only testimony on the subject was given by a medical witness who testified that he had talked to Dr. Pfeiffer on the telephone about one week before and asked Dr. Pfeiffer to appear as a witness. He testified as follows: "He said that whereas he had planned to come out to California, events had occurred which prevented him from coming. It was impossible for him to come. He did not enlarge on this since we immediately transferred our conversation to friendly and personal matters."

[3] This was no more than the conclusion of Dr. Pfeiffer that he found it impossible to attend the trial. What the events were which had occurred, which in Dr. Pfeiffer's opinion "prevented" his coming, were not stated. We are satisfied that, even assuming that a party who found it impossible to testify by his being unable to attend the trial would be entitled to the benefit of the presumption, he must in any

event prove the facts which prevented his attendance and not rest upon the statement of his naked and unsupported conclusion.

The defense of contributory negligence was not pleaded nor did respondents request any instruction on that defense. Nevertheless the trial judge announced after the close of the evidence that he intended to instruct the jury on contributory negligence and he did so. The only evidence relied upon here to establish contributory negligence is the notation "3 mos." which defendants' witnesses (not the plaintiff) testified indicated that appellant was to return in three months, whereas he waited seven, his delay in keeping an appointment of one week in another instance and his voluntarily leaving the sanitarium for a few days.

[4] Where a defense is neither raised by the pleadings nor on the trial it is error to instruct the jury on it. *Miller v. Peters*, 37 Cal.2d 89, 230 P.2d 803; cf. *Lein v. Parkin*, 49 Cal.2d 397, 318 P.2d 1. Respondents attempt to invoke the rule that where contributory negligence is shown on the plaintiff's own case defendants are entitled to the benefit of such evidence, citing *Curtis v. Kastner*, 220 Cal. 185, 192, 30 P.2d 26 and *Gerfers v. San Diego Transit System*, 126 Cal.App.2d 733, 272 P.2d 930. Appellant introduced the records which showed that he was one week late for one appointment and showed the notation "3 mos." He introduced these records for another legitimate purpose, to show the course of diagnosis and treatment, and it seems very doubtful that the rule of *Miller v. Peters*, supra, 37 Cal. 2d 89, 230 P.2d 803, is not applicable.

[5,6] Regardless of that fact the issue was whether Dr. Pfeiffer was negligent in not taking further diagnostic measures in view of the cloud on the lung shown by the first x-ray and the radiologist's note "It is suggested that the patient be evaluated for possible lung disease * * *," and there was no evidence that

Dr. Pfeiffer's conduct in this respect was in any wise affected by appellant's delay in keeping later appointments or would have been any different if he had kept them. His absenting himself from the sanitarium for a few days after the tuberculosis was diagnosed obviously could be no defense to the antecedent negligence, if found, of the physician. Even where plaintiff's negligence is proved it must be a proximate cause of the injuries to be a defense. This case is, on its facts, on all fours with *Preston v. Hubbell*, 87 Cal.App.2d 53, 62, 196 P.2d 113, 118, where it was held error to instruct the jury that they might consider plaintiff's delay in securing medical attention where there was no evidence that "more prompt treatment would have obviated the operation."

[7] The trial court also gave the instruction on unavoidable accident since condemned in *Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 320 P.2d 500. There was no evidence justifying this instruction under the rule of the *Butigan* case.

[8] The case was one depending upon the resolution of sharply conflicting expert testimony and the jury barely mustered the nine votes necessary to arrive at a verdict for defendants. We are satisfied that the cumulative effect of these instructions must on the facts of this case be held prejudicial.

[9] Appellant was not entitled in this case, which necessarily depended on the testimony of experts, to an instruction that the jury could determine the question of negligence from their common knowledge; nor was it error in this case, depending as it did entirely on the resolution of conflicting expert testimony, to refuse to give a *res ipsa loquitur* instruction.

Because of the errors herein noted the judgment is reversed.

KAUFMAN, P. J., and DRAPER, J., concur.

162 Cal.App.2d 325

A. LINCOLN, Plaintiff and Appellant,

v.

E. DIDAK et al., Defendants.

E. Didak, R. Arenbergh, P. Grey, R. Burns,
G. Barbour, J. A. Ford and W. H.
Parker, Respondents.

Civ. 22792.

District Court of Appeal, Second District,
Division 3, California.

Aug. 6, 1958.

Action for false imprisonment and for wrongful taking of cash bail. The Superior Court of Los Angeles County, Kenneth N. Chantry and William E. Fox, JJ., entered orders dismissing complaint, and plaintiff appealed. The District Court of Appeal held that where affidavits and the record of the prior judicial proceedings disclosed that imprisonment of plaintiff was pursuant to commitment valid on its face issued by municipal court and that plaintiff's cash bail was ordered forfeited by order of municipal court, complaint charging false imprisonment of plaintiff and theft of his cash bail was false, fictitious and sham and constituted an abuse of process of court and was properly dismissed for that reason.

Orders affirmed.

1. False Imprisonment ⇨12

Imprisonment of person pursuant to commitment valid on its face issued by municipal court is not false imprisonment.

2. Trover and Conversion ⇨25

Where cash bail is ordered forfeited by order of municipal court, the person giving bail could not charge city attorney, his deputies, the police chief, a member of county board of supervisors and the municipal court clerk with theft of the bail; if the order of forfeiture was wrongful or erroneous the person giving bail had available a ready remedy.

3. Pleading ⚡354(32)

Where affidavits and the record of the prior judicial proceedings disclosed that imprisonment of plaintiff was pursuant to commitment valid on its face issued by municipal court and that plaintiff's cash bail was ordered forfeited by order of municipal court and that plaintiff's cash imprisonment of plaintiff and theft of his cash bail was false, fictitious and sham and constituted an abuse of process of court and was properly dismissed for that reason.

4. Dismissal and Nonsuit ⚡53(2)

A court has inherent power to dismiss an action when it is shown to be sham, fictitious or without merit in order to prevent abuse of the judicial process.

5. Dismissal and Nonsuit ⚡71

Facts warranting dismissal of action when it is shown to be sham, fictitious or without merit in order to prevent abuse of the judicial process may be made to appear by affidavit as well as by the record of prior judicial proceedings.

6. Pleading ⚡352

While the Code of Civil Procedure provision authorizing a motion to strike the whole of a complaint without the necessity of filing an answer or demurrer does not purport to state the grounds upon which or the manner in which such motion may be made, the Legislature must have contemplated that the motion might be made for reasons and upon grounds not appearing upon the face of the complaint; such provision constitutes a legislative reaffirmance of the inherent right of a court to strike or dismiss a complaint when it is made to appear by extraneous evidence that it is sham and based upon false allegations. West's Ann.Code Civ.Proc. §§ 435, 453.

Harold W. Kennedy, County Counsel, and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondents George J. Barbour and John Anson Ford.

PER CURIAM.

Plaintiff, who is also known as John G. Oppenheimer, appeals from orders dismissing his complaint against various named defendants, being the City Attorney of the City of Los Angeles, three of his deputies, the Chief of Police of the City of Los Angeles, a member of the Board of Supervisors of the County of Los Angeles and the Clerk of the Municipal Court of the Los Angeles Judicial District.

The complaint which was directed not only against the defendants above named, who are respondents upon this appeal, but many others including judges of the Municipal Court of the Los Angeles Judicial District, the City of Los Angeles, the County of Los Angeles, the State of California and the People of the State of California, is in two counts. The first alleges that each of the defendants, "wilfully, unlawfully, wrongfully and maliciously, and with intent to oppress and injure the plaintiff, caused, instigated, directed and agitated the arrest and imprisonment of said plaintiff, without a warrant, and on or about December 26, 1956, did, in fact, arrest and imprison said plaintiff without a warrant, and detain him in overcrowded Linger Heights jail, and continued to and did wrongfully and unlawfully and maliciously confine the said plaintiff in said jail, all without warrant or legal authority of any kind, whatsoever, until on or about January 2, 1957, and without taking plaintiff before a magistrate, as required by section 849, Penal Code", to his damage in the sum of \$10,000. The second count incorporates therein by reference the foregoing allegations and in addition alleges that "In doing the things herein alleged, defendants maliciously abused and exceeded their rights, power, authority and jurisdiction, if any, under the Eighth and Fourteenth Amendments to the Constitu-

A. Lincoln, in pro. per.

Roger Arnebergh, City Atty., and William B. Burge, Deputy City Atty., Los Angeles, for respondents E. Didak, R. Arenbergh, P. Grey, R. Burns and W. H. Parker.

tion of the United States; under Article I, sections 6, 7 and 13, of the California Constitution; under the provisions of 28 U.S.C.A. § 1450; under the provisions of section 591 of the Vehicle Code; under section 80.76(1) of the Los Angeles Municipal Code, Ordinance No. 77,000, and section 80.73.2, of the Los Angeles Municipal Code, Ordinance No. 88,642, and lawlessly and maliciously and unreasonably enforced the provisions of each of said municipal ordinances against plaintiff by criminal process or pretense thereof, and maliciously abused said criminal process or purported process against the plaintiff for an improper purpose, and for a purpose for which it was not intended, and wilfully and unlawfully took and stole from, and deprived the plaintiff of, \$1,000.00 cash, in lieu of bail, lawful money of the United States, and the sole property of the plaintiff, without warrant or authority of law so to do, and with intent to take it, so as to unjustly enrich themselves at plaintiff's expense, and to oppress, injure, intimidate and damage the plaintiff, and to coerce and force him to pay tribute for baseless parking tickets, without defending against them, and to extort money from the said plaintiff, without notice of, or trial or hearing on, a parking ticket or citation." This is followed by a copy of sections 80.76 and 80.73.2 of the Municipal Code of the City of Los Angeles which make it unlawful for any person owning or possessing or having the control of any vehicle to park the same upon any street or alley for more than 120 hours in the aggregate during any period of 121 consecutive hours, and provide a penalty for the first violation thereunder of a fine not to exceed \$50 or by imprisonment in the city jail for a period not exceeding five days.

Each of the respondents filed a general and special demurrer to the complaint and at the same time gave notice of motions to strike and dismiss the complaint upon the grounds that the purported action was sham and fictitious, based upon false allegations and not brought in good faith;

that the filing of the complaint and the maintenance of the action constituted an abuse of the processes of the court; that plaintiff could not prove sufficient facts on which to base a claim for relief; that the defendant has a valid affirmative defense based upon incontrovertible facts, and that the interest of justice would be served by a dismissal of the action.

The notices of the motions to strike and dismiss were accompanied and supported by affidavits setting forth the official status of each of the respondents; that plaintiff's purported cause of action arose out of certain criminal proceedings instituted against plaintiff in the Municipal Court of the Los Angeles Judicial District and appeals taken by the plaintiff from the judgments and orders therein to the Appellate Department of the Superior Court of the County of Los Angeles, the official court files in each of said proceedings being identified and incorporated by reference in the affidavits. Also attached to one of such affidavits and incorporated by reference in the others are copies of two commitments dated December 26, 1956, issued by a judge of the Municipal Court of the Los Angeles Judicial District, from which it appears that in two separate proceedings instituted by the People of the State of California against the plaintiff herein the said plaintiff was convicted of violating section 80.73.2 of the Los Angeles Municipal Code and sentenced to serve five days in the city jail of the city of Los Angeles on each such conviction. The commitments recite, among other things, the fact of his conviction on January 18, 1955, the sentence then imposed; that an appeal was taken by the plaintiff to the Appellate Department of the Superior Court, and that said judgments were by said Appellate Department affirmed. It further appears from the court records hereinbefore referred to that after the affirmance of said judgments plaintiff herein moved to vacate and suspend the judgments and reduce bail, which motions were denied, following which plaintiff again appealed to the Appellate Department which affirmed said orders on July 27, 1956; that the

municipal court forfeited the \$1,000 cash bail deposited by the plaintiff upon his appeals from the judgments of conviction for his failure to appear in satisfaction of said judgments rendered against him; that plaintiff thereafter again moved to vacate the judgments and upon denial of such motion he appealed from said order as well as the order forfeiting bail to the Appellate Department which on December 11, 1956 dismissed the appeals. See *People v. Oppenheimer*, 147 Cal.App.2d Supp. 827, 305 P.2d 306.

While the plaintiff filed affidavits ostensibly in reply to affidavits filed by the respondents, each of these is equivocal and evasive. Therein plaintiff does not deny the official status of each of the respondents as set forth in their respective affidavits and while undertaking to deny the genuineness, due execution and validity of the commitments issued upon the judgments of conviction against him, he does not deny that he was imprisoned pursuant thereto nor does he undertake to deny the facts disclosed by the official records with respect to his efforts to set aside the order forfeiting the \$1,000 cash bail deposited by him in order to stay execution of the judgments upon his appeal therefrom. Plaintiff's affidavits, like his complaint, are designed to conceal rather than reveal the facts out of which his purported cause of action arises. By the official records of the judicial proceedings had against the plaintiff it is incontrovertibly made to appear that defendant was not falsely imprisoned by the respondents but that he was imprisoned pursuant to judgments of the Municipal Court of the City of Los Angeles, which judgments became and are final, and that the purported charge that the respondents "stole" the \$1,000 cash bail which he deposited upon his appeal from said judgments is false, it affirmatively being made to appear that the bail was ordered forfeited by the Municipal Court of the Los Angeles Judicial District.

[1,2] It is too clear to require extended argument to demonstrate that none of the respondents may be held liable for plaintiff's imprisonment pursuant to a commit-

ment valid upon its face issued by the municipal court (*Vallindras v. Massachusetts, etc., Ins. Co.*, 1954, 42 Cal.2d 149, 265 P.2d 907), nor that respondents may not be charged with theft of the cash bail which was ordered forfeited by the order of the municipal court. If the order of forfeiture was wrongful or erroneous, plaintiff had available a ready remedy. *People v. Oppenheimer*, supra, 147 Cal.App.2d Supp. 827, 305 P.2d 306.

[3,4] Thus it is clear that the plaintiff's purported complaint against the respondents is false, fictitious and sham and constitutes an abuse of the process of the court. *Cunha v. Anglo California Nat. Bank*, 1939, 34 Cal.App.2d 383, 388, 93 P.2d 572; *Crowley v. Modern Faucet Mfg. Co.*, 1955, 44 Cal.2d 321, 324, 282 P.2d 33; *Utz v. Aureguy*, 1952, 109 Cal.App.2d 803, 806, 241 P.2d 639. It has long been recognized in this State that a court has inherent power to dismiss an action when it is shown to be sham, fictitious or without merit in order to prevent abuse of the judicial process. *Neal v. Bank of America Nat. Trust & Savings Ass'n*, 1949, 93 Cal.App.2d 678, 682, 209 P.2d 825; *McKenna v. Elliott & Horne Co.*, 1953, 118 Cal.App.2d 551, 555, 258 P.2d 528; *Helvey v. Security-First Nat. Bank*, 1950, 99 Cal.App.2d 149, 151, 221 P.2d 257.

[5] It is likewise well settled that facts warranting the dismissal of an action for the reasons hereinbefore stated may be made to appear by affidavit (*Cunha v. Anglo California Nat. Bank*, supra, 34 Cal.App.2d 383, 388-390, 93 P.2d 572; *Best v. Fitzgerald*, 1947, 81 Cal.App.2d 965, 967, 185 P.2d 377; *Helvey v. Security-First Nat. Bank*, supra, 99 Cal.App.2d 149, 151, 221 P.2d 257), as well as by the record of prior judicial proceedings. *Crowley v. Modern Faucet Mfg. Co.*, supra, 44 Cal.2d 321, 282 P.2d 33; *Stafford v. Yerge*, 1954, 129 Cal. App.2d 165, 169, 276 P.2d 649.

[6] Appellant contends that all of the foregoing authorities were rendered obsolete by the decision of our Supreme Court in *Pianka v. State of California*, 1956, 46 Cal.2d 208, 293 P.2d 458, 461, wherein it

was held that non-statutory speaking motions, such as those here, had been "superseceded by the procedure governing motions for summary judgment contained in section 437c of the Code of Civil Procedure," and as here no answer had been filed by the respondents as required by section 437c in force at the time the motions were made¹ the motions may not be considered as having been made under section 437c. This contention would appear to be meritorious were it not for the fact that subsequent to the time that the cause of action in the Pianka case arose, the legislature enacted section 435 of the Code of Civil Procedure, reading as follows:

"The defendant, within the time required in the summons to answer, either at the time he demurs to the complaint, or without demurring, may serve and file a notice of motion to strike the whole or any part of the complaint. The notice of motion to strike shall specify a hearing date not more than 15 days from the filing of said notice, plus any additional time that the defendant, as moving party, is otherwise required to give the plaintiff. If defendant serves and files such a notice of motion without demurring, his time to answer the complaint shall be extended and no default may be entered against him, except as provided in Sections 585 and 586, but the filing of such a notice of motion shall not extend the time within which to demur."

While this section has not been judicially construed since its enactment, by its terms it clearly authorizes a motion to strike the whole of a complaint without the necessity of filing an answer or demurrer. While it does not purport to state the grounds upon which or the manner in which such motion may be made, it is reasonably apparent that the legislature must have contemplated that the motion might be made for reasons and upon grounds not appearing upon the face of the complaint. Otherwise there would have been no purpose in enact-

ing the section as defects appearing upon the face of the complaint could, prior to the enactment, be reached by demurrer or motion to strike under Code of Civil Procedure § 453. A reading of the section suggests that it constitutes a legislative reaffirmance of the inherent right of a court to strike or dismiss a complaint when it is made to appear by extraneous evidence that it is sham and based upon false allegations, thus restoring the law as it existed in California prior to the decision in the Pianka case. Sec. 3 U.C.L.A. Law Review 72.

In the instant case it would have been an imposition upon and a waste of the time of the superior court, already heavily burdened with work, to proceed with a trial upon plaintiff's complaint when it was made to appear by incontrovertible evidence that plaintiff's alleged cause of action was non-existent.

The orders appealed from are affirmed.



162 Cal.App.2d 712

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Paul Lawrence GRIFFIN, Defendant and
Appellant.
Cr. 3461.

District Court of Appeal, First District,
Division 2, California.

Aug. 12, 1958.

Hearing Denied Oct. 10, 1958.

Prosecution for uttering and publishing two forged checks. The Superior Court, Alameda County, Chris B. Fox, J., entered judgments of conviction and defendant appealed. The District Court of Appeal, Dooling, J., held that evidence sustained finding of trial court that police officer, at

1. In 1957 section 437c was amended so as to permit the making of a motion for summary judgment without the neces-

sity of filing an answer to the complaint.

time they seized incriminating evidence, were in defendant's room at his request and that such evidence was in plain sight.

Affirmed.

1. Criminal Law §304(1)

Court could take judicial notice of fact that if letter was mailed at Vacaville on September 25, in normal course it might be expected to be received in Oakland sometime on September 26.

2. Criminal Law §1081

Where last date to file appeal was September 26, and record disclosed that notice of appeal was put in hands of person assigned by prison authorities on September 25 and mailed at Vacaville on September 26, District Court of Appeal was entitled to hold that notice of appeal was constructively filed in time.

3. Searches and Seizures §3(1)

Where police officers were lawfully in defendant's room, although they could not make a search beyond scope of defendant's permission, they were not required to close their eyes to what appeared openly obvious to their observation.

4. Criminal Law §394

In prosecution for uttering and passing forged checks, there was evidence to support finding of trial court that police officer, who seized incriminating evidence in defendant's room, was in room at request of defendant and that such evidence was in plain sight.

5. Criminal Law §736(1)

Determination of legality of a search should be made by trial court and not by jury.

6. Forgery §44(3)

Evidence sustained conviction of uttering and publishing forged checks.

7. Criminal Law §1172(1)

In prosecution for uttering and publishing forged checks where court instructed on theory of conspiracy, there was no prejudice in failure to spell out definition of overt act which if given could

not change result since each of the offenses of which defendant was found guilty was sufficient to satisfy definition of overt act.

8. Criminal Law §781(1)

Where defendant denied making confession and no evidence was tendered to support finding that if confession were made it was not voluntary, there was no reason to instruct jury on its right to determine whether confession was freely and voluntarily made.

9. Criminal Law §1170½(5)

In prosecution for uttering and publishing forged checks where police officer testified to alleged confession of defendant made while defendant was in psychiatric ward of county hospital, there was no prejudicial error in sustaining objection to question on cross-examination that ordinarily an unruly person is placed in the city jail, where there was no contention made that defendant was mentally affected at time he made confession.

10. Criminal Law §1173(2)

In prosecution for uttering and publishing forged checks, error in failing to instruct jury that evidence of oral admissions ought to be viewed with caution, could not be said to be prejudicial in view of strength of entire case against defendant. West's Ann.Code Civ.Proc. § 2061, subd. 4.

Donald M. Sea, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant Griffin was charged jointly with one Homer Stephen in two counts of uttering and publishing two forged checks. The two were tried jointly and the jury returned a verdict of guilty against appellant on both counts.

The evidence showed that on May 10, 1957, one Herndon was working as a clerk in a liquor store in Oakland. At approxi-

mately 6:45 p. m. appellant entered this store and presented a payroll check in the amount of \$63.10 drawn on Allenite Products Company's bank account with Griffin as payee. At the trial Herndon testified that Griffin presented for identification a Social Security card and a Blue Cross card both bearing his name. (At the preliminary examination Herndon had testified that appellant offered no identification.) Appellant endorsed the check and Herndon cashed it noting on the check appellant's description.

At approximately 9:45 the same evening defendant Stephen entered the store and presented an Allenite check for \$68.15 with Griffin as payee. The same identification was offered. Herndon passed a note to one of the people in the store to call the police and at this time Stephen left.

Shortly thereafter the police apprehended Griffin and Stephen near the liquor store. Officer Holmes saw appellant throw a wallet in the gutter and found a union card in this wallet bearing appellant's name.

Herndon identified appellant as the person passing the first check and identified Stephen as the one who attempted to cash the second check. When appellant was identified at this time he was in a police car 4 or 5 feet from Herndon but he said nothing. He was again identified at the trial.

Leith Allen, owner of Allenite Products Company, testified that on May 2, 1957, he discovered that several of the company's checks were missing. He identified as two of the missing checks the check cashed by appellant and a torn check found in the area where appellant was apprehended. The checks were forgeries drawn to appellant and signed without authorization.

Inspector McChesney testified that he and Inspector Olsen visited appellant at the county hospital on May 14, 1957. At this time appellant, when asked about the forged checks, stated "I cashed two of them" and "I tried to cash the third one when the cops came and I ran." The inspector further testified that appellant ask-

ed him to go to his room and "see my clothes are taken care of, and then call my mother and have her go down and pick them up." In appellant's room the inspectors found on a table in plain sight eight blank checks of the Allenite Company and a laundry slip bearing appellant's name. On the back of the slip was the name Wayer or Wager, the same name that appeared as maker on the forged checks.

Appellant denied admitting that he passed the checks and testified that he was with one Joseph Williams during the evening of May 10, 1957. Williams testified that he was with appellant from 6:30 p. m. to approximately 9 p. m. that evening. Appellant denied asking the inspector to go to his room and he denied any knowledge of the checks and that he was in the liquor store. Two witnesses who were in the liquor store on May 10 testified that they saw Stephen but neither could recall seeing appellant.

[1, 2] A question is raised whether the notice of appeal was filed in time. The last day to file was September 26, 1957. The notice of appeal was put in the hands of a person assigned by the prison authorities on September 25. The envelope in which it was mailed at Vacaville was postmarked September 26. It was not filed until September 30 and we have the affidavit of a deputy county clerk that would indicate that it was not received before the date of filing. We can take judicial notice that if mailed at Vacaville on September 25 in normal course it might be expected to be received in Oakland some time on September 26. Under *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868, we are justified in holding that the notice of appeal was constructively filed in time.

[3] Appellant claims that the blank checks and laundry list found in his room were seized as the result of an illegal search. The officer testified that appellant requested him to go to his room and although appellant denied this the resolution of this conflicting testimony was the proper function of the trial court. That court

accepted the officer's version. Once in the room the checks and laundry list were in plain sight. The officer, being lawfully in appellant's room, although he could not make a search beyond the scope of the appellant's permission, was not required to close his eyes to what appeared openly obvious to his observation. *People v. Roberts*, 47 Cal.2d 374, 379-380, 303 P.2d 721.

[4, 5] Appellant argues that the resolution of the conflicting evidence to determine whether appellant requested the officer to go to his room should have been left to the jury. The cases are clear that the determination of the legality of a search should be made by the trial court and not by the jury. *People v. Gorg*, 45 Cal.2d 776, 780-781, 291 P.2d 469; *People v. Dewson*, 150 Cal.App.2d 119, 126-127, 310 P.2d 162; *People v. Lawrence*, 149 Cal.App.2d 435, 446-447, 308 P.2d 821.

[6] Appellant claims that his guilt of attempting to pass the second check was not proved. The circumstantial evidence of his complicity in the second offense was not merely sufficient but almost conclusive. There is nothing in *People v. Henderson*, 79 Cal.App.2d 94, 179 P.2d 406, which militates against this conclusion.

We cannot find any error in the instructions on direct and indirect evidence. They followed substantially the form of "Instruction No. 24 Alternate" found in *Cal. Jury Instructions—Criminal*, 1953 Pocket Parts, and sufficiently informed the jury on the subject.

[7] The court instructed on the theory of conspiracy. Appellant complains that while the words "overt act" were used in these instructions they were not defined. Each of the offenses of which appellant was found guilty was sufficient to satisfy the definition of "overt act" and we cannot find any prejudice in the failure to spell out a definition which if given could not have changed the result.

The court gave a somewhat confusing instruction on alibi: "If * * * you

find that a conspiracy did not exist, then in that case * * * the instruction on alibi will apply." The jury must have found that the evidence that appellant passed the one check and his co-defendant tendered the other was true and we cannot believe, despite the somewhat unfortunate language in which the quoted instruction was cast, that they would have made these findings if they had given credence to the alibi evidence.

[8] The appellant denied making a confession. There was no evidence tendered to support a finding that if the confession was made it was not voluntary. There was therefore no reason to instruct the jury on its right to determine whether the confession was freely and voluntarily made.

[9] Complaint is made of the limitation on the cross-examination of the officer who testified to the confession. At the time appellant was in the psychiatric ward of the county hospital. The witness had testified that both prisoners who were suspected of mental illness and those who were unruly were placed in this ward. Objection was sustained to the question: "Ordinarily in the City Jail if somebody is just unruly, you have a place where you put them in the City Jail, don't you?" Subsequent cross-examination developed that this witness was not the one who had appellant transferred to the hospital and did not know the reason for his transfer. If there was any substantial evidence that appellant was mentally affected when he made his confession we must assume appellant would have produced it. The appellant himself later testified about his conversation with this officer at the hospital and made no contention that his mind was not clear at the time. We can find no prejudice to appellant in the incident complained of.

[10] It was error to fail to instruct the jury that evidence of oral admissions ought to be viewed with caution (*Code Civ.Proc.* § 2061(4); *People v. Cornett*, 33 Cal.2d 33, 39-40, 198 P.2d 877), but in view of the strength of the entire case against appel-

lant we cannot find that the failure to give this instruction was prejudicial. *People v. Riley*, 35 Cal.2d 279, 286, 217 P.2d 625.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J.,
concur.



162 Cal.App.2d 96

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joseph Marion MILLER, Defendant and
Appellant.
Cr. 3383.

District Court of Appeal, First District,
Division 2, California.

July 14, 1958.

Defendant was convicted of possessing and transporting marijuana and furnishing it to a minor. From judgment rendered by the Superior Court, County of Santa Clara, M. G. Del Mutolo, J., defendant appealed. The District Court of Appeal, Dooling, J., held that trial court's admitting evidence that, 20 days after defendant's arrest, marijuana had been found in the backyard of an apartment on the next street behind the apartment occupied by the defendant, coupled with the statement that jury had right to consider such evidence, constituted reversible error.

Reversed.

1. Poisons ☞9

Evidence in prosecution for possessing, transporting, and furnishing marijuana to minor was sufficient for jury.

2. Criminal Law ☞507(1)

Uncorroborated testimony of a minor, though weak, was sufficient to support a conviction for furnishing marijuana to such

minor, who testified she smoked marijuana cigarette furnished her, since minor was not an accomplice.

3. Arrest ☞68

Searches and Seizures ☞3(9)

The statute providing that arresting officers may break open door or window of house to arrest person therein after having demanded admittance and having explained purpose for which admittance is required does not require that they so demand admittance and explain their purposes where their doing so would probably allow the destruction of incriminating evidence, and search made by officers possessing warrant was legal, even though they made no such demand or explanation. *West's Ann. Pen.Code*, § 844.

4. Criminal Law ☞1169(1)

Poisons ☞9

In prosecution for possessing and transporting marijuana and furnishing it to a minor, trial court's action in admitting evidence that, 20 days after defendant's arrest, marijuana had been found in the back yard of an apartment on the next street behind the apartment occupied by the defendant, coupled with the statement that jury had right to consider such evidence, constituted reversible error.

E. R. Williams, Stockton, for appellant.
Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury of three narcotics offenses, possession of marijuana, transportation of marijuana, and furnishing marijuana to a minor. The several offenses were alleged to have occurred on or about October 30, 1956.

The minor, a girl of fifteen, was cooperating with the police. On October 30, 1956, she was in an automobile with appellant and one Spencer, who was made a co-defendant in this case. They drove her to a doctor's office where she met the officers.

She testified that appellant while in the automobile smoked a marijuana cigarette and threw the butt to the ground. Later an officer found the butt of a marijuana cigarette where the car had been parked. This is the basis of the conviction of transportation.

That same evening appellant, Spencer and the minor were in appellant's apartment. The minor testified that while there she smoked a part of a marijuana cigarette. In answer to the question who lit this cigarette the minor testified:

"I am pretty sure it was Joe [the appellant] but I'm not positive," and she further testified that it was handed around from one to the other without any special order. This was the only evidence to support the verdict of furnishing marijuana to a minor.

Later the officers arrived with a warrant. When they arrived at the apartment no marijuana was being smoked. They found in the apartment a can containing "traces" of marijuana and some cigarette butts, described by the chemist as "pieces of cigarette paper in there that were burned on one end, which resembled roaches." A roach is the butt of a smoked cigarette. These showed traces of marijuana. Some seeds of marijuana were found in the dirt in a vacuum cleaner and in an ash tray. This is the basis of the possession conviction.

[1-3] The evidence was legally sufficient to support all three convictions. One who carries a narcotic on his person in a moving automobile may be found guilty of transportation. *People v. Holliday*, 120 Cal.App.2d 562, 564, 261 P.2d 301; *People v. Coleman*, 100 Cal.App.2d 797, 801, 224 P.2d 837. The uncorroborated testimony of the minor, though weak, is sufficient to support the verdict of "furnishing," since the minor is not an accomplice. *People v. De Paula*, 43 Cal.2d 643, 647, 276 P.2d 600. The traces of marijuana found in appellant's apartment with the other evidence will support the finding of possession. Nor is there any force in appellant's claim that the search of his apartment was illegal.

The officers were armed with a warrant and even though they may not have technically complied with the law in its execution, where compliance with Penal Code section 844 would probably permit the destruction of discriminating evidence, compliance is not required. *People v. Maddos*, 46 Cal.2d 301, 306, 294 P.2d 6; *People v. Shelton*, 151 Cal.App.2d 587, 588, 311 P.2d 859.

[4] On November 19, 1956, almost three weeks after appellant's arrest, a 10 year old boy found fifteen cans of marijuana and a paper bag containing marijuana under the shrubbery in the back yard of an apartment on the next street behind the apartment occupied by appellant. The two yards were separated by a five or six foot high, solid board fence with no gate or other opening. Appellant had lost a leg in an accident and testified that he doubted if he could climb this fence because of his disability. When this large quantity of marijuana was first mentioned objection was made to any evidence concerning it and the court stated: "If it isn't connected up, we will strike it out." No evidence was produced to connect appellant with this marijuana although it was the subject of extensive testimony. When the fifteen cans of marijuana and that found in the paper bag was finally offered proper objection was again made. The court admitted them over this objection. Appellant's counsel then made a motion to strike on the ground that this evidence had not been connected up and no knowledge of appellant of this marijuana had been shown. The court denied the motion saying: "I think the jury has a right to consider it being it was found close to where these other things were found. I think the jury has a right to consider it."

The court clearly committed error in the admission of this marijuana. It was not only separated from appellant by space but by time as well. He was arrested on October 30 and this marijuana was not found until November 19. Nothing was produced in evidence to connect appellant with it in any way. It might much more readily and reasonably have been placed where it was

found by somebody who had easy access to the back yard in which it was discovered than by appellant, who would have to climb a high board fence handicapped by the loss of a leg to place it there. Something more than mere suspicion must be shown and appellant's connection with this marijuana does not rise above the level of pure guess and conjecture. The People rely on *People v. Mandell*, 90 Cal.App.2d 93, 202 P.2d 348. In that case a can containing narcotics was found in the defendant's own yard the morning after her arrest. These narcotics were in bindles containing distinctive and unusual markings, and bindles and markings were exactly similar to those of other narcotics found in the defendant's possession. The circumstantial evidence was in that case clearly sufficient to support a finding that the narcotics belonged to the defendant. In our case no evidence, direct or circumstantial, was introduced connecting appellant with the marijuana introduced in evidence against him.

The prejudice to appellant from the introduction of this very large cache of marijuana is clear, and this was aggravated by the court's reiterated statement that the jury "has a right to consider it." Appellant denied his guilt of all charges. As to the transportation and furnishing counts the only direct evidence came from the minor. A witness testified that the minor had told her about a week after appellant was arrested:

"I'm afraid; the Police have told me that if I don't cooperate and testify against Joe [appellant], they will put me into a Girls' School, or they will prosecute me" and that "she didn't have much choice." This was corroborated in substance by another witness, and the minor herself testified on cross-examination that she had been afraid of being sent to a girls' school. There was also impeaching testimony that the minor's reputation for truth was not good. Appellant's explanation of the traces of marijuana found in his apartment was that a room-mate had used marijuana over his repeated protests. In weighing the conflicting

testimony fifteen cans and a paper bag of marijuana (a tremendous amount for anyone but a dealer to have at one time) might have weighed very heavily in the scales against appellant.

Appellant testified on direct that he had protested to his room-mate about his using marijuana for the reason that he did not want trouble with the police because of a previous felony conviction (auto theft). For the guidance of the court in the event of a new trial we are satisfied that this testimony did not open the door to cross-examination of appellant concerning previous misdemeanors or criminal charges which did not result in felony convictions.

Judgments reversed.

KAUFMAN, P. J., and DRAPER, J.,
concur.



162 Cal.App.2d 82

**Application of Charles R. KENNEDY, JR.,
for a Writ of Habeas Corpus.**

Cr. 2879.

District Court of Appeal, Third District,
California.

July 10, 1958.

Habeas corpus proceeding involving custody of a minor child. The District Court of Appeal held that in view of evidence establishing fitness of mother to have custody of her son, and unfitness of father to have custody, record supported finding that best interest and welfare of the child demanded that he be placed in the custody of his mother, notwithstanding child's expression in open court of his preference to remain with his father.

Decree in accordance with opinion.

1. Habeas Corpus ☞85.7(4)

In habeas corpus proceeding involving custody of a minor child, in view of evi-

dence establishing fitness of mother to have custody of her son, and unfitness of father to have custody, record supported finding that best interest and welfare of the child demanded that he be placed in the custody of his mother, notwithstanding child's expression in open court of his preference to remain with his father.

2. Habeas Corpus 112

Where mother in habeas corpus proceeding was awarded sole custody of her child, and she resided in Michigan, where she had and maintained for herself and her child a suitable home, court would order that her child be delivered by his present guardian into the custody of his mother, and that she be permitted to remove the child from the state.

Douglas C. Busath, Sacramento, for petitioner.

Landis, Brody & Martin, Sacramento, for respondent.

PER CURIAM.

This is a proceeding in habeas corpus involving the custody of a minor child.

The parties were residents of the State of Michigan and respondent herein, Ruth Kennedy, heretofore began an action in the Circuit Court for the County of Oakland in that State to obtain a divorce from petitioner herein, Charles R. Kennedy, Jr. She also in that action sought the custody of their minor son, Rex Charles Kennedy, presently aged 11 years. It appears that a decree was rendered in that action after the entry of petitioner's default therein and that petitioner filed within due time a claim of appeal in the Supreme Court of that State, which appeal is pending. Prior to the rendition of the decree in the Circuit Court and after the commencement of the action therein, petitioner herein brought the child into California. After the rendition of the decree Ruth came to California seeking to obtain the custody of her son. Upon Charles' petition this court issued a writ of habeas corpus and the

child was produced responsive to that writ. The matter of custody was heard by this court on the petition and the traverse thereto. The record of the Michigan action was introduced without objection, save that the parties advanced conflicting contentions as to its effect here. In addition to that record, however, the parties freely and fully tried out the merits of the issues as to custody and the matter was submitted to this court for its decision.

We find it unnecessary to treat the conflicting contentions of the parties as to the force and effect of the Michigan proceedings in view of the full trial upon the merits afforded the parties herein.

[1] The evidence showed the following: The fitness of Ruth to have custody of the child is without dispute in the testimony. On the other hand, the unfitness of petitioner to have such custody is sufficiently proved. He has a long record of illegal activities and defiance of law and its administration. He has been several times convicted of felonies, the record of his derelictions going back as far as 1920, and intermittently extending through the years up to 1943, which year marked his release from the penitentiary in Illinois. It is a fair inference that, notwithstanding his residence in the County of Oakland, State of Michigan, for a number of years he was unwilling to submit to the disposition of the Circuit Court for that county the issue of his right to the custody of his son. With knowledge of the pendency of the action involving that issue, he took his son out of the jurisdiction of the court and out of the State of Michigan and brought him into California under circumstances indicating an intent that his conduct should not be interrupted, for he traveled a devious route until he arrived in Grass Valley, Nevada County, and he did not disclose to Ruth the whereabouts of himself or of the child. It is unnecessary to make further detailed recitation of the matters shown to this court upon the hearing herein. It is sufficient to say that the record amply supports a holding that the best interests and welfare of this child demand that he

be placed in the custody of his mother, notwithstanding the child's expression in open court of his preference to remain with his father.

[2] In view of the premises this court decrees that Ruth Kennedy is entitled to the sole custody of said minor, which is hereby awarded to her. Since she resides in the County of Oakland, State of Michigan, where she has and maintains for herself and said minor a suitable home, it is ordered further that said Rex Charles Kennedy be by his present custodian, the Probation Officer of Nevada County, delivered into the custody of Ruth Kennedy, respondent herein, and that she be permitted forthwith to remove said child from this State. The writ heretofore issued is discharged.



162 Cal.App.2d 237

Merle CLAPP, Plaintiff and Respondent,

v.

Milton J. KRAMER, Defendant and Appellant.
Civ. 5847.

District Court of Appeal, Fourth District,
California.

July 18, 1958.

Action upon contract arising out of unpaid personal check and action of indebitatus assumpsit for goods sold and delivered in which defendant moved for change of venue on ground of nonresidence of defendant and claimed inconvenience of defendant's witnesses. The Superior Court of Imperial County, Elmer W. Heald, J., entered order denying motion and defendant appealed. The District Court of Appeal, Griffin, J., held that there was evidence authorizing finding that contract was to be

performed in Imperial County and there was no abuse of discretion in denying motion on ground of convenience of witnesses.

Affirmed.

1. Appeal and Error ⇨1024(3)

In hearing on motion to change venue on ground of nonresidence of defendant in action to recover upon contract arising out of unpaid personal check and indebitatus assumpsit for goods sold and delivered, court was authorized to find that contract was to be performed in county in which action was brought and such finding would not be disturbed. West's Ann.Code Civ.Proc. § 395.

2. Venue ⇨68

Burden of proof justifying change of venue rested on moving party.

3. Venue ⇨7

Common counts, if supported by affidavits, are sufficient to bring plaintiff within exception to statute providing for institution of action in county of defendant's residence. West's Ann.Code Civ.Proc. § 395.

4. Venue ⇨52(1)

In action on contract arising out of unpaid personal check and on indebitatus assumpsit for goods sold and delivered, there was no abuse of discretion by trial court in denying defendant's motion for change of venue on ground of inconvenience of his witnesses. West's Ann.Code Civ.Proc. § 395.

5. Venue ⇨52(1)

On motion for change of venue because of claimed inconvenience of witnesses, mere numerical majority does not necessarily determine issue. West's Ann.Code Civ.Proc. § 395.

Leonard Di Miceli, San Pedro, for appellant.

Beard & Wien, El Centro, for respondent.

GRIFFIN, Justice.

The question here presented is the propriety of an order denying defendant's motion for change of venue on the grounds of nonresidence of defendant and claimed inconvenience of defendant's witnesses.

Plaintiff's complaint sets forth two causes of action. The first is upon a contract arising out of an unpaid personal check of defendant for \$1,703, where payment was stopped. The complaint alleges the check was made and executed by defendant at El Centro and was drawn on the California Bank, Beverly Hills Branch. The second cause of action is one of indebitatus assumpsit for goods, wares and merchandise sold and delivered in said sum. It alleges that the obligation sued upon was incurred in Imperial County. Defendant's affidavit of residence and merit alleges the contract was "in fact and in law, based upon an oral agreement consummated and accepted by the defendant within the city of Los Angeles", whereby defendant purchased from plaintiff and plaintiff promised he would harvest and deliver to defendant at Los Angeles a certain number of crates of graded canteloupes and that plaintiff failed to fully perform said contract. It is further alleged that all the material witnesses called to testify by defendant, including himself, resided in Los Angeles. The gist of their proposed testimony is set forth.

These general allegations are set forth in an answer and cross-complaint wherein defendant seeks a judgment against plaintiff for \$2,000 loss of profits, etc. Plaintiff denied generally these allegations and by counteraffidavit alleged defendant's claim was untrue in that the alleged causes of action were not based on an oral agreement consummated and accepted in Los Angeles; that plaintiff, in truth and in fact, after preliminary negotiations in El Centro, telephoned defendant in Los Angeles and it was agreed that defendant would accept the canteloupes f. o. b. El Centro and defendant designated the common carrier in Imperial County to which

plaintiff should deliver the melons. The witnesses to be called by plaintiff resided in Imperial County. Their proposed testimony was there set forth.

[1-3] Section 395 of the Code of Civil Procedure provides generally that when a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant resides shall be a proper county for the trial of an action founded on such obligation. The trial court resolved the conflict in the affidavits and pleadings against the defendant. On this factual issue, particularly as to where the contract was to be performed, it was so authorized. Such finding will not be disturbed on appeal. *Swartz v. California Olive Growers' Packing Corp.*, 56 Cal.App. 2d 168, 133 P.2d 20; *Rench v. Harris*, 76 Cal.App.2d 113, 118, 172 P.2d 576. The burden of proof justifying the change of venue rested on the moving party. *Lake-side Ditch Company v. Packwood Canal Co.*, 50 Cal.App. 296, 306, 195 P. 284; *Ward Manufacturing Co. v. Miley*, 131 Cal.App.2d 603, 606, 281 P.2d 343. Common counts, if supported by affidavits, are sufficient to bring plaintiff within the exception to Section 395, *supra*. *Carnation Co. v. El Rey Cheese Co.*, 88 Cal.App.2d 857, 200 P.2d 19; *Cal-Ore Lumber Sales v. Russell*, 133 Cal. App.2d 296, 284 P.2d 179; *Schreiber v. Hooker*, 114 Cal.App.2d 634, 251 P.2d 55.

[4, 5] No abuse of discretion appears in denying the motion on the ground of convenience of witnesses. On such a motion mere numerical majority does not necessarily determine the issue. *Figley v. California Arrow Airlines*, 111 Cal.App.2d 285, 287, 244 P.2d 472; *Di Giorgio Fruit Corp. v. Zachary*, 60 Cal.App.2d 560, 563, 141 P.2d 8.

Order affirmed.

MUSSELL, Acting P. J., and McCABE, J. pro tem., concur.

162 Cal.App.2d 650

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Johnny M. PEREZ, Defendant and Appellant.
Cr. 6127, 6128.

District Court of Appeal, Second District,
Division 3, California.

Aug. 8, 1958.

Defendant was convicted in two prosecutions of selling, furnishing, and giving away heroin. The Superior Court of Los Angeles County, Maurice C. Sparling, J., entered judgments, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained convictions and that Superior Court, as trier of the facts, was not required, as a matter of law, to give credence to testimony of defendant and codefendant that defendant did not sell any narcotics.

Judgments affirmed.

1. **Polsons** ☞9

Evidence sustained convictions for selling, furnishing, and giving away heroin.

2. **Criminal Law** ☞554

In prosecutions for selling, furnishing, and giving away heroin, trial court was not required, as a matter of law, to give credence to testimony of defendant and his codefendant that defendant did not sell any narcotics.

Johnny M. Perez, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., of the State of California, for respondent.

SHINN, Presiding Justice.

By indictment in case No. 6127, Johnny M. Perez and Romero M. Rivera were accused in Count I of selling, furnishing and giving away a preparation of heroin on February 3, 1957, and in Count II, with the commission of a like offense on February 7, 1957. Rivera pleaded guilty and

was sentenced to state prison; Perez pleaded not guilty. By indictment in case No. 6128, Perez and John Doe Chocolate were accused of committing a like offense on February 9, 1957; Perez pleaded not guilty. Trial of the two cases was to the court; the court found Perez guilty as charged in the indictments and sentenced him to state prison for the terms prescribed by law. Perez appeals from the judgments of conviction. Although there are separate appeals the cases were tried together and the appeals are presented on a single transcript.

Richard Velasquez, an undercover narcotic inspector for the State of California, was the chief witness for the People. The following is the substance of his testimony. At 3:30 p. m. on February 3, 1957, Velasquez went to the El Rancho Cafe on East Second Street in Los Angeles, where he met Perez, who was seated at the bar; he knew Perez slightly as "Johnny". The officer asked appellant "if he had anything"; appellant said that he did and asked Velasquez how much he wanted. The officer replied that he wanted half a gram. Appellant pointed to Romero Rivera, who was seated nearby, and told Velasquez to go to a liquor store on the corner of San Pedro and Second Streets and wait for Rivera. Velasquez went to the liquor store; Rivera arrived shortly thereafter. The officer handed Rivera \$12 and received in exchange a small paper bundle which was proved to contain heroin. Velasquez testified: "I asked him if Johnny had sent him, and he said yes, that he was Johnny's boy, and that the next time I wanted anything, for me to contact him, and that his name was Boche."

At 2:45 p. m. on February 7th, Velasquez returned to the cafe, where he met Perez and Rivera. The officer asked appellant what kind of a deal he would give for \$100 and Perez replied that he would give seven grams. Appellant said that he could obtain the seven grams that day but Velasquez said it would take him several days to obtain the money. The officer then asked Perez if he had anything;

appellant said that he did and asked Velasquez how much he wanted; the officer replied that he wanted half a gram. Appellant told Rivera to "give him a half" and Rivera instructed Velasquez to go to the Atomic Cafe, which was located on South San Pedro Street. Velasquez went to the cafe. After a few minutes, Rivera arrived and asked him for the money. The officer handed him \$12. Rivera went to the rear of the building and returned with a package wrapped in a razor blade wrapper, which he gave to Velasquez. The package was proved to contain heroin.

At 11:30 a. m. on February 9th, Velasquez went back to the El Rancho Cafe, where he met appellant. The two men left the cafe and entered a 1955 Ford automobile, license No. MAS 867. Appellant drove Velasquez to the corner of Court and Hope Streets. The two men got out of the car and walked to the northwest corner; Perez removed a loose brick from a wall, reached in and took out a package wrapped in wax paper. They returned to the car. Appellant opened the package, displayed three bindles and said "There's three here." Perez placed the package under the front seat, drove to the intersection of San Pedro and Azusa Streets and parked the car on a parking lot. Appellant told Velasquez that he was going after the other four bindles and instructed him to give the money to a man called "Chocolate." Perez then left the car, taking the package with him. A few minutes after appellant's departure, a Mexican approached Velasquez and asked him for the money. The officer inquired if Johnny had sent him and the man replied: "Yes, that he was Chocolate." Chocolate led Velasquez to the west side of San Pedro Street; he pointed to a Chesterfield package on the sidewalk and said "There it is." Velasquez picked up the package, handed Chocolate \$100 and left. Inside the package were seven bindles containing a substance which was proved to be heroin. The three packages of heroin purchased by Velasquez were received in evidence without objection.

Romero Rivera was called as a witness for the defense. As previously mentioned, Rivera had pleaded guilty to two narcotics offenses involving the transactions that allegedly occurred February 3rd and 7th. Rivera testified that he sold a half gram of heroin to Velasquez on each of the two days. He stated that the heroin was his and that he did not obtain it from Perez. Rivera denied talking to appellant about obtaining narcotics for Velasquez and denied talking to Velasquez about obtaining narcotics from appellant; Perez was not present during his conversations with the officer.

Appellant, testified in his own behalf, that he had no narcotics in his possession, that he did not talk to Velasquez on February 3rd and 7th, he received no money from the officer and he did not tell Rivera to give narcotics to Velasquez. He was employed as a bartender at the El Rancho Cafe; on February 9th he arrived at the establishment between 8:30 and 9 a. m.; he did not recall seeing Velasquez on the premises and he did not leave the cafe at any time until he quit work between 3 and 4 the following morning.

Two patrons of the El Rancho Cafe testified on behalf of appellant that they were playing pool at the cafe from about 10:30 a. m. until after 3 p. m. on February 9th; Perez was tending bar and they did not see him leave the premises. A part-time employe at the cafe, one Sanchez, stated that "I seen him [appellant] for a while" that morning; he did not see Velasquez.

Roy Wells, a narcotic inspector for the State of California, was called by the People in rebuttal. Wells testified that he observed Velasquez leaving the cafe in the company of appellant shortly before noon on February 9th; Perez was wearing a beige suit. The witness saw them enter a 1955 Ford, license No. MAS 867. He followed the car to Court and Hope Streets and watched the two men walk to a brick wall, return to the car and drive away. He attempted unsuccessfully to keep the Ford under observation.

Appellant, testifying in surrebuttal, denied owning a beige suit, but admitted driving a Ford automobile, license No. MAS 867, to work on February 9th. Officer Velasquez was also called as a witness on surrebuttal. He testified that he made a search of appellant's home at the time of his arrest but did not notice a beige suit in his wardrobe; Perez was wearing a light brown suit on February 9th.

Upon request for appointment of counsel on the present appeals the court referred the matters to the Los Angeles Bar Association Committee on Criminal Appeals for report to the court as to possible merit in the appeals. The matters were assigned to a member of the committee who has made written report to the court stating that the record had been examined and that in the opinion of the attorney it disclosed no meritorious ground of appeal. After we had examined the record, which contains ample evidence of appellant's guilt and shows that no objection was made to the receipt or exclusion of evidence, the request for appointment of counsel was denied. Appellant was duly so advised and his time to file a brief was substantially extended. No brief has been filed. In accordance with our usual practice we have made a thorough study of the record. We have discovered no insufficiency of the evidence and no error at the trial.

[1,2] The evidence was sufficient to establish appellant's guilt of the three offenses charged in the indictments. The testimony of Velasquez and the reasonable inferences warranted the court in finding that appellant was in possession of narcotics, that he agreed to sell them to the officer, and that he furnished the heroin which his confederates delivered to Velasquez. Although appellant denied selling any narcotics and Rivera testified that appellant did not participate in the transactions occurring February 3rd and 7th, the court was not required, as a matter of law, to give credence to their testimony. *People v. Pastrana*, 136 Cal.App.2d 358,

288 P.2d 568. The statements of the other defense witnesses that they did not see appellant leave the El Rancho Cafe on the morning of February 9th created only a conflict in the evidence, which the court resolved against Perez.

Appellant was represented by counsel at the trial and a reading of the transcript leaves us in no doubt that he received an able and vigorous defense.

The judgments are affirmed.

PARKER WOOD, J., and PATROSSO, J. pro tem., concur.



162 Cal.App.2d 676

Edward L. THOMPSON, Plaintiff and Appellant,

v.

The MUNICIPAL COURT OF SOUTH BAY JUDICIAL DISTRICT, Defendant and Respondent.

Bank of America, National Trust and Savings Association, Real Party in Interest.

No. 22736.

District Court of Appeal, Second District, Division 3, California.

Aug. 11, 1958.

Certiorari to review judgment for defendant rendered by judge of municipal court, sitting as a small claims court. From a judgment of the Superior Court of Los Angeles County, Edward T. Bishop, J., affirming judgment of the municipal court, plaintiff appealed. The District Court of Appeal, Nourse, J. pro tem., held that judge of municipal court, sitting as small claims court, had no power to render judgment, where judge had not been present during any of proceedings and no order had been made in open court appointing clerk as referee and no entry had been made

in minutes or records of court of such appointment, though judge during absence from court had directed clerk by telephone to hear the evidence and report to judge thereon.

Judgment of Superior Court reversed with direction to annul judgment of municipal court.

1. Judges ⇨27

Judge of municipal court, sitting as small claims court, had no power to render judgment, where judge had not been present during any of proceedings and no order had been made in open court appointing clerk of court as referee and no entry had been made in minutes or records of court of such appointment, though judge during absence from court had directed clerk by telephone to hear the evidence and report to judge thereon and clerk had heard and made brief summary of the testimony upon record of court. West's Ann.Code Civ. Proc. §§ 117g, 166.

2. Reference ⇨6, 13

Power to order a reference is vested in court and not in judge thereof, and such order may not be made by judge during his absence from court or in chambers. West's Ann.Code Civ.Proc. § 166.

3. Reference ⇨6, 24

Order made by telephone by judge of municipal court, sitting as small claims court, during his absence from court appointing clerk of court as referee to hear evidence and report to judge thereon, was a nullity and ineffective for any purpose, and act of plaintiff in giving his evidence before clerk could not give such order validity or constitute a waiver. West's Ann.Code Civ.Proc. §§ 166, 638.

4. Reference ⇨6

Statute prescribing procedure in small claims court contemplates a trial before and receipt of evidence by judge, and provision in statute that judge may informally make any investigation of controversy either in or out of court does not authorize judge to delegate his authority to hear evi-

dence to someone else. West's Ann.Code Civ.Proc. § 117g.

5. Judges ⇨27

Judge of municipal court, sitting as small claims court, had no authority to receive evidence through medium of his clerk and without being personally present, though he was authorized by statute to informally make any investigation of controversy either in or out of court. West's Ann.Code Civ.Proc. § 117g.

Wolver & Wolver, Los Angeles, for appellant.

Samuel B. Stewart, San Francisco, Hugo A. Steinmeyer and Harris B. Taylor, Los Angeles, for real party in interest.

NOURSE, Justice pro tem.

Appellant was the plaintiff in an action commenced by him against the Bank of America, National Trust and Savings Association, the real party in interest herein, in the Municipal Court of the South Bay Judicial District, sitting as a small claims court. The small claims court having rendered judgment in favor of defendant bank, appellant sought in the Superior Court in and for the County of Los Angeles, and was granted, a writ of certiorari directed to the municipal court. The superior court having entered its judgment affirming the judgment of the municipal court, plaintiff now appeals from that judgment.

The facts are: The matter of plaintiff's claim being at issue the case was set down for trial at 1:30 p. m., December 18, 1956. At that hour the plaintiff and the representative of the defendant therein, Bank of America, were present. The judge of the court was not present. The clerk of the court advised the judge over the telephone that the parties were present and ready for trial and he advised the clerk that he would be unable to be present but to advise the litigants that if they agreed thereto the clerk would hear the evidence as a referee of the court and thereafter report to the judge thereon. The clerk

did so advise the parties and thereupon proceeded to hear the testimony of the plaintiff and the representative of the defendant and upon the record of the court made a brief summary of that testimony and thereafter in the absence of the parties, the judge made the notation "Judgt for deft" and initialed this notation.

The judge was not present during any of the proceedings, did not take any evidence and no order was made in open court appointing the clerk as referee and no entry was made in the minutes or records of the court of such an appointment.

[1] We are of the opinion that it was beyond the power of the municipal court to render the judgment against the plaintiff and that the superior court erred in affirming that judgment.

[2, 3] Assuming that the telephone conversation between the clerk and the judge was an attempt by the judge to make a general reference of the matter with the clerk as referee, it was an abortive attempt. The power to order a reference is vested in the court, not in the judge, and the order is not one which may be made by the judge during his absence from the court. It is not an order that may be made in chambers under the provisions of section 166 of the Code of Civil Procedure. The telephonic order was therefore a nullity. *Finkle v. Superior Court*, 71 Cal.App. 97, 234 P. 432; *Shepherd v. Superior Court*, 54 Cal.App. 673, 202 P. 466; *Carpenter v. Nutter*, 127 Cal. 61, 64, 59 P. 301. The order being an absolute nullity was ineffective for any purpose and the act of the plaintiff in giving his evidence before the clerk could not give it validity and could not constitute a waiver. *Finkle v. Superior Court*, supra, *Shepherd v. Superior Court*, supra.

The real party in interest relies upon *Garland v. Smith*, 131 Cal.App. 517, 21 P.2d 688 and *Shain v. Peterson*, 99 Cal. 486, 33 P. 1085. Neither is controlling here. In each of them the order of ref-

erence had been made in open court but there was a question as to whether or not the parties had given their consent to the references pursuant to the provisions of section 638, Code of Civil Procedure. In each of them the parties evidenced their consent to the reference by trying the entire matter before the referee without raising any question as to the sufficiency of the order appointing him. The failure to secure the written consent of the parties or to enter their consent in the minutes was in each case a mere irregularity which could be waived and which the court in those cases held was waived. That is not the case here, for in the present matter there was not a mere irregularity; there was no order.

Respondents further assert that the judge of the municipal court was authorized to receive the evidence, through the medium of his clerk and without being personally present, under the provisions of section 117g, Code of Civil Procedure, which provides in part as follows: "The plaintiff and defendant shall have the right to offer evidence in their behalf by witnesses appearing at such hearing, or at any other time. The judge or justice may also informally make any investigation of the controversy between the parties either in or out of court * * *".

[4, 5] We see no merit in this contention. The statute clearly contemplates a trial before the judge and receipt of evidence by the judge and the fact that he may himself make an informal investigation of the controversy does not indicate that it was the intent of the Legislature that he, of his own motion, may delegate his authority to hear the evidence to someone else.

The judgment of the superior court is reversed and that court is directed to enter its judgment annulling the judgment of the municipal court.

SHINN, P. J., and VALLEE, J., concur.

162 Cal.App.2d 508

J. M. W. MILLER, Plaintiff and Appellant,
v.

C. C. BOSWELL et al., Defendants.

Catherine A. McKenna, L. V. McCardle, as
Treasurer of the City of Los Angeles, and
Board of Public Works of the City of Los
Angeles, Respondents.

Civ. 23002.

District Court of Appeal, Second District,
Division 1, California.

Aug. 1, 1958.

Action to quiet title. The Superior Court of Los Angeles County, Martin Katz, J., refused to quiet title to one parcel of property, and plaintiff appealed from that portion of judgment. The District Court of Appeal, Fourn, J., held that city treasurer's deed executed and delivered to plaintiff's predecessor in interest under 1893 Street Improvement Bond Act following foreclosure of street improvement bond established a prima facie title in plaintiff, and plaintiff, in absence of any showing to contrary, was not required to go any further and was entitled to have his title quieted.

Reversed and trial court directed to enter judgment in favor of plaintiff.

1. Quieting Title ⇨44(4)

City treasurer's deed executed and delivered to plaintiff's predecessor in interest under 1893 Street Improvement Bond Act following foreclosure of street improvement bond established a prima facie title in plaintiff in his quiet title action, and plaintiff, in absence of any showing to contrary, was not required to go any further and was entitled to have his title quieted. St.1893, p. 33, § 5, subd. k as amended by St.1921, p. 560; St.1933, p. 946.

2. Quieting Title ⇨44(1)

Plaintiff in quiet title action, upon making out a prima facie case of ownership, then puts defendant to necessity of meeting his claim, and if claim is not met

by defendant, plaintiff is entitled to a judgment.

Robt. E. Rosskopf, Hollywood, for appellant.

No appearance for respondents.

FOURTH, Justice.

This is an appeal on the judgment roll from a decree wherein the court refused to quiet the title to a parcel of real property.

The plaintiff brought the action to quiet his title to, and determine the adverse interests if any in four parcels of real property in Los Angeles county. The defendant, Catherine A. McKenna, filed an answer wherein she denied substantially all of the plaintiff's claims; however, in such answer she did not claim any title for herself.

The court, after a trial, found the title (insofar as parcels 1, 2 and 3 were concerned) to be in the plaintiff and ordered cancellation of certain special assessment liens. As to the fourth parcel, the court found:

"That on or about April 5, 1922, the City Treasurer of the City of Los Angeles, following the foreclosure of Street Improvement Bond No. 1657, Series 1, executed and delivered to Samuel M. Garroway, a Treasurer's Deed under the 1893 Street Improvement Bond Act (Stats.1893, P. 33), covering the following described real property in the City of Los Angeles, State of California, to-wit:

"Parcel 4: The northeasterly 30 feet of Lot 5 in Block 'I' of the Knob Hill Tract, in the city of Los Angeles, County of Los Angeles, State of California, as per map recorded in book 10 page 97 of Miscellaneous Records.

"That the interest of said Samuel M. Garroway in and to said real property was conveyed to plaintiff on June 23, 1953, and is now owned by plaintiff. That defendant Catherine A. McKenna has not been in the open and adverse possession of said

real property for any period of five years continuously, prior to the commencement of this action. That since June 23, 1953, plaintiff has occupied said real property for parking purposes and has improved the same with black top paving and since said date has been in the exclusive possession thereof, and has paid all taxes levied and assessed against the same."

The court then as a conclusion of law therefrom set forth:

"That title to the real property described in paragraph IV of the foregoing Findings has not been established on behalf of any party to this action and as to said real property judgment shall not be rendered for or against any party to this action."

Judgment was entered and no mention was made of any disposition as to parcel No. 4. A motion was made by the plaintiff to vacate the judgment so entered, and to make a different judgment as to parcel No. 4 upon the ground that the conclusion of law was erroneous and not consistent with, and not supported by the findings of fact. The motion was denied.

The appellant contends that the findings of fact compel a judgment in his favor as to Parcel No. 4.

We have concluded that the appellant is correct in his contention. The Act of 1893 entitled "An Act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvement within municipalities, and also for the payment of such bonds," provided for the issuance of certain bonds. In 1921 (effective July 29, 1921), the Act was amended and, among other things such amendments provided as follows:

"The deed, when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of the period for redemption, free of all encumbrances, except the lien for state, county and municipal taxes;

* * *." Section 5, subdivision k, St.1921, p. 560.

In 1933 (Chapter 343, Stats.1933, page 946) the Act of 1893 was repealed. It was, however, set forth in such repealing act that nothing therein would affect any proceeding taken before January 1, 1933.

Counsel for appellant has not directed our attention to any case which interprets Subdivision k of Section 5 of the Act of 1893, however, by reference to a substantially similar provision in the Improvement Act of 1911, we believe there is ample authority to sustain the appellant's views in the matter. Section 6555 of the Streets and Highways Code (The Improvement Act of 1911) provides as follows:

"The deed of the treasurer, when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of the period for redemption, free of all encumbrances, except the lien for state, county and municipal taxes."

In *Pacific States Savings & Loan Co. v. Perez*, 51 Cal.App.2d 84 at page 88, 124 P.2d 184, at page 186, the court had under consideration a part of the 1911 Act, and said:

"Upon the trial of the case plaintiff offered in evidence the three deeds issued to it by the city treasurer of Oakland. Defendants contend that no sufficient foundation was shown for their introduction. We cannot agree with this contention. Section 75 of the act provides that the treasurer's deed, when duly acknowledged or proved, 'is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of the period for redemption, free of all encumbrances, except the lien for State, county and municipal taxes.' The phrase 'primary evidence' appears in section 3786 of the Political Code in reference to the evidentiary value of the tax deed, and as

there used has been held to mean *prima facie* evidence. (Citing case.) Obviously the same meaning should be given to the phrase in construing the act with which we are here concerned."

Likewise in *Schulman v. Shores*, 108 Cal. App.2d 156, at page 159, 238 P.2d 664, at page 666, the court interpreted the 1911 Act, and, among other things, said:

"Plaintiff's objection to the introduction of evidence attacking the validity of the deeds should have been sustained. (Sts. & Hy. Code, § 6571.) The deeds constituted *prima facie* evidence of the regularity of all proceedings antedating their execution. Sts. & Hy. Code, § 6555; *Pacific States Savings & Loan Co. v. Perez*, 51 Cal.App.2d 84, 88, 89, 124 P.2d 184. The deeds were issued September 29, 1948, and the complaint filed May 11, 1949. The six months' period within which the validity of the deeds could be assailed had, therefore, expired. However, since no motion to strike the evidence was made by plaintiff, we consider the record as made in the court below."

In *Elbert, Ltd. v. McKenna*, 116 Cal.App. 2d 480, at page 481, 254 P.2d 107, at page 108, it was set forth:

"Plaintiff introduced into evidence the two treasurer's deeds and rested. These deeds which were issued under the Improvement Act of 1911 (§§ 5000-6794 now Sts. & Hy. Code,), were primarily evidence of the regularity of foreclosure proceedings theretofore had. § 6555, Sts. & Hy. Code. They were *prima facie* evidence of title. *Sipe v. McKenna*, 106 Cal.App.2d 559, 235 P.2d 416. * * *

[1] The plaintiff established a *prima facie* title in himself, and in the absence of any showing to the contrary (and the record in this case does not disclose such contrary showing), he was not required to go any further.

[2] The law is well settled to the effect that the plaintiff, upon making out a *prima*

facie case of ownership, then puts the defendant to the necessity of meeting his claim. If the claim of the plaintiff is not met by the defendant the plaintiff is then entitled to a judgment. See, *Davis v. Crump*, 162 Cal. 513, 123 P. 294; *De Noon v. Morrison*, 83 Cal. 163, 23 P. 374; *Redmond v. McLean*, 32 Cal.App. 729, 164 P. 15; *Syme v. Warden*, 114 Cal.App. 707, 300 P. 863.

It was appropriately stated in *McPhail v. Nunes*, 48 Cal.App. 383, at page 387, 192 P. 95, at page 97:

"This record, under the circumstances in this action, surely establishes a *prima facie* case of ownership in plaintiff, and, the defendants not being in possession of the property, or any part thereof, and having no title whatever in themselves, are in no position to attack this *prima facie* case made by the plaintiff. *Williams v. City of San Pedro*, 153 Cal. 44, 49, 94 P. 234. Mr. Justice Shaw, in his concurring opinion in *Williams v. City of San Pedro*, 153 Cal. at page 50, 94 P. at page 237, says: 'The rule is elementary and practically universal that no party will be permitted to interpose to defeat the *prima facie* title of another party to the thing derived by him from a third person, unless such attacking party pleads, or shows in some authorized manner, that he has some right, title, or interest in the thing. A defendant who does not himself claim some right, title, interest, or possession, has no *status* to question the validity of a conveyance of the property by a third person to the plaintiff.' See, also, *Bell v. Towne*, 155 Cal.App.2d 225, 318 P.2d 110, which was a case involving Catherine A. McKenna with reference to a quiet title action.

The judgment is reversed and the trial court is directed to enter a judgment in favor of the plaintiff quieting his title to Parcel No. 4 as described in the complaint and findings of fact.

WHITE, P. J., and LILLIE, J., concur.

K. WOLEY, Plaintiff and Appellant,

v.

Stanley Phillip TURKUS, also known as Stanley P. Turkus and sometimes known as S. Turkus, Phillip Turkus and P. Turkus, Defendant and Respondent.*

Civ. 17652.

District Court of Appeal, First District,
Division 1, California.

Aug. 11, 1958.

Hearing Granted Oct. 10, 1958.

The Superior Court, San Mateo County, Aylett R. Cotton, J., rendered judgment dismissing action for failure to bring it to trial within five-year period allowed by West's Ann.Code Civ.Proc. § 583, as extended by written stipulation, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that written stipulation prepared by plaintiff that her motion for summary judgment and trial of action be continued at defendant's request to date specified beyond the five-year period allowed by statute was properly construed as extending the time allowed for bringing action to trial only to specified date and not for a reasonable period of time after hearing and determination of motion for summary judgment and that hearing on motion for summary judgment, which was denied, was not a trial within meaning of statute.

Judgment affirmed.

1. Stipulations Ⓒ14(1)

Written stipulation prepared by plaintiff that her motion for summary judgment and trial of action be continued at defendant's request to date specified therein beyond the five-year period allowed by statute for bringing action to trial was properly construed as extending time for commencement of trial of action only to specified date and did not extend such time for a reasonable period of time after hearing and determination of motion for summary judgment. West's Ann.Code Civ.Proc. § 583.

2. Stipulations Ⓒ14(1)

Any ambiguity in written stipulation extending time for trial of action beyond the

* Opinion vacated 334 P.2d 12.

five-year period allowed by statute should be resolved against party by whom such stipulation was prepared. West's Ann.Code Civ.Proc. § 583.

3. Appeal and Error Ⓒ1024(3)

Dismissal and Nonsuit Ⓒ73

On motion to dismiss for failure to bring action to trial within five-year period allowed by statute, as extended by written stipulation, conflicts in the evidence furnished by opposing affidavits must be resolved by trial court and its ruling thereon cannot be disturbed on appeal. West's Ann.Code Civ.Proc. § 583.

4. Dismissal and Nonsuit Ⓒ60(2)

Hearing on plaintiff's motion for summary judgment, which was denied, was not a "trial" within meaning of statute requiring action to be brought to trial within five years. West's Ann.Code Civ.Proc. § 583.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial".

5. Dismissal and Nonsuit Ⓒ60(2)

In order to bring action to "trial" within meaning of statute requiring dismissal of action unless brought to trial within five years, action must be brought to a stage at which final disposition is to be made of it. West's Ann.Code Civ.Proc. § 583.

Abraham Setzer, San Francisco, for appellant.

Charles O. Morgan, Jr., San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff has appealed from a judgment dismissing the action pursuant to section 583 of the Code of Civil Procedure, for her failure to bring it to trial within the five-year period, as extended by stipulation in writing.

The judgment found and declared that "there has been an inexcusable delay of more than five (5) years after the filing of said action and that there was a stipulation in writing between the parties extending the time to bring said action to trial to the 13th

day of January, 1956 and not thereafter, and said action not having been brought to trial on January 13, 1956, and *good cause appearing therefor, it is hereby ordered, adjudged and decreed* that the above-entitled action be, and the same is hereby, dismissed. * *."

There is evidence that supports this judgment and some which tends not to do so. That conflict was resolved against the plaintiff by the trial court. Since the supporting evidence is substantial there would be nothing for a reviewing court to do but to affirm, save for the consideration that should be given to the written stipulation mentioned in the judgment, construed therein as extending the time of trial to a date certain only, and not beyond that date.

It appears without dispute that the action was filed December 28, 1950, and the answer on February 2, 1951. It was not until December 9, 1955, that plaintiff filed a memorandum to set for trial, at the same time giving notice of a motion for summary judgment. Both matters were set for December 27, 1955.¹ Meanwhile, defendant's counsel represented that this was too short a time within which to prepare adequately, and requested a continuance. On December 22 the parties made and on December 27 filed the following stipulation in writing: "Stipulation for continuance of plaintiff's motion for summary judgment, and of trial of action, at defendant's request, beyond five year period prescribed by Section 583 of Code of Civil Procedure. The defendant above named having requested the same, it is hereby stipulated and agreed between the undersigned attorneys for the respective parties hereto that Plaintiff's Motion For A Summary Judgment, and the Trial of the above entitled action, now set for the 27th day of December, 1955, at the hour of 9:45 o'clock in the forenoon of said day, before the above entitled Court, in the Presiding Judge's Department, located in the County Court House, in the City of Redwood City,

County of San Mateo, State of California, be continued to the 13th day of January, 1956, at the same hour and place, the parties hereto expressly waiving further notice of the time and place of the respective hearing of said motion and of said trial and consenting thereto after the elapse of the five year period prescribed by Section 583 Code of Civil Procedure."²

[1] Plaintiff contends that this stipulation, in the light of attendant circumstances, operated as an extension beyond the five-year period of the time within which to try the case, to a reasonable period of time after the hearing and determination of her motion for summary judgment. The trial judge did not so view it, and we see no basis in the record for overruling his interpretation or his decision.

[2, 3] First, by this stipulation the parties continued the motion and the trial to a date certain. Next, they waived further notice of the motion and of the trial (literally construed, this refers to the date certain, January 13). They then concluded with the words "and consenting thereto after the lapse of the five year period prescribed by section 583 * * *." What did they mean by "thereto"? Conceivably, they meant the "continuance" of the motion and the trial to January 13, 1956. Thus, the fair intentment of this stipulation was to extend to January 13, 1956, the time within which the action could be brought to trial, despite the expiration of the five-year period. If a different intent could possibly be derived from the wording of the stipulation, we would have an ambiguity which should be resolved against the plaintiff as the party who prepared the stipulation. The trial judge had this principle as an aid to his interpretation. He also had the function of resolving conflicts in the evidence furnished by the opposing affidavits, a function which a reviewing court does not possess. His ruling can not be disturbed.

1. A minute order of December 15, 1955, declares: "Motion to advance and fix a day certain for trial * * * Motion granted and trial set for December 27, 1955."

2. Respondent in his brief states that plaintiff-appellant prepared the stipulation.

This statement is neither denied nor questioned in plaintiff's closing brief.

Plaintiff in aid of her interpretation of the stipulation narrates the following events: The motion for summary judgment and the trial were on the calendar on December 27. Defendant had requested further time to prepare. Accordingly, the stipulation was executed and filed. On January 13, the motion was heard and ordered submitted, subject to the subsequent filing of further papers by the parties; and the trial was continued to February 10. It happened that the motion was decided March 27 by an order denying summary judgment. On April 2 the clerk gave notice that on April 11th the court would reset the trial for a date certain, and it was reset for May 25. Upon the latter date, there being no trial department available, the trial was continued to June 20, and, later, for the same reason, to June 28. Meanwhile, on June 5, defendant gave notice of his motion to dismiss, which was heard on June 12 and decided by judgment of dismissal filed June 28, 1956.

Construing the stipulation in the light of these events, plaintiff argues: The reasonable intendment of the stipulation was that the motion be heard before the trial be conducted; i. e., if the motion were to be granted there would be no occasion for a trial, also the stipulation mentions the motion ahead of the trial.

We find nothing in the record upon which to base a reversal by a reviewing court of the implied finding by the trial court that such was not the actual intent and understanding of the parties. The mere order of mention of the motion and the trial, in the stipulation, is too slender a basis for us to say that by this stipulation the parties agreed in writing that the motion be heard and disposed of prior to the commencement of the trial.

The cause was on the calendar for trial on December 27. There was no real necessity for deciding the motion prior to holding the trial. Plaintiff could (on December 27 or January 13) have put a witness on the stand. After asking the witness a few questions, plaintiff would have satisfied the five-year mandate of section 583. She could

then have requested or consented to postponement of further conduct of the trial until the motion had been heard and determined.

[4] The sole remaining question is whether by bringing her motion to a hearing on January 13, 1956, plaintiff brought the action to trial. If so, she did bring the action to trial within the time to which the five-year period had been extended by stipulation in writing. We think not.

[5] *Berri v. Superior Court*, 43 Cal.2d 856, 859-860, 279 P.2d 8, 11, reviewed the question of when a "trial" has been had within the meaning of Code of Civil Procedure, section 583, when proceedings other than a commencement of a trial on the merits have taken place. Its conclusion was that the "essential thing is that the action be brought to a stage where final disposition is to be made of it." This was not done within the necessary time in this case.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



162 Cal.App.2d 622.

Emil FRITZ, Plaintiff and Respondent,

v.

Louise FOOTE, Defendant and Appellant.
Civ. 17833.

District Court of Appeal, First District,
Division 2, California.

Aug. 6, 1958.

Defendants appealed from a judgment of the Superior Court, City and County of San Francisco, Thomas M. Foley, J., declaring that a parcel of real property was owned by defendant, plaintiff, and another, each having an undivided one-third interest at court's request, parties argued question of timeliness of notice of appeal. The

District Court of Appeal, Draper, J., held that where notice of entry of judgment was mailed on December 27 to defendant's counsel and December 28 which was not a holiday was deemed to have been the day on which defendant received the notice of entry, notice of intention to move for new trial filed by defendant on January 8 was not filed within the statutory 10 day period, and therefore notice of appeal filed more than 60 days after entry of judgment was not filed in time.

Appeal dismissed.

1. Appeal and Error ⇨428(2)

Where notice of entry of judgment was mailed on December 27 to defendant's counsel, and notice was deemed to have been received by defendant on December 28, which was not a holiday, notice of intention to move for new trial filed by defendant on January 8 was not filed within statutory 10 day period, and therefore notice of appeal filed more than 60 days after entry of judgment was not filed in time. West's Ann.Rules on Appeal, rule 2 and subd. (a); West's Ann.Code Civ.Proc. §§ 659, 1013 and subd. (a) (2).

2. Judgment ⇨276

Where notice of entry of judgment was mailed on December 27 to defendant's counsel and certificate of mailing recited mailing of both entry of judgment and costs bill bearing notary's jurat dated December 28, notice of entry of judgment would be deemed to have been received on December 28, which was not a holiday, in absence of affirmative proof of receipt of notice of entry on date later than December 28, notwithstanding defendant's contention that costs bill could not have been mailed December 27 and that notice of entry must also be deemed mailed a day later than shown by certificate of mailing. West's Ann.Code Civ.Proc. §§ 1013 and subd. (a) (2), 1963(24).

3. Appeal and Error ⇨428(2)

Timely filing of a notice of appeal is jurisdictional and a late filing requires court, of its own motion, to dismiss appeal.

4. Appeal and Error ⇨801(1)

The policy of the law favors the hearing of appeals on the merits.

Leon H. Sorell, San Francisco, for appellant.

William E. Ferriter, San Francisco, for respondent.

DRAPER, Justice.

Defendant appeals from a judgment declaring that a parcel of real property is owned by defendant, plaintiff, and another, each having an undivided one-third interest. By supplemental briefs filed at the court's request, the parties have argued the question of the timeliness of the notice of appeal.

[1] Since the notice was filed more than 60 days after entry of judgment, it was too late (Rules on Appeal, Rule 2), unless the time was extended by the filing of a *valid* notice of intention to move for a new trial (Rule 2(a)). To be "valid" within the meaning of that rule, the notice of intention must itself be filed in time (Kientz v. Harris, 117 Cal.App.2d 787, 789, 257 P.2d 41; King v. Wilson, 101 Cal.App.2d 242, 225 P.2d 270), that is, within 10 days after receipt of written notice of entry of judgment (Code Civ.Proc. § 659). Here the certificate of mailing shows that notice of entry of judgment was mailed in San Francisco December 27, 1956, in an envelope addressed to appellant's counsel at his San Francisco office. This is adequate proof of service (Code Civ.Proc. § 1013(a) (2)), and shows that appellant's time to institute new trial proceedings began to run December 28 (Code Civ.Proc. § 1013). Since that day was not a holiday, it must also be deemed the day on which appellant received the notice of entry. Labarthe v. McRae, 35 Cal.App.2d 734, 97 P.2d 251. But the notice of intention to move for new trial was not filed until January 8, 1957, one day beyond the period allowed.

[2] Appellant seeks to discredit the certificate of mailing by pointing out that

the single certificate recites the mailing of both the notice of entry of judgment and the costs bill. The latter document bears notary's jurat dated December 28. Appellant argues that the costs bill, sworn to on the 28th, could not have been mailed the day before, and thus that the notice of entry must also be deemed mailed a day later than shown by the certificate of mailing. We do not agree. It is equally possible that copy of the costs bill, original of which was not filed until December 31, was mailed before it was sworn to. No affidavit or other evidence of receipt of the notice of entry on a date later than December 28 is before us. In the absence of some such affirmative proof, we cannot disregard the presumption that notice of entry was received December 28 (Code Civ.Proc. § 1963(24)).

[3] Timely filing of the notice of appeal is jurisdictional (In re Estate of Welch, 146 Cal.App.2d 534, 538, 304 P.2d 57; Levy v. Brill, 107 Cal.App.2d 204, 205, 236 P.2d 603), and a late filing requires the court, of its own motion, to dismiss the appeal (In re Estate of Hanley, 23 Cal.2d 120, 123, 142 P.2d 423, 149 A.L.R. 1250; In re Estate of Brewer, 156 Cal. 89, 90, 103 P. 486).

[4] We are aware of the policy of the law favoring the hearing of appeals on the merits. Manning v. Gavin, 14 Cal.2d 44, 46-47, 92 P.2d 795. Review of the record here, however, shows that each party and the third person involved testified that each was entitled to a one-third interest in the property here in issue. Even if the case were reversed for defects of pleadings and findings, it is difficult to see how a different ultimate result could be reached in the light of these admissions. Appellant's basic concern appears to be an accounting as to two other parcels, her right to which is not barred by the judgment in the present action.

Appeal dismissed.

KAUFMAN, P. J., and DOOLING, J., concur.

* Opinion vacated 334 P.2d 573.

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Wilma Lee RICHARDSON, Defendant
and Appellant.**

Cr. 3454.

**District Court of Appeal, First District,
Division 1, California.***

Aug. 12, 1958.

Rehearing Denied Sept. 11, 1958.

Hearing Granted Oct. 10, 1958.

Prosecution for illegal possession of narcotics. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., rendered judgment, and defendant appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to establish that arrest had been made upon information received from an informant known to the officer and believed by him to be trustworthy and reliable.

Judgment affirmed.

1. Arrest ⇨63(4)

An officer is justified in making an arrest acting solely upon information from an informant where that informant is known to the arresting officer and is believed by the officer to be trustworthy and reliable.

2. Arrest ⇨63(4)

In narcotics prosecution, evidence was sufficient to establish that arrest had been made upon information received from an informant known to the officer and believed by him to be trustworthy and reliable.

3. Arrest ⇨63(4)

In justification of arrest, one officer may use information given to him by a brother officer who received it from a reliable informer.

4. Arrest ⇨63(4)

The weight to be accorded the information upon which an officer acts in making an arrest for a felony is to be determined by the trial court in the exercise of a sound discretion.

5. Criminal Law Ⓒ1036(1)

Where defendant in narcotics prosecution did not object to admission of officer's testimony as to the making of the arrest and the finding of narcotics, or to the admission of the narcotics, admissibility of evidence was not reviewable on appeal.

6. Poisons Ⓒ9

In prosecution for possession of narcotics, evidence was sufficient to sustain finding that defendant had been aware of the presence of a narcotic in her possession. West's Ann. Health & Safety Code, § 11500.

Frank J. Baumgarten, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from a conviction, after jury trial, of violation of section 11500, Health and Safety Code (possession of narcotics).

Questions Presented.

1. Was there a valid arrest and search?
2. Did defendant knowingly possess the narcotics?

Facts.

On the morning of January 2, 1957, between 10:30 and 11 o'clock, Inspectors Noel and Ohlson of the State Narcotics Bureau with two officers of the San Francisco Police Department went to defendant's apartment. Defendant had gone to the back of the premises and the officers entered her open door. When she returned she was placed under arrest. A small vial which contained heroin was taken from her skirt pocket. A butt of a marijuana cigarette was found in a robe in a closet. Inspector Noel asked defendant where she got the narcotics. She replied, "Well, I guess you have got me good this time." She stated that she did not want to divulge her source as she did not want to "get anyone else

in trouble.'" Defendant denied making such statements and testified that Faye Robertson who also occupied the apartment had given her that morning "something wrapped up in a \$5 bill," to keep for her until she would return in a few minutes; in fact, she had stuck it in defendant's pocket. Defendant did not see and did not know what was wrapped in the bill. As to the marijuana butt defendant claimed to know nothing about it. Faye, however, had worn the garment from which it was taken, the day before. Defendant admitted a prior conviction for possession of narcotics.

Faye Robertson, who was under confinement at the Women's State Prison at the time of the trial, denied that she had given defendant the heroin but admitted giving her a \$5 bill to keep for her "because she always kept my money."

Officer Logan testified that he found a \$5 bill in defendant's purse on the dresser in her bedroom. There was other money in the purse. He took the bill because it was marked.

Obviously the evidence fully supports the conviction. Defendant does not, and could not, contend that it does not.

1. Arrest and Search.

Inspector Noel testified that the morning of the arrest, one James Allen, from whom on approximately four prior occasions he had received reliable information and whom he regarded as a reliable informant, informed him that defendant was selling heroin at her apartment. Allen told the inspector that he was living with defendant at her apartment. Noel also testified that before the arrest that morning Inspector Ohlson, who was in the arresting party, told him that Randolph Clark had informed him that defendant was selling heroin at her apartment. This informant had theretofore been found to be reliable.

Defendant testified that Faye Robertson and Randolph Clark rented the back bedroom from her and had occupied it for approximately two months. The day before the arrest, she told them to either pay up the back rent or get out.

[1-5] It is now well settled in this state that "an officer is justified in making an arrest acting solely upon information from an informant where that informant is known to the arresting officer and is believed by the officer to be trustworthy and reliable * * *". *Lorenzen v. Superior Court*, 1957, 150 Cal.App.2d 506, 509, 310 P.2d 180, 183. The evidence in our case easily meets this test. Both Allen and Clark were considered reliable informants by the officers. In justification of arrest, one officer may use information given him by a brother officer who received it from a reliable informer. See *People v. Hood*, 150 Cal.App.2d 197, 201, 309 P.2d 856; *People v. Gorg*, 157 Cal.App.2d 515, 321 P.2d 143. Defendant contends, however, that Allen could not be found by the trial court to be reliable because of the following situation: Inspector Noel testified that James Allen told him that he, Allen, was living with defendant in her apartment. Defendant produced a James Allen, a truck operator, who testified that some time prior to the date of defendant's arrest he had lived at the Eddy Street address of defendant's apartment and that he had never given Inspector Noel any information concerning defendant or anyone else. A "mug shot" of the James Allen referred to by Inspector Noel had been introduced in evidence. It was shown to witness Allen who said he did not know him. The parties then stipulated that the witness James Allen was not the James Allen Inspector Noel referred to. Defendant contends that she was deprived of due process for the reason apparently that she claims that there actually was no James Allen who informed Inspector Noel. There are three answers to this contention. (1) There was no evidence that the James Allen referred to by the inspector did not exist. There was considerable confusion in the evidence concerning the James Allen produced by defendant. He testified that he had lived at defendant's apartment but was not living there at the time in question. Defendant testified that she was living with a James Allen and the morning of her arrest drove him to work about 7:30.

She did not testify that this Allen was the Allen she produced as a witness. Also she testified that she did not know the James Allen shown in the photograph produced by the inspector as the Allen he referred to. This confusion was a matter which could have been resolved by the trial judge had objection been made to the testimony of the inspector. (2) "The weight to be accorded the information upon which the officer acts in making an arrest for a felony is to be determined by the trial court in the exercise of a sound discretion." *Lorenzen v. Superior Court*, supra, 150 Cal.App.2d at page 510, 310 P.2d at page 183. Evidently the trial court believed Inspector Noel's testimony to the effect that the James Allen who claimed to be living with defendant had informed him. There was no abuse of discretion here. (3) At no time did defendant object to the admission of the testimony of the inspector as to the making of the arrest, the finding of the narcotics nor the occurrences at defendant's apartment. Nor did defendant object to the admission in evidence of the narcotics. The failure to object in the trial court prevents a review of the admissibility of this evidence here. *People v. Alvidrez*, 158 Cal.App.2d 299, 322 P.2d 557; *People v. Woo Mee Foo*, 159 Cal.App.2d 429, 323 P.2d 1071; *People v. Goldberg*, 152 Cal.App.2d 562, 572, 314 P.2d 151.

2. Knowledge.

[6] Defendant contends that there is no evidence that defendant was aware of the presence of the narcotic. See *People v. Gory*, 28 Cal.2d 450, 454, 170 P.2d 433, and *People v. Lotrean*, 120 Cal.App.2d 583, 584, 261 P.2d 543, holding that knowledge of the presence of the object must be shown.) The evidence here clearly establishes that defendant was aware of her possession of the vial. Her own testimony shows that she was. She, of course, denies that she knew what was in the package which she claims Faye Robertson gave her. Defendant admitted that she knew what heroin was. Moreover, Faye denied giving the vial to her. These facts and defendant's statement to the officers, "you have got me

good this time," amply justify the implied finding that not only was she aware of the vial being in her possession but she also knew its narcotic content. The prosecution's burden of proof of knowledge required by *People v. Antista*, 129 Cal.App. 2d 47, 276 P.2d 177, was amply met by the evidence here.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



162 Cal.App.2d 668

Ernest FOURAKER, Plaintiff and Respondent,

v.

HILL & MORTON, Inc., a California corporation, Defendant and Appellant.

Civ. 22980.

District Court of Appeal, Second District,
Division 1, California.

Aug. 11, 1958.

Rehearing Denied Sept. 3, 1958.

Hearing Denied Oct. 10, 1958.

Action by employee of consignee of lumber shipment against shipper for injuries sustained when lumber fell upon him while unloading same. The Superior Court of Los Angeles County, David Coleman, J., entered judgment for employee, and shipper appealed. The District Court of Appeal, Fournier, J., held that evidence sustained finding of negligence by shipper in loading of lumber without "stickers" or cross supports in upper part of load and that shipper who loaded lumber onto flat car himself was liable to employee for its negligence.

Affirmed.

1. Railroads ⇨275(4)

Where shipper of lumber undertook to load shipment in flat car itself and shipment was not disturbed until it reached con-

signee's yard, shipper was liable in damages to employee of unloading consignee for injuries proximately resulting from negligence of shipper in loading car.

2. Railroads ⇨282(5)

In action by employee of consignee for injuries sustained in unloading lumber from flat car, evidence sustained findings that there were no "stickers" or cross supports in upper part of load and that to load lumber in such fashion was dangerous to lives of persons who might come into vicinity of load.

3. Railroads ⇨275(1)

Seller and shipper of goods by common carrier who himself undertakes to load shipment is under duty to exercise reasonable care to do so in a manner reasonably safe for unloading, and violation of such duty will render the seller and shipper liable for injury to consignee's employee proximately caused thereby.

4. Railroads ⇨282(9)

In action by employee of consignee of lumber shipment for personal injuries received when lumber fell on him while unloading flat car, evidence presented jury question as to alleged contributory negligence of employee.

5. Negligence ⇨122(1), 136(31)

Burden of proving contributory negligence is upon defendant and while contributory negligence may be found by trier of fact from plaintiff's own evidence, cases in which it can be said that negligence of plaintiff contributes proximately to accident as a matter of law are rare.

Schell, Delamer & Loring, Los Angeles, for appellant.

Francis J. Gabel, Los Angeles, Homer L. Martin and Bruce A. Randall, Tujunga, for respondent.

FOUR, Justice.

This is an appeal from a judgment in favor of the respondent for personal injuries sustained when certain lumber fell upon him.

In the complaint it was alleged that on August 10, 1953, the defendant negligently loaded, stacked and placed certain lumber owned by Hill & Morton, Inc., on a railroad flat car and caused the same to be shipped to Anawalt Lumber & Material Company, at Pacoima, California. It was also alleged that the defendant negligently loaded and placed the lumber upon the flat car without placing any cross stays or support (known as "stickers" in the lumber business) throughout the load to prevent the lumber from falling off when the stakes on the sides of the car were removed. The complaint further set forth that the plaintiff was an employee of Anawalt Lumber & Material Company, and that he was directed by his employer to unload the flat car, and that when the car was being unloaded the lumber fell off upon him and he was seriously injured thereby.

On August 18, 1953, Fouraker was at work in his employer's lumber yard in Pacoima, doing yard work in connection with loading and unloading lumber, at which time the accident occurred. The lumber came into the yard in flat cars and box cars. The lumber with which we are concerned consisted of 6" x 6" unfinished, rough, new and wet timbers from 12 feet to 20 feet in length, which were on a flat car. It was the practice to unload unfinished lumber with a fork lift (a mechanical loader and unloader), and on the morning in question Fouraker was to strip the flat car with the heavy timbers on it. Stripping the car consisted, generally, in clipping the wire bands and taking the stakes out from the side of the car so that the fork lift could remove the lumber. Separators are placed in the load (sometimes called bolsters) at the time of loading to permit the mechanical discharge by a fork lift. Stickers are intended to tie the load together so that it can be handled without falling apart. In this instance Fouraker loosened the stakes by going on top of the load, knocked off some bracing material and then cut the steel bands which went across the top of the load. When he did this the posts at the side of the load swung

free from the sides of the timber, which is an indication to lumbermen that a car is soundly loaded. Fouraker then climbed down off of the load and proceeded to take the posts out of the casters and placed them upon the ground.

The substance of the testimony of the witnesses most favorable to the respondent is as follows: Contreras, a fellow employee, stated that he was in the yard the day of the accident and saw the respondent lying on the ground with timbers on top of him; that he, Contreras, looked the flat car over and saw that there were separators in the load but no stickers, however he later testified that he did see one sticker at the bottom unit of the timbers. Further, he said that he unloaded the car with a fork lift and found one small sticker at the unit. He said that he believed that six timbers had fallen from the top unit.

Fouraker testified, in effect, that the lumber on the flat car was in units four feet high and four feet wide, or eight timbers high and eight timbers wide (sixty-four timbers in each unit). He had glanced at the load and it appeared to be straight up and down and it looked to him the same as all other loads had looked. He stated that after the bands were cut, the stakes on the sides of the car swung away free and that no lumber was pressing against the stakes. He looked at the load when he got ready to remove the last stake and did not see any stickers.

Raymond Schuler testified that he examined the flat car after the accident and found the top row of timbers on the outside of the car, and perhaps one or two other rows of the timbers had rolled off of the car. He also stated in substance that the lifts of lumber on the car were separated by separators to the end that room would be available for the mechanical discharge of the lumber with a fork lift. Further, he described a sticker as a thin piece of board about $\frac{3}{4}$ of an inch thick, and said that it was put into units of lumber to bind them together so that the lumber as piled would not separate and fall apart. He stated that lumber on a car is loaded eight feet high,

and that rough lumber needs more securing than smooth lumber, both for shipping and for unloading. He had examined the load on the flat car in question and stated that there were no stickers in the lumber.

Nick Cardil qualified as an expert witness and he testified that a load of 6" x 6" timbers requires stickers to stabilize it, and that a load of such timbers four feet high should have been stuck twice in each unit, and further, that if no stickers were used it would have been an extremely unstable load and very dangerous to be around. He also stated that if the stakes swung free when the wedges were loosened and the bands were cut, there would be an assumption upon the part of lumbermen that the car was soundly loaded. Further he stated that in rough lumber loads the sticker was very important to stabilize the load and tie it together. As to the use of a fork lift, he said in effect that timbers could be loaded with a fork lift even though the load was not stuck. He further stated in substance that a person standing upon the ground might not always be able to tell whether a load of timbers upon a flat car was properly stuck by merely looking up at the load, and that he had only heard of four accidents similar to the one in question within the last ten years.

Appellant called as a witness David Johnson, who stated that he worked for the Brookings Plywood Corporation in Oregon (the original mill producer of the timbers) and that he had stacked some 6" x 6" green, rough timbers destined for appellant's place of business in Arcata, California, upon trucks and trailers; that such timbers were stacked on the plane seven timbers wide and seven timbers high; that there would be four timbers, then a sticker, then three timbers on top of that. He stated that he had cut down the size of the units to seven timbers for the convenience of the trucking company; that there were broken units on each of the trucks, however, that he did not see the trucks unloaded. He did say, in effect, that he had removed the stickers in the upper courses of the units in breaking the units, and that he left those

stickers on the load; that the stickers were left intact in the lower courses.

Bert Gilbert, an appellant's witness, stated that he was employed by appellant as a loading supervisor, but could not state that he was on the premises when the particular flat car in question was loaded. He testified that the units would come from the mill properly stuck, and that an entire unit is put on to a flat car just as it comes from the mill; that they loaded the flat car in whatever shape they received the load from the mill, and did not rearrange or touch any of the units and did not put stickers in any of the units. Further, he said that if the lumber left their yard not stuck, it would have been dangerous. He also said: "The minute you picked it up you'd be jeopardizing everybody's lives and limbs because it would fall over. I wouldn't say that it would do that, but you'd be risking your employees' lives or anybody else that happened to be walking in the neighborhood." At the trial he said the units were seven timbers across and seven timbers high, or each unit 3½ feet by 3½ feet; however, in his deposition he stated that the units were 4 feet by 4 feet, and were not broken down individually, and were lifted onto the flat car accordingly.

Nicholas Kempf, an appellant's witness, stated that he was a car inspector for the Southern Pacific Railroad, and had occasion to inspect the load in question, and that if the load was eight feet high there should have been two stickers; however that their inspection was for the purpose of seeing that the load would go to its destination in proper loading form, and that otherwise they had no interest in the matter.

Appellant contends that there were stickers in the load, and that (1) there was no negligence proved against appellant, there were no hidden dangers and the condition of the lumber was open and obvious; (2) the title to the lumber had passed from appellant to respondent's employer, and it was no longer under appellant's control, custody or possession; (3) the respondent was guilty of contributory negligence as a matter of law.

[1] We are of the belief that under the facts of this case the shipper who loaded the flat car is liable in damages to the employee of the unloading consignee for injuries proximately resulting from the negligence of the shipper in loading the flat car. In *Owen v. Rheem Mfg. Co.*, 83 Cal.App.2d 42, at pages 46-48, 187 P.2d 785, at page 787, it was stated:

"In upholding a verdict for plaintiff, this principle was announced in *Wintersteen v. National Cooperage & Woodenware Co.*, 361 Ill. 95, 197 N.E. 578, 579, that 'every person owes a duty to all persons to exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act,' for which wrong the law furnishes a redress; that this duty to exercise ordinary care to avoid injury to another does not depend upon contract, privity of interest, or the proximity of relationship between the parties. There, as here, an employee of the consignee brought suit against the shipper. As the employee was opening a box car door one of the barrels fell out and injured him. The shipper had used defective lumber for *shoring* or 'the dunnaging of the car.' In respect to negligence, the court there said:

"If a reasonably prudent person might, and ordinarily would, foresee that the omission to do a certain act or the commission of an act in a certain way would likely result in injury to another, and injury to another does follow as a result thereof, such act of omission or commission is negligence, and the proximate cause of the injury. 1 *Thompson on Negligence*, § 50. There was positive evidence of the defective condition of one of the strips used in the dunnaging of the car. * * * The facts and weight of the evidence were for the jury, and we would not be warranted in disturbing the verdict of the jury unless it be against the manifest weight of the evidence.'

"While our search has not disclosed a case where the courts of this state have applied the above mentioned rule where, by the act of a shipper, injury resulted to a consignee or his employee, the *principle* has been employed in *Dahms v. General Elevator Co.*, supra [214 Cal. 733, 7 P.2d 1013], where the elevator operator in a business building was injured by the negligence of the defendant which had entered into a contract with the owner of the building (plaintiff's employer) to inspect and repair the elevator. It was there said, 214 Cal. at page 738, 7 P.2d at page 1015:

"We are of the opinion that it falls properly within another well-settled exception. There are numerous cases from nearly every jurisdiction which hold that an action sounding in negligence may be maintained by a stranger to a contract for the execution of a specific piece of work or the sale of a manufactured article, if the product of the stipulated work or the article sold was abnormally dangerous or noxious.'

"See, also, *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481, in which case it is remarked that things classified as inherently dangerous have been steadily extended to include those articles which are reasonably certain to place life and limb in peril, when negligently made, prepared or constructed, as it then becomes a thing of danger, with a corresponding extension of the application of the remedy. It began with articles such as the sale of poison and such things now include a dangerous and defective scaffolding (*Devlin v. Smith*, 89 N.Y. 470 * * *); defective rungs in ladders, and defective spokes in automobiles (*MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696 * * *); etc. See, also, *Hall v. Barber Door Co.*, 218 Cal. 412, 23 P.2d 279; and *Johnston v. Long*, 56 Cal.App.2d 834, 133 P.2d 409."

[2] Without again reviewing the evidence, suffice it to say that there was testimony to the effect that there were no stickers in the upper part of the load of timbers, and that to load lumber in such a fashion was dangerous to the lives of persons who might come into the vicinity of the load.

[3] In other jurisdictions there are well reasoned cases holding that a seller and shipper of goods by common carrier, who himself undertakes to load the shipment, is under a duty to exercise reasonable care to do so in a manner reasonably safe for unloading, and that a violation of such duty will render the seller liable for injury to consignee's employee proximately caused thereby. See *Pacific States Lumber Company v. Bargar*, 9 Cir., 10 F.2d 335; *Edwards v. Southern Railway Company*, 233 Ala. 65, 169 So. 715, 106 A.L.R. 1133; *Yandell v. National Fireproofing Corporation*, 239 N.C. 1, 79 S.E.2d 223.

There was no evidence that the load shifted en route, nor was there any evidence that the load had been disturbed before respondent began the routine stripping of the car prior to unloading.

[4] Considering appellant's contention that the respondent was guilty of contributory negligence. From what has heretofore been set forth, it is apparent that respondent did take at least some caution for his own safety, and in our opinion this was a matter for the jury to determine. The respondent saw that the stakes swung free from the load after the bands were cut, he glanced at the load and started to work on it, and he could see, as he walked up to it, that it appeared to be sitting straight up and down, and looked the same as other loads looked. We cannot say, as a matter of law, that under the circumstances respondent was guilty of contributory negligence. The rule is set forth in *Anthony*

v. Hobbie, 25 Cal.2d 814, at page 818, 155 P.2d 826, at page 829.

[5] "The burden of proving contributory negligence is upon the defendant. 19 Cal.Jur. 697-699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. (Citing cases.)"

Likewise, in *Bady v. Detwiler*, 127 Cal. App.2d 321, at page 339, 273 P.2d 941, at page 952, it is appropriately said:

"It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence the question is one of fact for the jury. (Citing cases.)"

We have reviewed the entire record in this case, and we find no prejudicial error.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

Hearing denied; SCHAUER, J., dissenting.

162 Cal.App.2d 733

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

William Herbert COCHRAN, Defendant and
Appellant.
Cr. 6131.

District Court of Appeal, Second District,
Division 3, California.

Aug. 12, 1958.

Prosecution for attempted burglary. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Parker Wood, J., held that statute providing that court shall set all criminal cases for trial for a date not later than 30 days after date of entry of the plea of the defendant is merely directory, and a failure to comply with its terms did not require a reversal of a judgment of conviction.

Judgment affirmed.

1. Criminal Law ☞575, 1166(1)

Statute providing that court shall set all criminal cases for trial for a date not later than 30 days after date of entry of the plea of the defendant is merely directory, and a failure to comply with its terms did not require a reversal of a judgment of conviction. West's Ann.Pen.Code, § 1050.

2. Criminal Law ☞576(5)

In criminal prosecution, minutes of clerk of the Superior Court stating in part that defendant was present with his counsel, at time date of trial was reset, and that statutory time for trial was waived, were determinative with respect to waiver of defendant's statutory right to trial within 60 days after filing of the information, and defendant would not be granted a dismissal of the information on theory he did not consent to such a waiver, especially in view of facts defendant was present when trial date was set, and during the trial defendant did not object to its being held after the 60-day period. West's Ann.Pen.Code, § 1382.

3. Indictment and Information ☞45

Even if an information was dismissed for failure to bring a defendant to trial within 60 days after filing of same, district attorney could file a new information within period of statute of limitations. West's Ann.Pen.Code, §§ 1382, 1387.

4. Burglary ☞41(10)

Evidence sustained conviction for attempted burglary.

5. Criminal Law ☞1182

Affirmance of a judgment of conviction carries with it affirmance of sentence.

Virgil V. Becker, Wilmington, for appellant.

Edmund G. Brown, Atty. Gen., and Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

In a trial by jury, defendant was convicted of attempted burglary. He appeals from the judgment.

He asserts that the judgment should be reversed because: (1) the court did not set the case for trial within 30 days after the entry of his plea; and (2) he was not brought to trial within 60 days after the filing of the information. He also asserts that the evidence was not sufficient to support the judgment.

The information was filed July 11, 1957. Defendant's plea was entered August 1, 1957, and at that time the case was set for trial on August 16, 1957. On said August 16, the case was reset for trial on September 19, 1957. The trial was commenced on said September 19 and was concluded on September 24, 1957.

[1] It thus appears that the case was first set for trial on a date (August 16) which was within 15 days after defendant's plea; and that on August 16, it was reset for a date which was 49 days after the plea. Section 1050 of the Penal Code provides, in part: "The court shall set all criminal cases for trial for a date not later than thirty (30) days after the date of entry of the plea

of the defendant. * * *

That section does not provide that the case shall be dismissed if it is not set for trial within the 30-day period. The section is directory, and a mere failure to comply with its terms does not require a reversal of a judgment. *People v. Tenedor*, 107 Cal.App.2d 581, 583, 237 P.2d 679.

[2] It also appears that the trial was not commenced until 70 days after the information was filed. Section 1382 of the Penal Code provides, in part: "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: * * *

2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial in a superior court within 60 days after the finding of the indictment, or filing of the information * * *." The minutes of August 16, in Department 41 of the superior court, state in part: "Defendant with counsel, Deputy Public Defender Fred Kilbride, present. Reset for trial on September 19, 1957, 9 AM in Department 42. Statutory time for trial waived." Defendant asserts, however, in his brief on appeal, that said deputy public defender was not authorized by him to waive statutory time; defendant did not know that said deputy was appearing for him at the time of the alleged waiver; and defendant was not aware that the time had been waived until after the conclusion of the trial. (It appears that on August 16, immediately prior to the proceeding in Department 41, the case was on the calendar in Department 46 and defendant was present in Department 46 where the public defender was appointed as his counsel, and at that time Deputy Public Defender Erskine was present. After that appointment the case was transferred to Department 41 for resetting. In Department 41, Deputy Public Defender Kilbride was present—instead of Mr. Erskine who had been present in Department 46.) Defendant's assertion, in his brief, to the effect that he did not authorize the waiver, and did not know of it, relates to purported matters which are outside the record. In *People v. Villarico*, 140 Cal.App.2d 233, 295

P.2d 76, where defendant asserted that he was not brought to trial within 60 days after the information was filed, the clerk's transcript showed that the continuance to a date beyond the 60-day period was "by consent." In that case the defendant claimed that he refrained from protesting the delay by reason of intimidation by police officers. The court therein ruled (140 Cal.App.2d at page 236, 295 P.2d at page 78) that matters outside the record on appeal, which were stated only in the briefs, could not be considered on appeal. In the present case, appellant's said assertion regarding the waiver is not substantiated by anything in the record. When the trial date of September 19 was set, the defendant was present. During the trial he did not object to the trial being held after the 60-day period. In *People v. Martinez*, 145 Cal.App.2d 361, 302 P.2d 643, the trial commenced on the 74th day after the information was filed. It was said therein (145 Cal.App.2d at page 365, 302 P.2d at page 645) that the right to a dismissal under section 1382 of the Penal Code and, the constitutional right to a speedy trial, may be waived. It was also said therein (145 Cal.App.2d at page 365, 302 P.2d at page 645) that the defendant "participated throughout the trial proceedings, neither voicing any objection nor interposing a motion to dismiss. It is not the policy of the law to permit a person thus to keep his silence, take his chance on getting a favorable verdict and, if he loses, at some later time (perhaps after the statute of limitations has run) come in and void the judgment by raising a point which if timely raised would have allowed the filing of a new information before the running of the statute and while the state's witnesses were still available." In the present case, the clerk's minutes are determinative with respect to the matter of waiver.

[3] It seems that defendant is of the belief that if the information had been dismissed because he had not been brought to trial within the 60-day period, he could not be prosecuted again upon this charge. Even if the information had been dismissed for such reason, the district attorney could

have filed a new information within the period of the statute of limitations. Pen. Code, sec. 1387; *People v. Vacca*, 132 Cal. App.2d 8, 281 P.2d 315.

[4] Another contention of appellant is that the evidence was not sufficient to support the judgment.

On June 24, 1957, about 4 a. m., while the owner of a liquor store was in the back room of his store doing book work, he heard footsteps on the roof of the store building. Immediately thereafter he reported the incident to the sheriff's office by telephone. While he was making the report he heard a noise which sounded as if the roof were being torn off. After making the report he heard "footsteps running away," and he noticed that the skylight was torn off. Two deputy sheriffs received the radio report when they were in a sheriff's car about 100 yards from the store, and they arrived at the store within a very short time. One of the officers ran around the north side of the building and saw the defendant about 15 to 20 feet from the corner of the building, and at that time defendant was running. The other officer drove the car into an alley (on the south side of the building) and saw the defendant about 30 yards from the building, and at that time defendant was running "as hard as he could." Then that officer turned on the flashing red lights of the car and pursued the defendant. About half a block down the alley, that officer drove by the side of defendant and ordered him to halt. Defendant jumped over a fence that was at the side of the alley. The officer got out of the car, jumped over the fence and chased defendant through a yard and down a street to a house where defendant jumped over a gate. The officer told defendant to halt or the officer would shoot. Defendant stopped and the officer arrested him. Near the gate, where he was apprehended, the officers

found a sock and a flashlight. One of the officers went upon the roof of the store and observed that the skylight had been ripped open and that a wrench and a screwdriver were near the skylight. He also noticed that dust on the roof had been disturbed. An investigating officer, who saw defendant at the sheriff's station later that morning, testified that defendant's clothes were comparatively clean and well pressed; that he asked defendant why he was near the store; defendant replied that he arrived in town on June 22 and he was looking for newspapers to sleep on, and when he heard someone holler at him he "took off running"—he did not know the person.

Defendant testified that he had been in town about twelve hours when he was arrested; he did not go upon the roof of the store building or attempt to get into the store; he was in the alley looking "for something to lay down and rest for the night"; someone called to him; he did not know that person; then he (defendant) went over a fence, ran two or three blocks and jumped over another fence before he stopped; he did not realize that an officer was chasing him; there was no dust on his trousers when he was arrested; he never saw the flashlight, wrench, or screwdriver, which were received in evidence; he gave a false name when he said that his name was Jack Kelly.

The evidence was amply sufficient to support the verdict and judgment.

[5] The notice of appeal states that the appeal is also from the sentence. "Affirmance of the judgment carries with it affirmance of the sentence." *People v. Perkins*, 147 Cal.App.2d 793, 798, 305 P.2d 932, 935.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

162 Cal.App.2d 833

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Burnis John SHARP, Defendant and
Appellant.

Cr. 6202.

District Court of Appeal, Second District,
Division 2, California.

Aug. 18, 1958.

Rehearing Denied Aug. 26, 1958.

Hearing Denied Oct. 15, 1958.

Defendant was convicted of forcible rape. The Superior Court of Los Angeles County, LeRoy Dawson, J., rendered judgment and defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence on issues of resistance and outcry sustained rape conviction.

Judgment affirmed, attempted appeal from order denying new trial dismissed.

1. Criminal Law ⇨1086(13)

Attempted appeal from order denying new trial would be dismissed where order did not appear in record.

2. Rape ⇨54(1)

Testimony of prosecutrix requires no corroboration in a rape case.

3. Rape ⇨51(4)

Evidence on issues of resistance and outcry sustained rape conviction.

Casey & Kerrigan, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Joan D. Gross, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

[1] Convicted of forcible rape defendant appeals from the judgment and an alleged order denying his motion for new trial. There is no such order in the record and that attempted appeal must be dismissed.

The appeal presents nothing more than an effort to obtain a reweighing of the evidence by this court, contrary to the governing rule laid down in *People v. Newland*, 15 Cal.2d 678, 681-682, 104 P.2d 778.

[2] The argument centers upon the question of consent of the prosecutrix. Her testimony is that she was forced and that she resisted as long as she could. Defendant's version is to the contrary. There is nothing about the prosecutrix' testimony which stamps it as inherently incredible. See *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758; *People v. Huston*, 156 Cal.App.2d 670, 320 P.2d 175. The testimony of the prosecutrix requires no corroboration in a rape case (42 Cal.Jur.2d § 97, p. 286), but there is substantial corroboration in this instance,—summoning of neighbors and making immediate complaint to them while in a hysterical and disheveled condition, followed by summoning the police. 42 Cal.Jur.2d § 68, p. 255.

[3] The extent and duration of the resistance to be offered by the assaulted woman is to be determined by her in the first instance. "The courts no longer follow the primitive rule that there must be resistance to the utmost." *People v. McIlvain*, 55 Cal.App.2d 322, 329, 130 P.2d 131, 135. 'The resistance required in each case depends upon the circumstances of that case, such as the relative strength of the parties, the uselessness of resistance, the degree of force manifested and other factors. The resistance of the prosecutrix need only be such as to make nonconsent and actual resistance reasonably manifest.'" *People v. Ford*, 81 Cal.App.2d 580, 582, 184 P.2d 524, 525. "The resistance must be proportioned to the outrage and must be judged in the light of all the accompanying facts, such as the relative strength of the parties, the age and the condition of the female person, the uselessness of resistance as it would appear to her, and the degree of force manifested, and what knowledge she had of the defendant's past conduct. She need not resist until either strength or consciousness is gone; her re-

sistance need continue only until it becomes so apparently useless as to warrant its cessation.

"'Even when a woman yields in sexual intercourse to a male aggressor, if her yielding has been induced by fear that it is necessary to save her from violence or death or that it offers hope of so doing, her conduct in such circumstances does not constitute consent.'" *People v. Nazworth*, 152 Cal.App.2d 790, 795, 313 P.2d 113, 117. See, also, cases cited in 42 Cal.Jur.2d § 14, pp. 203-207.

Review of the transcript herein reveals that there is a substantial conflict in the evidence upon the controlling issues of the case; after a nonjury trial, the court resolved that conflict against the defendant and he presents no good ground for reversal.

Attempted appeal from order denying new trial is dismissed. Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.



162 Cal.App.2d 639

Paul ROUSE, by **Joseph A. Brown**, Guardian of his person and estate, Plaintiff and Appellant,

v.

TWIN PINES SANITARIUM, INC., The American Trust Company, as Executor of the Last Will and Testament of Willard G. Snow, deceased, and James Alexander Hamilton, Defendants and Respondents.

Civ. 17746.

District Court of Appeal, First District,
Division 2, California.

Aug. 7, 1958.

Rehearing Denied Sept. 5, 1958.

Hearing Denied Oct. 1, 1958.

Patient's action against two physicians and a hospital charging malpractice and charging one physician with malicious prosecution of proceeding wherein patient was

committed to state mental hospital. From adverse judgment rendered by the Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., plaintiff appealed. The District Court of Appeal, Dooling, J., held that evidence proffered to show that physicians had negligently prescribed such quantities of bromides as resulted in plaintiff's bromide poisoning was insufficient for jury and that order committing defendant to mental hospital barred malicious prosecution action.

Judgment affirmed.

1. Appeal and Error ⇨927(3)

In reviewing action of trial court in granting nonsuit in malpractice action against physician, ordinary rules apply and evidence must be construed most strongly in favor of plaintiff and every reasonable inference from evidence must be drawn in his favor.

2. Physicians and Surgeons ⇨18(9)

In patient's malpractice action against physicians charging that they had negligently prescribed bromides and other dangerous and deleterious drugs so that he contracted bromide poisoning with resultant physical and mental pain, evidence on issue of whether either physician had ever prescribed an overdose of bromides or other complained of drugs was insufficient for jury.

3. Malicious Prosecution ⇨25(3)

An order committing a defendant to a state mental hospital bars any action for malicious prosecution of the proceeding for commitment.

4. Malicious Prosecution ⇨64(2)

In malicious prosecution action against physician based on his signing complaint in proceeding wherein defendant was committed to state mental hospital, evidence revealed that physician had probable cause for seeking the commitment.

Joseph A. Brown, Miguel Leite, San Francisco, for appellant.

Peart, Baraty & Hassard, Robert D. Huber, San Francisco, for respondent James Alexander Hamilton.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, Joseph W. Rogers, Jr., San Francisco, of counsel, for respondents American Trust, etc.

DOOLING, Justice.

Appellant brought this action in three counts: 1. for malpractice; 2. for assault and battery; and 3. for malicious prosecution. The second count has been dismissed with prejudice. Nonsuit was granted as to the first and third counts at the close of plaintiff's case. From the judgments of nonsuit appellant has appealed and argues only as against respondents Snow and Hamilton.

Appellant is a barber and respondent Snow, a physician and surgeon, had been a customer in his shop. In July of 1952 appellant suffered a broken ankle after drinking for three days with his brother. He was taken to Park Sanitarium by Dr. Davidson (an associate of respondent Snow) and later transferred to Stanford Hospital. Dr. Sterling Bunnell put his ankle in a cast. Dr. Snow prescribed for him tuinal (sleeping tablets), paraldehyde to quiet his nerves and some codeine to relieve pain. After his discharge from the hospital appellant continued to use the two former drugs until he "passed out on the floor of the barber shop." He was readmitted to Stanford Hospital and after three or four days discharged. He continued to take the sleeping pills and paraldehyde until about the middle of January 1953. At that time he requested Dr. Snow to renew his prescription for tuinal and Snow said to him: "I gave you too much already, use bromide." " * * * He says, 'I can't give you any more sleeping pills,' he said, 'I give you too many,' and he says, 'Take a bromide.'" Appellant bought and consumed from three to five bottles of triple bromide. This can be obtained without a prescription and there are directions on the bottle as to the prop-

er dosage. Appellant did not see Dr. Snow again until after he was released from Agnews State Hospital.

About February 6, 1953, appellant felt a pain in his head. He finished the bottle of bromide which he had and took a sleeping pill. After that he "passed out." On February 7 Dr. Snow was called to appellant's barber shop. He felt that he was mentally incompetent and should be admitted to a psychiatric institution. Appellant was taken to Twin Pines Sanitarium where he was attended by respondent Dr. Hamilton. He had 246 mg. percent of bromide in his blood which according to Dr. Hamilton "is a tremendous blood bromide. This is the largest that I have ever seen in any patient * * * It is close to what I ordinarily regarded as a lethal dose * * *

After a week's stay at this sanitarium appellant was not improving and was moving from a confused delirious state to a state in which clear and fixed psychotic symptoms were present. Dr. Hamilton decided that appellant should be committed to a state mental hospital where he could get shock treatments, which he believed he should have. Dr. Hamilton signed a complaint for his commitment and appellant was committed to Agnews State Hospital by a superior judge of San Mateo County. After about four weeks in Agnews he was released.

We have omitted any discussion of brutal treatment by sanitarium attendants testified to by appellant since the count for assault and battery is not before us.

[1] Upon the motion for nonsuit in malpractice cases the ordinary rules apply. The evidence must be construed most strongly in favor of plaintiff and every reasonable inference from the evidence drawn in his favor. *Lashley v. Koerber*, 26 Cal.2d 83, 156 P.2d 441.

[2] The first count charged that "defendants * * * so negligently and carelessly prescribed for and treated plaintiff by administering to plaintiff divers bromides

and other dangerous and deleterious drugs * * * in dangerous and detrimental quantities * * * that plaintiff * * * was caused to and did contract severe bromide poisoning and was rendered ill and nervous and was caused to and did suffer great physical and mental pain * * *

There is no evidence that respondent Hamilton ever saw, let alone treated, appellant until after he was admitted to Twin Pines Sanitarium suffering from an excess of bromide in his blood and no evidence from which a jury could find that he gave him an overdose of any drug thereafter.

As to respondent Snow insofar as bromide poisoning is concerned there is no evidence other than that Dr. Snow told appellant to "take bromide" or "take a bromide." The evidence shows that the bromide which appellant secured could be purchased from any drug store without prescription and that the proper dosage was printed on the label of the bottle. There is no evidence that bromide taken in accordance with these directions would normally have the effects which followed in this case or that a physician following the usual and customary practice in the community would be negligent in prescribing "bromide" or "a bromide" for this appellant. This is not one of those cases in which we, or a jury, could from common knowledge say that the respondent Snow was guilty of negligence in suggesting that appellant take bromide.

Dr. Snow did testify that after his release from the hospital the second time he thought that he had given appellant too much tuinal, but there is no evidence that this drug contained bromide or did or could

have contributed to the excess of bromide in appellant's blood or caused any of the illness or ill effects from which he afterwards suffered.

[3] On the count for malicious prosecution, appellant cites *Kellogg v. Cochran*, 87 Cal. 192, 25 P. 677, 12 L.R.A. 104, in support of his argument that the commitment order of the superior court is not a bar to the action for malicious prosecution. The later cases of *Fetterley v. Gibson*, 210 Cal. 282, 291 P. 411, and *Schwartz v. Schwartz*, 25 Cal.App.2d 303, 77 P.2d 260, squarely decided that the court's order of commitment is a bar to such an action and in the latter case one of appellant's counsel in this case made the same argument and cited *Kellogg v. Cochran*, supra, to no avail. See *Schwartz v. Schwartz*, supra, 25 Cal. App.2d at page 304, 77 P.2d at page 260.

[4] In any event "probable cause has been in substance defined as such a state of facts as would lead a reasonably prudent man to believe that the plaintiff was insane." *Brock v. Southern Pacific Co.*, 86 Cal.App.2d 182, 196, 195 P.2d 66, 74. The evidence shows that appellant was suffering from delusions that people were shooting at him and that he was being given poison and the records of Agnews State Hospital show that appellant was suffering from the same sort of delusions five days after being admitted there. On this uncontradicted evidence the facts were clearly sufficient to constitute probable cause for seeking appellant's commitment.

Judgment affirmed.

KAUFMAN, P. J., concurs.

Hearing denied; CARTER, J., dissenting

162 Cal.App.2d 693

Matter of the ESTATE of Ethel M. BERNATAS, also known as Ethel May O'Neill, Deceased.

Joseph BERNATAS, Appellant,
v.

**Gladys L. HONNERT, Virginia F. Crockett
and Donald E. Honnert, Respondents.**
Civ. 17955.

District Court of Appeal, First District,
Division 1, California.

Aug. 12, 1958.

Hearing Denied Oct. 10, 1958.

Proceeding by administrator with will annexed for settling of final account and decree of distribution. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered order from which administrator appealed. The District Court of Appeal, Bray, J., held that evidence sustained finding that house belonging to decedent prior to her marriage to surviving husband was her separate property, notwithstanding use of community funds for renovation and payment of mortgage, and provision in will that husband was to live in house as long as he wished "while he is alone" would be construed as giving husband a life estate determinable upon his remarriage.

Order modified and as so modified order and decree affirmed.

1. Husband and Wife ⚭263

Contents of will may not be considered in determining character of property as separate property of decedent or community property of parties, and it is well settled that declarations in a will unknown to other spouse are inadmissible to prove that property is separate property. West's Ann.Civ. Code, § 162.

2. Husband and Wife ⚭266

A wife's separate property may be transmuted into community property by simple oral agreement between husband and wife that it shall be such, and testimony of husband, if believed, is sufficient to sup-

port a finding adverse to record title: West's Ann.Civ.Code, § 162.

3. Evidence ⚭594

Generally, uncontradicted and unimpeached testimony of a witness tending to establish an issuable fact may not be disregarded and should be accepted to establish fact unless it is inherently improbable, but most positive testimony may be contradicted by circumstances in evidence which may satisfy trial court of its fallacy and court may reject testimony even though witness is not discredited by direct testimony.

4. Husband and Wife ⚭264

In proceeding to settle final account and for decree of distribution, evidence sustained finding that home in decedent's name alone, which was acquired by her prior to marriage to surviving husband, constituted her separate property notwithstanding use of community funds for renovation of same and payment of mortgage thereon. West's Ann.Civ.Code, § 162.

5. Husband and Wife ⚭266

If husband expended community funds for benefit of wife's separate property, it may be presumed that he intended, in absence of any evidence to contrary, that such improvement or benefits were to be gifts and that he made such expenditures without expectation of repayment.

6. Wills ⚭440, 470

Cardinal principle in construing wills is to ascertain the intention of testator as expressed therein, and in seeking this intention, the will should be read from its four corners and all parts of document should be construed in relation to one another so as to form one consistent whole.

7. Wills ⚭456

Language used is to be given its plain, ordinary meaning.

8. Wills ⚭450

Doubtful words are to be construed if reasonably possible so as to give effect intended by testator or are to be given a construction which will give them operative effect rather than cause them to be inoperative.

9. Wills 6614(13)

Provision in will whereby decedent gave home in her separate name to surviving husband as long as he wished "while he is alone", would be construed to provide a life estate determinable upon surviving husband's remarriage.

J. Elwood Andresen, Oakland, for appellant.

Charles O. Morgan, Jr., San Francisco, for respondents.

BRAY, Justice.

The administrator with the will annexed appeals from the order settling final account and decree of distribution.

Questions Presented.¹

1. The correctness of the distribution of the real property which in turn depends upon the finding that it was separate property.

2. Is the restriction on the life estate of Joseph C. Bernatas "as long as he wishes while he is alone" void for indefiniteness?

Evidence.

Appellant, in addition to being administrator with the will annexed, was the husband of decedent. She left a holographic will dated July 20, 1948, in which she stated that she wanted "my home at 531 Hearst Ave S F to go to my niece Virginia F. Crockett, my husband Joseph C. Bernatas to live in it as long as he wishes while he is alone." The will then disposed of 25 shares of telephone stock, 5 shares to Joseph and 5 shares each to four other named persons.

In his final account and petition for distribution appellant alleged that the real property was community property and should be distributed half to him outright and half to Virginia F. Crockett subject to a life estate in him. Gladys L. Honnert, sister of decedent, Virginia F. Crockett,

niece, and Donald E. Honnert, nephew, filed an objection, alleging that the real property was the separate property of decedent and should be distributed to Virginia F. Crockett subject to a limited life estate in Joseph. The court found that the real property was the separate property of decedent and distributed it to Virginia with the right of Joseph C. Bernatas to live in the same "as long as he is alone."

1. Separate Property.

[1] The property belonged to decedent prior to her marriage to Joseph. It had been held in joint tenancy between her and her former husband. After his death and on December 1, 1945, she married Joseph. In 1952 under her name of Bernatas decedent executed an affidavit for the termination of the joint tenancy. Although the assessor assessed the property to her in that name, the title remained in her former name. Joseph testified that "She always stated, 'It is our home, belonging to ourselves.'" He testified further that a month or two after the marriage he and decedent discussed buying a new home. But she said "'Why buy a new home? Let's fix this one up. We would be better off.'" They thereupon renovated the house and installed a new roof and furnace. At the time of the marriage the property was subject to an F.H.A. loan of \$1,419.28. The loan and the cost of renovation were paid for out of community funds. Joseph knew that the property remained in decedent's name. He testified "when she stated her excuse, that it cost so much money to have it transferred," he did not know that she had terminated the joint tenancy, nor that she had made the will until after her death. About 1950 they had bought in joint tenancy a small summer home in the country. Virginia Crockett testified to a conversation by decedent about a month before her death at which Joseph was present. During

1. Appellant also complains of an error of \$778.76 in the credits allowed him. Respondents concede this error and that the order and decree should be corrected as

hereinafter set forth. This court has such power. See *In re Estate of Machado*, 186 Cal. 246, 252, 199 P. 505.

it decedent stated that the property was to be Virginia's home after her death. Joseph denied that there was any such conversation.²

[2] Presumptively, under Civil Code, section 162, as the property stood in decedent's name it was her separate property. However, a wife's separate property may be transmuted into community property by a simple oral agreement between husband and wife that it shall be such. In re Estate of Cummins, 1955, 130 Cal.App.2d 821, 829, 280 P.2d 128. Moreover, in re such an oral agreement, the testimony of the husband, *if believed*, is sufficient to support a finding adverse to the record title. In re Estate of Cesare, 1955, 130 Cal.App.2d 557, 568, 279 P.2d 607.

[3] It is appellant's contention that his testimony plus the fact that the renovation costs and the F.H.A. loan were paid by community funds compels a finding in his favor. While it is the general rule that uncontradicted and unimpeached testimony of a witness tending to establish an issuable fact may not be disregarded and should be accepted to establish the fact unless it is inherently improbable (see Tillotson v. Findley, 1927, 87 Cal.App. 654, 662, 262 P. 438; Lissauer v. Union Bank & Trust Co., 1941, 45 Cal.App.2d 468, 472, 114 P.2d 367), there are exceptions to the rule. Thus the most positive testimony may be contradicted by circumstances in evidence which may satisfy the trial court of its fallacy and the court may reject that testimony even though the witness is not discredited by direct testimony. Jenks v. Carey, 1933, 136 Cal.App. 80, 85, 28 P.2d 91; In re Estate of Tompkins, 1932, 123 Cal.App. 670, 11 P.2d 886. In In re Estate of Horn, 1951, 102 Cal.App. 2d 635, 642, 228 P.2d 99, the court pointed out that the fact that the only person who could successfully contradict the husband's testimony is dead, may be taken into con-

sideration in determining the truth of his testimony.

[4] In spite of appellant's contention that the evidence in his behalf was conclusive, it was merely conflicting. Opposed to his claim of an oral agreement was the presumption that the property acquired by decedent before marriage and remaining in her name was her separate property, the fact that on terminating the joint tenancy long after her marriage she did not include appellant's name in the title to the property, and the other circumstances of the case. The trial court resolved this conflict against appellant. Its findings are supported by the evidence.

[5] Appellant contends that in any event he is entitled to a community interest in the property pro tanto to the amount of the community funds used for the renovation and for payment of the loan. He relies upon Garten v. Garten, 1956, 140 Cal.App.2d 489, 493-494, 295 P.2d 23, 26: "Where payments are made with community funds on real property owned by one spouse before marriage 'the rule developed through the decisions in California gives to the community a *pro tanto* community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds.['] Forbes v. Forbes, 118 Cal.App.2d 324, 325, 257 P.2d 721; Giacomazzi v. Rowe, 109 Cal.App.2d 498, 501, 240 P.2d 1020. The rule would, of course, equally apply where the payments were made on an encumbrance placed on property acquired by one of the parties prior to marriage. Giacomazzi v. Rowe, *supra*." However, the rule stated there is too broad as it applies, in the absence of an agreement between the spouses, only to payments by the husband from community funds made on the husband's separate property. As said in

2. Contrary to respondents' contention the contents of the will may not be considered in determining the character of the property. It is well settled that declarations in a will, unknown to the other spouse, are inadmissible to prove that

the property is separate property. Rowe v. Hibernia Savings and Loan Society, 1901, 134 Cal. 403, 407, 66 P. 569; In re Estate of McCarthy, 127 Cal.App. 80, 86, 15 P.2d 223; Logan v. Forster, 114 Cal.App.2d 587, 602, 250 P.2d 730.

Dunn v. Mullan, 211 Cal. 583, 590, 296 P. 604, 607, 77 A.L.R. 1015:

"* * * we think it may be presumed that, if a husband expended community funds for the benefit of his wife's separate property he intended, in the absence of any evidence of a contrary intent, such improvements or benefits to be a gift, and that he made such expenditures without expectation of repayment.

"This conclusion is not impaired by the fact that in some of the community property states it has been held generally that the separate estate of one member of the community must reimburse the community for improvements made in good faith upon the separate lands of either. *Rice v. Rice*, 21 Tex. 58; *Sims v. Billington*, 50 La. Ann. 968, 24 So. 637; *Legg v. Legg*, 34 Wash. 132, 75 P. 130. In California a distinction is made between the case where, as here, the husband has improved his wife's lands with community funds and where he has improved his own lands with community funds. In the former case he is presumed to have intended a gift. In the latter case a right of reimbursement is granted to the wife upon the theory that to permit a husband to appropriate the community property under his management to his own separate use operates as a constructive fraud upon his wife. *McKay on Community Property*, 2d ed., § 1017, p. 661."

Neither the *Garten* case nor the *Forbes* case from which the above quotation was taken dealt with payments made by the husband from community funds on the wife's separate property. Both cases dealt with community payments made on the husband's separate property. Moreover, the cases upon which the *Forbes* statement was based, likewise did not deal with community payments on the wife's property. *Vieux v. Vieux*, 80 Cal.App. 222, 251 P. 640, dealt only with community payments on the husband's separate property. *Masks v. Maskuns*, 93 Cal.App. 27, 268 P.

1093; *In re Estate of Caswell*, 105 Cal.App. 475, 288 P. 102, and *Giacomazzi v. Rowe*, 109 Cal.App.2d 498, 240 P.2d 1020, dealt with situations in which the spouses commingled the separate funds of each with community funds and applied the commingled funds in payment of the balance due upon property bought by the husband prior to marriage. The court held that by reason of the commingling of the funds applied to the purchase price a half interest in the property was the community interest of the spouses. *In re Estate of Ball*, 92 Cal.App.2d 93, 206 P.2d 1111, dealt with shares of stock standing in the husband's name before marriage and paid for thereafter by community funds. Thus none of the cases cited as supporting the rule dealt with the situation of community funds applied to the wife's separate property. Moreover, none of the cited cases discussed the rule above quoted from *Dunn v. Mullan*, supra, 211 Cal. 583, 296 P. 604. As said in *Re Estate of Turner*, 35 Cal.App.2d 576, 579, 96 P.2d 363, 364: "All of the California cases arose out of payments made by the husband out of community funds for improvements of his wife's paraphernal property and no lien is held to have been created in the husband's favor as against the community estate. *Dunn v. Mullan*, 211 Cal. 583, 296 P. 604, 77 A.L.R. 1015, and authorities cited. But in making such expenditures the husband is presumed to have made a gift to his wife. It is presumed that it was his intention 'to advance the money for the benefit of his wife's estate, and that it was to accrue to her interest.' *Carlson v. Carlson*, 10 Cal.App. 300, 101 P. 923, 925. The reasons given for this holding are two, viz.: (1) he is presumed to have intended a gift because (2) he had authority to control the disposition of community funds. *Dunn v. Mullan*, supra." The court then refers to the statement in 31 Corpus Juris § 1179; 41 C.J.S. Husband and Wife § 510, to the effect that the general rule is that the community has a claim against the separate estate of either spouse for expenses properly incurred in behalf of such estate, and states (35 Cal.

App.2d at page 579, 96 P.2d at page 365): "This is clearly the rule in all cases involving improvements made on a separate estate out of community funds except cases mentioned in the next preceding paragraph in which the husband makes improvements on the wife's paraphernal property." See also *Spreng v. Spreng*, 119 Cal.App. 155, 159, 6 P.2d 104; *Callnon v. Callnon*, 7 Cal. App.2d 676, 680-681, 46 P.2d 988; *Tompkins v. Bishop*, 94 Cal.App.2d 546, 550, 211 P.2d 14; *Cullen v. Spremo*, 142 Cal.App. 2d 225, 229, 298 P.2d 579; *In re Estate of Inman*, 148 Cal.App.2d 952, 958, 307 P.2d 953; see also *Armstrong, California Family Law*, pp. 616, 617, 618.

Thus, it is clear that in California community payments made by the husband on the wife's separate property are presumed, in the absence of an agreement to the contrary, to constitute a gift to her. Here the court found that there was no agreement. Hence Joseph is only entitled to the life estate in the home left him by decedent's will.

2. Life Estate Limitation.

Following the terms of the will the court distributed the home to Virginia Crockett "with the right of Joseph C. Bernatas to live in the same as long as he is alone." Appellant contends that this language is so vague and indefinite as to be of no legal effect and hence that he is entitled to an unlimited life estate. He contends that construed literally Joseph could not have visitors or a pet in the home.

In giving appellant the right "to live in it [the property] as long as he wishes" a life estate was created. See 31 Cal.Jur.2d 312; *Tiffany on Real Property*, 3d Ed., vol. 1, p. 72. But the problem is what kind of a life estate was it in view of the use of the words "while he is alone." If such a phrase is construed to mean as long as appellant remains unmarried or the decedent's widower, then appellant was devised a determinable life estate. See *In re Reinhardt*, 1887, 74 Cal. 365, 16 P. 13; *Tiffany on Real Property*, 3d Ed., vol. 1, p. 80.

In the instant case the trial court did not, either in the findings or the final decree, expressly state the interest which appellant was to receive, but instead repeated in effect the phraseology used by the decedent. However, during the hearing the trial court did seem to indicate that he considered that appellant could only live in the property as long as he did not marry.

[6-8] The cardinal principle in construing wills is to ascertain the intention of the testator as expressed therein. In seeking this intention, the will should be read "from its four corners" and all parts of the document should be construed in relation to one another so as to form one consistent whole. *In re Estate of Soulie*, 1945, 72 Cal.App.2d 332, 335, 164 P.2d 565. The language used is to be given its plain, ordinary meaning. *In re Estate of Mitchell*, 1938, 10 Cal.2d 628, 75 P.2d 1048, 76 P.2d 1184. And doubtful words are to be construed if reasonably possible so as to give the effect intended by the testator or are to be given a construction which will give them operative effect rather than cause them to be inoperative. *In re Estate of Carrillo*, 1921, 187 Cal. 597, 601, 203 P. 104; *In re Estate of Spence*, 1943, 57 Cal.App.2d 922, 926, 135 P.2d 419.

[9] In the instant case, following the above rules, a reasonable construction of the will indicates that the testatrix intended that appellant was to receive a life estate determinable upon his remarriage. "[W]hile he is alone" is more reasonably interpreted to refer to remarriage rather than to complete solitude as contended by appellant.

The order and decree is hereby modified as follows: by striking from the second paragraph thereof the words and figures "a balance of Fifteen Thousand Two Hundred Seven and 43/100 Dollars (\$15,207.43) of which Four Thousand Nine Hundred Seven and 43/100 Dollars (\$4,907.43)" and substituting therefor "a balance of Fifteen Thousand Fifty Seven and

43/100 Dollars (\$15,057.43) of which Four Thousand One Hundred Twenty Eight and 67/100 Dollars (\$4,128.67)." As so modified the order and decree is affirmed. Respondents are awarded costs.

PETERS, P. J., and FRED B. WOOD, J., concur.



162 Cal.App.2d 548

H. W. RICHARDS, Plaintiff and Appellant,
v.

Margaret S. OLIVER, Robert H. Oliver, Vista Escrow Company, Winfield D. Little, Henry A. Bickler, Defendants and Respondents.

Civ. 22923.

District Court of Appeal, Second District,
Division 1, California.

Aug. 4, 1958.

Rehearing Denied Aug. 28, 1958.

Action by buyer of cocktail lounge and restaurant against sellers and others for rescission of contract, cancellation, return of money and personal property and other relief. From adverse judgment of the Superior Court, Los Angeles County, Joseph M. Maltby, J., the buyer appealed. The District Court of Appeal, White, P. J., held that evidence sustained finding that buyer was not induced to enter into contract through false or mistaken representations and that he was not entitled to rescission of contract.

Judgment affirmed.

1. Contracts ⚡9(1), 10(1), 47

Contracts must be definite enough to enable court to ascertain what is required of respective parties in the performance thereof, and courts will not uphold agree-

ments which contain indefinite and uncertain provisions regarding obligations imposed upon parties thereto and which are devoid of mutuality and consideration.

2. Contracts ⚡9(1)

Although terms of a contract need not be stated in the minutest detail, it is requisite to enforceability that it must evidence a meeting of the minds on essential features of agreement, and that scope of duty and limits of an acceptable performance be at least sufficiently defined to provide a rational basis for assessment of damages.

3. Contracts ⚡9(1)

Where contract for sale of cocktail lounge and restaurant provided that sellers would cause a corporation to be formed and that buyers would purchase shares of stock of corporation, which shares would be duly transferred to buyers upon close of escrow, and buyers in turn would pledge shares to sellers as security for payment of balance due on purchase price, and escrow instructions, which formed basis of contract, provided that escrow would close upon completion of transfer of liquor license by sellers to corporation and contract provided that inventory of merchandise was to be taken by parties immediately prior to delivery of possession and cost price thereof was to be paid by buyers to sellers, contract was not uncertain as to subject matter and terms and was not void ab initio.

4. Licenses ⚡18½(18)

Contract for sale of cocktail lounge and restaurant whereby sellers agreed to transfer assets of business, including lease, fixtures, license, to corporation to be formed by sellers and sellers then agreed to convey all stock in corporation to buyers, did not violate Corporate Securities Act. West's Ann.Corp.Code, § 25500.

5. Licenses ⚡18½(5)

Corporate Securities Act does not apply to sale of securities when made by or on behalf of a vendor not the issuer. West's Ann.Corp.Code, §§ 25152, 25500.

6. Intoxicating Liquors ⚡327(1)

Contract for sale of cocktail lounge and restaurant under which sellers agreed to form a corporation to which they would sell assets of business including liquor license and then transfer stock to buyers was not in violation of Alcoholic Beverages Control Act. West's Ann.Bus. & Prof. Code, § 23300.

7. Contracts ⚡99(3)

In action by buyer of cocktail lounge and restaurant against sellers and others for rescission of contract, return of money and personal property and other relief, evidence sustained finding that buyer was not induced to enter into contract through false or mistaken representations and that he was not entitled to rescission of contract.

8. Contracts ⚡93(1)

Fact that purchaser of a business has no previous knowledge as to operation of business and after entering upon venture realizes he has made a mistake in purchasing and attempting to operate business does not constitute ground for rescission.

9. Contracts ⚡93(1)

In absence of fraud, misrepresentations or mistake, parties cannot be relieved from their voluntary contracts on ground alone that they constituted a mistake in business judgment or are improvident.

10. Appeal and Error ⚡989, 994(1)

Reviewing judges are in no position to determine credit which should be accorded to witnesses or to weigh their testimony.

11. Appeal and Error ⚡1071(3)

Where controlling finding is supported by the evidence, fact that findings on other irrelevant matters are not supported is immaterial.

12. Appeal and Error ⚡1071(1)

In order to justify reversal of a judgment because of defective findings, it must affirmatively appear not only that substantial injury has been caused and that sub-

stantial rights have been affected, but also that a different result would have been probable if defect had not occurred. West's Ann.Code Civ.Proc. § 1855, subd. 1.

13. Appeal and Error ⚡15

Whenever possible, a litigated controversy should be finally disposed of by a single appeal. West's Ann.Code Civ.Proc. § 1855, subd. 1.

14. Evidence ⚡183(13)

In action by buyer of cocktail lounge and restaurant for rescission of contract and for return of property and money paid pursuant thereto and for other relief, record reflected sufficient proof of loss of original agreement to warrant introduction into evidence of copy thereof. West's Ann. Code Civ.Proc. § 1855, subd. 1.

Jesse M. Allen, Long Beach, for appellant.

Lewis, Signer & Burns, and Emanuel Cowitt, Los Angeles, for respondents, Margaret S. Oliver and Robert H. Oliver.

Dreizman & Corfman, Santa Ana, for respondent, Henry A. Bickler.

No appearance, for respondents, Vista Escrow Co., and Winfield D. Little.

WHITE, Presiding Justice.

In the latter part of September, 1954, plaintiff, who had just recently returned from Arabia and taken up his residence at Van Nuys, in Los Angeles County, although he had no previous experience with or in the operation of a food or cocktail business, conceived the idea of acquiring and engaging in the operation of such an enterprise. To that end plaintiff contacted defendant Winfield D. Little, a business opportunity salesman working out of the office and under the license of A. J. Maragos, a business opportunity broker, regarding an advertisement which plaintiff had observed in a Los Angeles daily paper, concerning the offer for sale of a bar or cocktail lounge in the city of Long Beach, in Los

Angeles County. However, the advertised business was not available because another deal in regard thereto was in progress. Accompanied by defendant Little, plaintiff looked at several other places, and finally became interested in "The Corsican Room", a cocktail lounge and restaurant in the city of Long Beach, upon which Mr. Maragos, the aforesaid broker, obtained a listing, and which establishment, according to plaintiff, defendant Little represented to him was a "fabulous place that was opening up. It was doing a terrific business and he (defendant Little) wanted me to see it * * *". The Corsican Room was owned by defendants Margaret S. Oliver and Robert H. Oliver, her son. When the broker, Mr. Maragos, on October 12, 1954, obtained a listing on the Corsican Room he made it available to his salesman, defendant Little, to work upon and sell for the sum of \$39,500 cash. It appears that the Corsican Room had been open for about a month prior to October 12, 1954, the date Mr. Maragos obtained the listing, and the latter testified that he told plaintiff that "approximately \$14,000 was the gross business done from the day of opening to the date of listing". Plaintiff testified that defendant Little told him that he (Little) had been informed that "there was about \$3,000 off the top" (i. e., not entered in the books of account). The making of

such a statement was denied by both defendant Little and the broker, Mr. Maragos.

It appears that defendant Little advised plaintiff that the latter would need the assistance of someone experienced in the food business if he bought a type of business such as the Corsican Room. Defendant Little, according to plaintiff, led him to believe that the former possessed such experience, and plaintiff informed defendant Little that he would not buy the business unless he had such an experienced man with him as a co-buyer. After further conversation between plaintiff and defendant Little, it was agreed that the latter would become a buyer with the former in the purchase of the Corsican Room and that defendant Little would invest some \$6,000 as capital in the operation.

In the late afternoon of October 20, 1954, plaintiff Richards, broker Maragos and defendant Margaret Oliver signed a document entitled "Agreement of Purchase and Ratification". This agreement provided for the purchase of "The Corsican Room" for the sum of \$42,500. It provided that the terms were to be "\$15,000.00 in escrow on or before possession, the balance to be paid at rate of \$1,000.00 or more monthly including 6% interest. Food and liquor stock to be inventoried above \$42,500." The signatures appear on the document as follows:

" A. J. Maragos Broker, License No. 628

"By A. J. Maragos Broker or Salesman.

"Winfield D. Little

"I agree to purchase the above described business and/or property on the terms and conditions herein stated.

"Purchaser H. W. Richards

"I agree to sell the above described business and/or property on the terms and conditions herein stated and agree to pay the above signed *broker* as a commission the sum of \$2125 or \$2750 TD Dollars, or one-half of the part payment in the event that *purchaser* shall fail, refuse or be unable to complete this purchase as set forth herein, provided that said one-half shall not exceed the full amount of *broker's* commission.

Seller Margaret S Oliver

Seller Robert H. Oliv "

On October 22, 1954, escrow instructions were signed whereby defendant Vista Escrow Company, a corporation, was designated as escrow holder and stakeholder; Margaret and Robert Oliver as sellers, and plaintiff Richards and defendant Little as buyers.

By the terms of these escrow instructions the aforesaid "Agreement of Purchase and Ratification" of October 20, 1954 was modified. Under the escrow instructions, the purchase price was reduced to \$40,375. Instead of the buyers purchasing the Corsican Room, however, the sellers agreed to sell certain capital stock in Margo, Inc., a corporation not yet formed. Such corporation was to be formed by the sellers. All of the assets of the Corsican Room, including the lease, license, fixtures and inventory, would be transferred to this corporation, and all of the stock would be owned by Margaret and Robert Oliver. Margaret and Robert Oliver would then convey all of the stock in this corporation, which would own the property Richards originally agreed to buy. The escrow instructions further provided that the buyers would pledge the stock of Margo, Inc. back to the sellers until the total purchase price was paid; and, that the purchase was to be under a conditional sales contract and that the balance due after the down payment was made would be secured by a personal note from Richards and Little to the Olivers.

On October 22, 1954, Richards deposited \$5,000 with the Vista Escrow Company and obtained a receipt. On October 25, 1954, Richards deposited \$9,600 in escrow and obtained a receipt therefor. On this same date a trust deed and note in the face value of \$2,755.32 executed by Joseph R. Parris and Myrtle Parris payable to H. W. Richards and Catherine B. Richards, on which a balance was then unpaid of the sum of \$2,742.46, was deposited in escrow for which plaintiff received a receipt.

On October 26, 1954, an inventory of stock was taken and Richards and Little accepted the keys, took possession of the assets and the premises of the Corsican

Room, and opened for business on the following day.

During the succeeding two weeks, according to the testimony of plaintiff Richards, he became aware that the Corsican Room was not doing anywhere near the business claimed for it, that defendant Little had been unable to raise the \$6,000 or any capital which he had previously represented he would be able to raise, and that working capital was necessary for the survival of the business.

Plaintiff Richards then consulted with the broker Maragos to see if Maragos could find someone to buy Richards' interest in the business.

A listing agreement, dated November 8, 1954, was signed by Richards, Little, and Maragos.

Maragos then informed Richards that another salesman in his office, defendant Henry A. Bickler, who had been in the Corsican Room on several occasions after Richards and Little had commenced operations, and who had extensive experience as a bar operator, had expressed an interest in the business and that Bickler had enough money to work out a deal on terms which would be satisfactory to Richards.

Negotiations ensued between defendant Bickler and plaintiff Richards. It was agreed that Bickler would buy Little's interest in the business on an "as is" basis, and would raise any monies that were necessary in the business.

On or about November 15, 1954, defendant Bickler entered into the operation and management of the Corsican Room in place of Little.

An amendment to the previous escrow instructions dated November 18, 1954, was signed, whereby defendant Little withdrew from the escrow and defendant Bickler was substituted in his place "as is", whereby Bickler assumed all of Little's liabilities and obligations arising out of the transaction.

Bickler paid Little \$3,000 outside of escrow for Little's interest in the business.

During the next three weeks, according to plaintiff's testimony, he concluded that defendant Bickler was unable to manage and operate the business and also, that the latter had failed to contribute any working capital. On December 24, 1954, defendant Bickler and plaintiff, as sellers, and defendant Little, as salesman, signed a listing authorizing broker Maragos to sell the respective interests of plaintiff and defendant Bickler in the Corsican Room. Two days later plaintiff consulted for the first time with attorney Jesse M. Allen concerning the legal status of the former in the foregoing transactions.

On January 3, 1955, a Notice of Rescission was served on Patrick Phelan, as attorney for Margaret Oliver, and also upon her personally and the broker Maragos and defendant Bickle. On the following day a similar notice of rescission was served upon defendants Little, Robert Oliver and Vista Escrow Company. The notice of Rescission reads in part:

"You and each of you please take notice that H. W. Richards does hereby rescind that certain agreement contained in escrow instructions under Escrow number 1597-LB of the Vista Escrow Company, at 6029 Atlantic Avenue, Long Beach, California, to which reference is made for further particulars.

"That said agreement is rescinded on the ground that Margaret S. Oliver by herself and through her agents made material representations to said H. W. Richards, which were in fact untrue, and upon which representation said H. W. Richards did rely to his detriment."

By such document plaintiff offered to restore to defendants Margaret S. and Robert H. Oliver "all benefits received by him pursuant to said agreement", and then demanded, "that the sum of \$14,600.00 in cash, together with that certain second trust deed now on deposit in escrow with the *Vista Escrow Company*, as aforesaid, be forthwith returned to said H. W.

Richards; and further demands that all necessary instruments to release said properties be executed to escrow; and further, H. W. Richards shall relinquish and abandon possession of the Corsican Room to said Margaret S. Oliver and Robert H. Oliver in three days from the date of service of the within instrument; and further, said H. W. Richards does repudiate the said agreement."

On January 7, 1955, plaintiff returned the keys to defendant Margaret S. Oliver, and three days later returned monies to the Corsican Room commercial account, which had been deposited on a room as rent for the office, and wrote a letter directed to the officers of the bank, authorizing them to substitute in his place and insert on the Corsican Room bank account the name of defendant Margaret S. Oliver. Richards delivered that letter to Margaret Oliver who later signed it and presented it to the Belmont Shore Bank. Defendant Margaret S. Oliver and defendant Bickler wrote a check for the balance of the funds on deposit in that bank.

Defendant Bickler continued to stay in the place of business and operate there on a cash basis until January 24, 1955, at which time a fire partially destroyed the premises and Bickler vacated the Corsican Room on the advice of his attorney.

Defendant Mrs. Oliver collected the insurance, made change, reopened the Corsican Room and operated it.

After plaintiff Richards had served his notice of rescission on the Olivers, and returned the keys to the Corsican Room to defendant Margaret S. Oliver, the Olivers sold their stock in Margo, Inc., without notice to Richards, or accounting to him for the proceeds, and did not at any time reveal the sale price of the stock.

The cause proceeded to trial upon plaintiff's amended complaint and three answers thereto by four of the defendants only, namely, Margaret S. Oliver and Robert H. Oliver, Vista Escrow Company, and Henry A. Bickler; and upon a cross-complaint in interpleader brought by de-

defendant Vista Escrow Company against the plaintiff and all other defendants herein, and an answer to said cross-complaint in interpleader by two defendants only, namely, Margaret S. Oliver and Robert H. Oliver; and upon a cross-complaint brought by said defendant Henry A. Bickler against plaintiff herein, and the plaintiff's answer to said cross-complaint; and upon a cross-complaint brought by said defendants Margaret S. Oliver and Robert H. Oliver against the plaintiff and all other defendants herein, and the answer to said cross-complaint by the plaintiff only, namely, H. W. Richards.

The plaintiff's amended complaint sets out seven separate causes of action, the first three causes being common counts and four causes being for rescission, cancellation, and the return of money and personal property.

Counts one, two and three are common counts in law and allege, in brevity, money and personal property had and received, a demand for return and a refusal.

The fourth cause of action alleges that a rescission has been effected due to fraud.

The fifth cause of action alleges that if the court finds a rescission has not been effected in fact, that it do so now on plaintiff's renewed offer to restore anything of value he received to the defendants, provided that they return to him all they have received from him.

The sixth cause of action alleges a rescission effected due to mistake of fact.

The seventh cause of action is a renewal in court on the stated facts of the offer to rescind, based on mistake of facts, and praying for a decree cancelling and rescinding the contract of sale alleged in the complaint.

The answer of the defendant Vista Escrow Company to the amended complaint filed herein contains general denials, excepting the defendant Vista Escrow Company admits and alleges: its corporate entity and that all transactions occurred in Los Angeles County, California; admits it received the sums of money as specified in

the escrow agreement, has paid them out as required by said escrow agreement, and has remaining on hand, after paying a reasonable attorney's fee of \$1,000 and escrow costs and charges, the sum of \$1,342.36; admits the provisions of the escrow instructions as alleged by plaintiff, and the payments out of escrow as alleged by plaintiff; and, admits the receipt of a written notice of rescission and demand by plaintiff. As a separate and distinct defense the defendant Vista Escrow Company alleges that it acted as a stakeholder only, and acted only as authorized by both buyer and seller, and that after the payment of a reasonable attorney's fee of \$1,000, escrow costs and charges, it now has the sum of \$1,342.36 on hand which it tenders in court.

The answer of the defendants Margaret S. Oliver and Robert H. Oliver to the amended complaint filed herein contains general denials, except the defendants Margaret S. Oliver and Robert H. Oliver admit and allege: that all transactions mentioned occurred in Los Angeles County, California; admit that A. J. Maragos was at all times mentioned, their agent; admit they have not paid plaintiff the sum alleged; allege that all plaintiff's causes of action do not state facts sufficient to constitute causes of action against them; admit that the Corsican Room did not collect the sum of \$3,000 per month, or any other sum which was not reflected in the books of account; admit that they refuse to pay to plaintiff the sum of \$14,600, or to return the note and trust deed; allege that the plaintiff has no legal capacity to sue, that there is a defect of parties plaintiff, a non-joinder of parties plaintiff, a misjoinder of parties defendant, and a non-joinder of parties defendant.

The answer of the defendant Henry A. Bickler to the amended complaint filed herein contains a general denial of the entire amended complaint, except that the defendant Henry A. Bickler admits and alleges: that plaintiff served a notice of rescission on the named defendants on or about January 3, 1955; admits plaintiff was not familiar with the business and operation of a restaurant and cocktail bar, that plaintiff

entered into the contract alleged, to purchase the Corsican Room, and that plaintiff entered into possession of the Corsican Room on October 26, 1954.

The cross-complaint in interpleader by Vista Escrow Company contains one count.

It alleges the corporate entity of the cross-complainant; that on October 22, 1954, cross-defendants Margaret S. Oliver and Robert H. Oliver, as sellers, and cross-defendants Winfield D. Little and H. W. Richards as buyers, entered into an alleged written escrow agreement in which the cross-complainant Vista Escrow Company was designated as escrow holder and stakeholder; that by the terms of said agreement the buyers agreed to purchase the capital stock of Margo, Inc., a corporation, doing business as the Corsican Room, for the sum of \$40,375; that thereafter disputes arose between buyer and seller and that both made conflicting demands upon the escrow holder and stakeholder; that the escrow holder has complied with the terms of the said agreement; that it has a balance of \$2,342.36 less costs and attorney's fees of \$1,000; that under the terms of said agreement in such event the escrow holder is empowered to withhold all further proceedings of the performance of said escrow; that by reason of said disputes and delay, cross-complainant has incurred costs and legal expenses in the reasonable sum of \$1,000.

The answer of the cross-defendants Margaret S. Oliver and Robert H. Oliver to the cross-complaint in interpleader contains a general denial of the entire cross-complaint, plus a further denial that \$1,000 is a reasonable fee for costs and attorney's fees; plus an allegation that said cross-complaint does not state facts sufficient to constitute a cause of action; excepting that cross-defendants Margaret S. Oliver and Robert H. Oliver admit that said cross-complainant has in its possession the sum of \$2,342.36.

The cross-complaint of Margaret S. Oliver and Robert H. Oliver contains one count for breach of contract.

It alleges a written agreement between cross-complainants as sellers and cross-defendants H. W. Richards, Winfield D. Little and Henry A. Bickler as buyers, wherein the cross-defendant Vista Escrow Company was designated as escrow holder; that under the terms of said written escrow agreement the buyers agreed to purchase from the sellers all the capital stock of Margo, Inc., a California corporation, doing business as the Corsican Room; that possession and assets of the Corsican Room were delivered to the cross-defendants who operated same until January 24, 1955; that cross-defendants agreed to be responsible for matters undertaken while in possession; that cross-defendants wilfully failed, refused and neglected to perform the terms of the said written agreement, complete said transaction, or continue said business; that cross-defendants left unpaid debts and obligations of \$20,000 which cross-complainants were compelled to pay to their damage.

The answer of the cross-defendant H. W. Richards to the cross-complaint of Margaret S. Oliver and Robert H. Oliver contains an admission that cross-complainants delivered to cross-defendants possession of the said Corsican Room and all assets thereof; that cross-defendants operated said business but that the cross-defendant H. W. Richards did not operate the said business on and after January 5, 1955. But other than these admissions the answer of the cross-defendant H. W. Richards to the cross-complaint of Margaret S. Oliver and Robert H. Oliver contains a general denial of the entire cross-complaint.

The cross-complaint of Henry A. Bickler charges fraud and deceit against H. W. Richards.

It alleges that plaintiff entered into a written contract with the defendants Margaret S. Oliver and Robert H. Oliver for the purchase of the Corsican Room on October 20, 1954; that the escrow instructions were executed on or about October 22, 1954; that plaintiff H. W. Richards and defendant, Winfield D. Little, entered into

possession of the Corsican Room and commenced operations on or about October 26, 1954; that between November 7, 1954, and November 18, 1954, the plaintiff wilfully made false representations to defendant Henry A. Bickler, to-wit: that if Henry A. Bickler would join H. W. Richards as a buyer of the Corsican Room and purchase the interest of Winfield D. Little, that H. W. Richards would complete the purchase of said business in accordance with the terms of the escrow and operate the business with Henry A. Bickler for a reasonable period of time; that the plaintiff H. W. Richards at the time of making said statements had no intention of completing the escrow agreement or contract for purchase but at such time was secretly consulting with attorneys and attempting to find ways to avoid said purchase contract and escrow agreement; that defendant Henry A. Bickler believed and relied upon said representations; that he was thereby induced to and did purchase the said interest of Winfield D. Little for the sum of \$3,000 and pay a broker's commission of \$500; that the defendant Henry A. Bickler entered into an agreement with plaintiff H. W. Richards on November 26, 1954, which agreement provided for the general operation of the business of the Corsican Room and an equal division of interest; that Henry A. Bickler took over management and operation of the Corsican Room; that plaintiff served a notice of rescission on the defendants on January 3, 1955; that because of the cost of purchase from Winfield D. Little, broker's commission, loss of earnings, and attorney's fees, the defendant Henry A. Bickler has sustained actual damages totaling \$4,425.

The answer of the cross-defendant H. W. Richards to the cross-complaint of Henry A. Bickler, contains a general denial of the entire cross-complaint, excepting that the plaintiff H. W. Richards admits the written contract between himself and defendants Margaret S. Oliver and Robert H. Oliver; admits the execution of the escrow instructions; admits the receipt of possession of the Corsican Room and the commence-

ment of operations on October 26, 1954; admits that defendant Bickler became a party to the said escrow instructions as per plaintiff's allegations in his first amended complaint and as admitted by defendant Bickler in his cross-complaint; admits that the defendant Bickler entered into an agreement with plaintiff Richards on November 26, 1954, which agreement provided for the general operation of the business of the Corsican Room and for a division of interests; and admits the service of the notice of rescission on January 3, 1955, on each of the defendants.

The trial court found that:

(A) The defendant Little and the plaintiff, and defendant Bickler and the plaintiff, were partners;

(B) That the subject matter of the contract was for the purchase and sale of the Corsican Room;

(C) That the contract for the purchase and sale of the Corsican Room was not rescinded;

(D) That the plaintiff did not return, restore or offer to do so anything of value received by him under any contract;

(E) That plaintiff and Little, or plaintiff and Bickler, were not agents of the defendants Oliver in the operation of the Corsican Room;

(F) That the defendants Oliver resumed dominion and control of the Corsican Room for the purpose of mitigating damages;

(G) That broker Maragos was not the agent at all times of the defendants Oliver;

(H) That the plaintiff committed a wrongful abandonment; and

(I) That plaintiff never served on defendants a notice of his election to rescind the contract.

Judgment was rendered as follows:

(a) That the plaintiff take nothing by reason of the amended complaint.

(b) That judgment is ordered for the defendants.

(c) That defendant Henry A. Bickler have judgment against the plaintiff herein for his costs in the sum of \$10.50

(d) That the cross-complainant Henry A. Bickler have judgment against the plaintiff herein in the sum of \$3,675.

(e) That the cross-complainant Vista Escrow Company have judgment on its cross-complaint; that after payment of said cross-complainant's escrow charges, court costs, and \$500 attorney's fees, the balance then to be paid into court and distributed pro-rata among cross-complainants Bickler, Margaret Oliver, and Robert Oliver for whom a money judgment is given.

(f) That cross-complainants Margaret S. Oliver and Robert H. Oliver have judgment against plaintiff herein for all monies heretofore paid to them by reason of said transaction.

Plaintiff prosecutes this appeal from the judgment.

[1,2] As his first ground of appeal it is contended by appellant that the court erred in failing to conclude as a matter of law that the contract for the purchase of the Corsican Room was void *ab initio*. In this regard, appellant urges that the contract is uncertain as to subject matter and terms. That the agreement, if it was understood by the parties at all, was not a contract for the purchase and sale of the lease, furniture, fixtures, equipment, or merchandise of the Corsican Room, but was an agreement for the purchase and sale of the Olivers' stock in a corporation not yet formed, and which was to be the owner of said enumerated items above, by a transfer from the Olivers to that corporation when formed. It is true, as urged by appellant, that the courts will not uphold agreements which contain indefinite and uncertain provisions regarding the obligations imposed upon the parties thereto, and which contracts are devoid of mutuality and consideration (Hamlin v. Barnhart, 26 Cal.App. 632, 634, 147 P. 1188). Contracts must be definite enough to enable the court to ascertain what is required of the respective parties in the performance thereof (Moore

v. White, 98 Cal.App.2d 510, 513, 220 P.2d 918; Goehring v. Stockton Morris Plan Co., 93 Cal.App.2d 417, 420, 209 P.2d 41). As was said in Ellis v. Klaff, 96 Cal.App.2d 471, 478, 216 P.2d 15, 20:

"* * * Although the terms of a contract need not be stated in the minutest detail, it is requisite to enforceability that it must evidence a meeting of the minds on the essential features of the agreement, and that the scope of the duty and limits of acceptable performance be at least sufficiently defined to provide a rational basis for the assessment of damages."

[3] However, we cannot perceive wherein the contract here in question may be strictured with the imperfections charged by appellant and referred to in the foregoing cases. Read in its entirety the contract herein simply provided that the sellers (respondents Mr. and Mrs. Oliver), would, at their own expense, cause a corporation to be formed, and that the buyers (appellant and defendant Little) would purchase the shares of stock of the corporation that respondents Mr. and Mrs. Oliver would cause to be issued, and which shares would be duly transferred to the buyers upon the close of escrow, and that said buyers in turn would pledge said shares to the sellers as security for payment of the balance due on the purchase price of the Corsican Room. The escrow instructions, which formed the contract of the parties, clearly provided that the escrow would close upon completion of the transfer of the liquor license by the sellers to the corporation. It is also clearly set forth in the contract that an inventory of the merchandise was to be taken by the parties immediately prior to delivery of possession to the buyers, and the cost price thereof was to be paid by the buyers to the sellers, in addition to the agreed consideration to be paid for the sale of the business. Appellant not only read the escrow instructions which formed the basis of the contract, but suggested several changes therein and which suggestions were adopted and inserted in retyped copies of the escrow instructions.

[4, 5] Appellant next assails the validity of the contract for the asserted reasons that it is in violation of the Corporate Securities Act (Corp.Code, Sec. 25500) and the Alcoholic Beverage Control Act (Bus. and Prof.Code, Sec. 23300). Neither in his notice of rescission, pleadings, or at the trial did appellant raise either of these issues. As is stated in 12 Cal.Jur.2d, p. 306, section 106, "Necessity for Pleading Illegality.—It is presumed that private transactions have been fair and regular and that the law has been obeyed. Therefore, if a contract is valid on its face, and if facts exist which tend to prove its invalidity and to overcome the presumption, the burden rests on the party claiming illegality to prove such facts." However, conceding that appellant's contentions in this regard may be raised for the first time on appeal, we are constrained to say that an examination of the contract here in question impresses us that both claims lack substance here. While Section 25500 of the Corporations Code provides that, "*No company shall sell * * **" (emphasis added) the corporate shares mentioned in the instant contract were shares of the corporation issued personally to respondents Mr. and Mrs. Oliver, pursuant to a permit issued by the Commissioner of Corporations and thereby became the personal property of said respondents. The Corporate Securities Act does not apply to the sale of securities when made by or on behalf of a vendor not the issuer (Corp. Code, Sec. 25152).

[6] As to the argument that the contract was in violation of the Alcoholic Beverages Control Act, the record reveals that the transfer of the liquor license to the corporation was duly completed by respondents Mr. and Mrs. Oliver in accordance with the escrow instructions and contract. The corporation was thereby licensed to operate the business insofar as the sale of liquor is concerned. The instructions provided that the escrow should close when such transfer of the liquor license was completed, and this was done. There is no evidence in the record that such transfer was not accomplished in conformity with the law and

rules governing such a transaction. As to operation of the business by appellant it seems fair to say that such operation was under the existing liquor license held by the sellers, and as an agent of the sellers until the transfer of the liquor license was completed. Under the facts and circumstances surrounding the transactions between the parties herein, we are not at liberty to assume that there was a violation of the law.

Appellant next contends that neither defendant Little nor respondent Bickler were his partners. This contention is devoid of merit. A cursory examination of the escrow instructions hereinbefore referred to, and which constituted the basis for the contract of the parties, indicates at once that the documents contained all the indicia of a partnership. Clearly, appellant, defendant Little, and later, respondent Bickler associated themselves together to carry on, as co-owners, a business for profit. When two or more persons contract to unite their property, labor and skill, in the prosecution of some joint and lawful business, and to share the profits, a general partnership is thereby established (37 Cal.Jur.2d, p. 519, sec. 2).

A review of the pleadings and the reporter's transcript unmistakably show that the basis for this action was, as set forth in the amended complaint, wherein it was alleged:

"VIII.

[7] "That in order to induce plaintiff to enter into the contract herein alleged, defendant Margaret S. Oliver and her agents did state and represent to the plaintiff that the said Corsican Room was a good and profitable business and it was then collecting and had been collecting a gross amount on account of sales made to customers a sum in the excess of \$14,400.00 per month of operation; that in addition to the \$14,400.00 gross sales that the Corsican Room was grossing approximately \$3,000.00 per month in sales which were not reflected in the books of account of said business; that the profits from the total sales of said business were in excess of \$2,000.00 per month; and

defendant Margaret S. Oliver did further represent to plaintiff that such sales and profits in like amounts would continue; that defendants suppressed facts concerning the gross income from sales of food and liquor during the month of October prior to the execution of the agreement herein alleged; and defendant's Margaret S. Oliver and Robert H. Oliver did represent that the Corsican Room was capable of and would gross even greater sales and profits in the succeeding months; and defendant Robert H. Oliver did further represent to plaintiff that the months of November and December were the best two months of the year for sales and profits in restaurant and cocktail bar business in the City of Long Beach, California; and said Margaret S. Oliver did further represent to the plaintiff herein that her reason for selling the Corsican Room to him was that her health would not permit her to operate the Corsican Room as well as another similar business in the City of Long Beach, known as Oliver's Rose Room.

"IX.

"That plaintiff was not familiar with the business and the operation of a restaurant and cocktail bar, and did rely entirely upon the said representations of defendant Margaret S. Oliver and her agents, and upon her judgment, knowledge and conclusions, and being induced thereby, did enter into the contract herein alleged to purchase the Corsican Room aforesaid, and did enter into possession of the Corsican Room on or about the 26th day of October, 1954.

"That during the following months of November and December of 1954, and subsequent to the making of the contract herein alleged and subsequent to the payment and deposit of the money and documents with the Vista Escrow Company as aforesaid, plaintiff discovered that the defendant had made an error in her calculations as to the amount of sales per month that would be made by the business of operation of the Corsican Room aforesaid; that such error was gross in that the monthly gross sales for the month of November were only in

the amount of \$5825.77; and that the gross sales for the month of December were only in the amount of \$5582.61; and that it appeared that the calculations of the defendant Margaret S. Oliver were not based on the sales during the month of October while she, Margaret S. Oliver, was operating the said Corsican Room, but were based on figures compiled the first four weeks of operation of the said Corsican Room during the month of September, 1954."

The entire trial was conducted on the theory of alleged fraudulent or mistaken representations made to appellant by respondents Mr. Oliver and his mother, Mrs. Oliver, that the Corsican Room was doing a business in excess of \$14,000 per month prior to the sale and that to the income as shown by the books should be added the sum of \$3,000 per month, "taken off the top" (register slips destroyed and therefore, would not show in the records). The evidence as to these and other claimed fraudulent representations was very much in conflict. Appellant's charges of misrepresentation were denied. After hearing all of the testimony, the trial judge observed, when directing that briefs be filed,

"Now, there has been some proof offered of alleged misrepresentation by some of the parties. I am not particularly impressed with some of these alleged misrepresentations. I am inclined to think, and I am still open-minded about it, I am open to conviction contrary to what I am stating now, I think the plaintiff's case must stand or fall on one thing, and that is whether or not Mrs. Oliver, Marigos, or Little told him that they were taking money off of the top. That has been denied.

"There is a conflict of testimony. Mr. Marigos, Beaman, Mrs. Oliver have all denied that they made any such statements, and I am inclined to think that perhaps those statements were not made in just the way the plaintiff testified. He went into this deal, I would assume open-mindedly, and rather than

being less careful than the average individual, I think Mr. Richards (appellant) is the type of person who is more careful.

"The books were thrown open to him. He took his time to examine them, was down at the place several times, and looked the place over * *."

[8-10] We have heretofore given a synoptical statement of the testimony upon which appellant chiefly relied for the establishment of his case based on fraudulent or mistaken representations, and upon which the court in the main manifestly based its verdict. In the instant case the gravamen of appellant's cause of action was that he entered into the contract here in question because of fraudulent or mistaken representations. This primarily presented a factual situation for determination by the duly authorized trier of the facts. If no fraud was perpetrated upon appellant, as was found by the trial court, then under his pleadings and the theory upon which he tried the case, he was not entitled to rescind the contract which he made. The fact that appellant had no previous knowledge as to the operation of a cocktail lounge and restaurant, and after entering upon such a venture, realized he had made a mistake in purchasing and attempting to operate such a business, about which he knew nothing, does not constitute grounds for rescission. In the absence of fraud, misrepresentations or mistake, parties cannot be relieved from their voluntary contracts on the ground alone that they constituted a mistake in business judgment or are improvident (*Cherney v. Johnson*, 72 Cal.App. 725, 734, 238 P. 150). It is manifest that appellant's case must stand or fall upon the verity of the testimony addressed to the trial court. Since the trial judge accepted the testimony of respondents Mr. and Mrs. Oliver and their witnesses as to alleged false or mistaken representations, we are powerless to disturb the conclusion arrived at in the court below. As has so often been repeated, reviewing judges are, obviously in no position to determine the

credit which should be accorded to witnesses or to weigh their testimony. The triers of fact are the exclusive judges of the credibility of witnesses (Code Civ.Proc. Sec. 1847), and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates (Code Civ.Proc. Sec. 2061). As a necessary corollary of the rules just noted, the trial judge in the instant case was authorized, if he conscientiously felt warranted in so doing, after a full and fair consideration thereof, to reject any testimony which might have been contradictory to that of respondents and their witnesses, and therefore, to disbelieve the testimony of appellant, and accept that of respondents as to the facts and circumstances surrounding the negotiations for and the execution of the contract here in question.

[11] Appellant earnestly attacks other findings of the court as being unsupported by the evidence. He also urges inconsistency of the findings. We agree that some of the findings are contrary to the evidence, and some others are inconsistent, but we are confronted with the pertinent material and controlling finding that appellant was not induced to enter into the contract through false or mistaken representations, which is supported by substantial evidence, and since we have construed the contract as binding upon appellant in the absence of fraudulent, false or mistaken representations, the fact that findings on other, and therefore, irrelevant matters are not supported becomes immaterial in this case. As was stated in *Culjak v. Better Built Homes, Inc.*, 58 Cal.App.2d 720, 725, 137 P.2d 492, 496:

[12, 13] "But aside from the foregoing, if we concede the inconsistency of the findings, it cannot truly be said that the entire record discloses a miscarriage of justice. In such event the judgment can not be disturbed. Constitution, Art. VI, § 4½. In order to justify the reversal of a judgment be-

cause of defective findings it must affirmatively appear not only that substantial injury has been caused and that substantial rights have been affected but also that a different result would have been probable if the defect had not occurred. *Lutz v. Merchants' National Bank*, 179 Cal. 401, 177 P. 158; *Murnane v. Le Mesnager*, 207 Cal. 485, 495, 279 P. 800. On this point the code as well as the constitution is mandatory. § 475 Code of Civil Procedure; § 4½, Art. VI, supra. Whenever possible a litigated controversy should be 'finally disposed of by a single appeal.' § 956a Code Civil Procedure; *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970."

[14] Finally, appellant insists that the court erred in overruling his objections to the introduction into evidence of a copy of an agreement entered into between him and respondent Bickler. When the copy of the original document was offered in evidence, the following occurred:

"Mr. Allen (attorney for appellant): Objected to as not the best evidence. This copy was not signed and we have not found the original, nor is sufficient foundation laid for the use of a copy and this copy is not the final agreement between the parties that was signed.

"The Court: How do we know that?

"Mr. Allen: Mr. Bickler has not testified this was the final agreement. He said that was a copy of the original paper.

"The Court: He has not said it was not the final agreement. I am satisfied with the foundation. He said he was furnished with a signed copy. He can't find it, has lost it and says this is a copy of the one which was signed and of which he had possession.

"Mr. Allen: I will withdraw it then.

"The Court: For the record, let your objection remain and let me overrule it.

"Mr. Allen: All right.

"The Court: The objection is overruled. Received in evidence as defendant Bickler's exhibit A. Agreement dated November 2, 1954."

Not only did appellant's counsel withdraw his objection, but the ruling of the court was correct because the record reflects sufficient proof of the loss of the original to warrant introduction into evidence of the copy (Code Civ.Proc., sec. 1855, subd. 1).

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.



162 Cal.App.2d 600

Lydia YANKE, Petitioner and Appellant,

v.

STATE DEPARTMENT OF PUBLIC HEALTH, State Board of Public Health, and Malcolm H. Merrill, M.D., Director of Public Health, et al., Respondents.

Civ. 18129.

District Court of Appeal, First District, Division 2, California.

Aug. 5, 1958.

Rehearing Denied Sept. 4, 1958.

Hearing Denied Oct. 1, 1958.

Mandamus proceeding to review order of State Board of Public Health revoking license for operation of convalescent home. The Superior Court, County of Marin, Thomas F. Keating, J., entered judgment denying writ, and the licensee appealed. The District Court of Appeal, Draper, J., held that the State Department of Public Health regulations which were violated by the licensee were not beyond the rule-making power of the Department.

Affirmed.

1. Asylums ⌘3

Constitutional Law ⌘287

Where accusation was filed seeking revocation of license for operation of convalescent home, case was referred to hear-

ing officer for hearing by himself alone, and State Board of Public Health refused to accept hearing officer's recommendation and ordered preparation of transcript of proceedings before hearing officer and set matter for oral argument, the failure to give licensee notice of proceeding in which board ordered preparation of transcript was not a denial of due process or in violation of the statutory requirements. West's Ann. Gov.Code, §§ 11512(a), 11517(b, c).

2. Asylums ⇨3

Where accusation is filed seeking revocation of license for operation of convalescent home and case is referred to hearing officer for hearing by himself alone, the State Board of Public Health may adopt the hearing officer's proposed decision and may do so without reading the transcript of the hearing; however, if the proposed decision is not adopted, the board, before it can render a contrary decision, must read the record and afford the parties the opportunity for argument. West's Ann. Gov. Code, §§ 11512(a), 11517(b, c).

3. Constitutional Law ⇨287

Where accusation was filed seeking revocation of license for operation of convalescent home, case was referred to hearing officer for hearing by himself alone and State Board of Public Health refused to accept hearing officer's recommendation and ordered preparation of transcript of proceedings before hearing officer and set matter for oral argument, the failure of board to have hearing officer present when board ordered transcript or when board heard the argument did not deprive licensee of due process. West's Ann. Gov. Code, §§ 11512(a), 11517(b, c).

4. Administrative Law and Procedure ⇨472

Licenses ⇨38

Under statutes relating to hearing before government agency's hearing officer to determine whether a right, authority, license, or privilege should be revoked, the "hearings" at which the hearing officer must preside are proceedings where evidence is taken or questions of law are presented. West's Ann. Gov. Code, §§ 11512(a), 11517(b, c).

See publication Words and Phrases, for other judicial constructions and definitions of "Hearings".

5. Asylums ⇨3

There was no ambiguity in accusation seeking revocation of license for operation of convalescent home where licensee was sufficiently informed to prepare a full and detailed defense to the charges.

6. Mandamus ⇨172

In mandamus proceeding to review order of State Board of Public Health revoking license for operation of convalescent home, superior court could exercise its independent judgment on the evidence.

7. Mandamus ⇨187(9)

Claimed errors of mere procedure before the State Board of Public Health in proceeding in which board revoked license for operation of convalescent home could not be asserted on appeal from judgment of superior court denying mandamus to review order of revocation, inasmuch as there had been a full and fair judicial hearing in view of the superior court's authority to exercise its independent judgment on the evidence.

8. Hospitals ⇨6

The Health and Safety Code provision that State Department of Public Health shall make and promulgate reasonable rules and regulations to carry out purposes of chapter relating to licensing of hospitals, classifying hospitals and prescribing minimum standards of safety and sanitation in the physical plant and equipment of hospitals not only authorizes regulations concerning design and construction of hospital building but also regulations concerning safety and sanitation in maintenance and operation of hospital within the structure when completed and used. West's Ann. Health & Safety Code, § 1411.

9. Asylums ⇨6

Regulation of State Department of Public Health that sufficient personnel shall be employed to give adequate care to convalescent home's patients both day and night was not void for uncertainty in its references to "adequate care". West's Ann. Health & Safety Code, § 1411.

10. Asylums ⚡3

In proceedings for revocation of license for operation of convalescent home, evidence showed violation of regulation of State Department of Public Health requiring sufficient personnel to be employed to give adequate care to patients both day and night. West's Ann.Health & Safety Code, § 1411.

11. Asylums ⚡5

Quoted terms in regulation of State Department of Public Health relating to admission of "drug addict," "alcoholics," and "persons with mental diseases" to convalescent homes were not so vague and uncertain as to render the regulation invalid. West's Ann.Health & Safety Code, § 1411.

12. Asylums ⚡3

In proceeding for revocation of license for operation of convalescent home in violation of regulations of State Department of Public Health, record failed to show arbitrary discrimination in the enforcement of the regulations. U.S.C.A.Const. Amend. 14.

13. Mandamus ⚡187(9)

In mandamus proceeding to review order of State Board of Public Health revoking license for operation of convalescent home, refusal to require board to produce all correspondence between agents of State Department of Public Health and each of the other five convalescent homes in the county and all reports of inspections and investigations by department agents of each home and all notes or memoranda in the department files concerning the other homes did not prejudice the licensee in the absence of some definite offer on part of licensee to show that there was discrimination which was in fact arbitrary. West's Ann.Health & Safety Code, § 1416; West's Ann.Code Civ.Proc. § 1881, subd. 5.

14. Asylums ⚡3

Where there is violation of regulations of State Department of Public Health by licensee operating a convalescent home, the extent of the penalty is within discretion of State Board of Public Health. West's Ann.Code Civ.Proc. § 1094.5.

15. Mandamus ⚡187(9)

In mandamus proceeding to review order of State Board of Public Health revoking license for operation of convalescent home on ground of violation of regulations of State Department of Public Health, where the trial court, on substantial evidence, concluded that the board had acted within its jurisdiction and had not abused its discretion, the matter of punishment was not reviewable in the District Court of Appeal. West's Ann.Code Civ.Proc. § 1094.5.

Lawrence E. Wright, San Anselmo, for appellant.

Edmund G. Brown, Atty. Gen., Richard H. Perry and Wiley W. Manuel, Deputy Attys. Gen., for respondent.

DRAPER, Justice.

In 1953, respondent department issued to petitioner and another a license for the operation of a 50-bed convalescent home in Marin County. The license was re-issued January 1, 1954, to petitioner alone. In August, 1954, an accusation against petitioner was filed, seeking revocation of the license. Upon issue being joined, the case was referred to a hearing officer for hearing by himself alone. Govt.Code, § 11512 (a). After full hearing, this officer found a number of the charges in the accusation to be true, and recommended that petitioner be placed on probation for 5 years. The State Board of Public Health refused to accept this recommendation, ordered preparation of a transcript of the proceedings before the hearing officer, and set the matter for oral argument. Govt.Code, § 11517(c). After argument, the board ordered revocation of petitioner's license. She then filed in the superior court this petition for writ of mandate. The case was submitted upon the transcript of proceedings before the hearing officer, without further evidence. After argument, the court entered its judgment denying the writ. Petitioner appeals.

[1,2] Appellant first contends that she was denied due process in the proceedings

before the board, arguing that she was entitled to notice of the proceeding at which the board ordered preparation of a transcript of the hearings before the hearing officer. But appellant points to no statute requiring such notice. The board may adopt the hearing officer's proposed decision (Govt.Code, § 11517(b)) and may do so without reading the transcript of the hearing (*Hohreiter v. Garrison*, 81 Cal.App.2d 384, 396, et seq., 184 P.2d 323). However, if the proposed decision is not adopted, the board, before it can render a contrary decision, must read the record and afford the parties the opportunity for argument. Govt.Code, § 11517(c); *Hohreiter v. Garrison*, supra, 81 Cal.App.2d at page 396, 184 P.2d at page 331. Here the board merely ordered preparation of the transcript "in order to review it and make a final decision whether or not to take action other than that recommended" by the hearing officer. The parties were afforded opportunity for argument before such decision was reached. There was no violation of any statutory requirement and no denial of due process.

[3,4] Appellant also claims deprivation of due process in the failure of respondent to have the hearing officer present at the determination just discussed and at the noticed argument of June 7, 1956, when the revocation order was made. But review of the code sections as a whole makes clear that the "hearings" at which the hearing officer must preside are proceedings where evidence is taken or questions of law presented. Neither the meeting of the board to order a transcript nor that to hear argument were in this category. At oral argument, the sole question was the penalty to be imposed. No evidence was received, and no argument is or was made that the more severe penalty imposed by the board was beyond that permitted by law.

[5] Petitioner also asserts denial of due process in the alleged "ambiguity" of the accusation. But review of the record clearly indicates that appellant was sufficiently informed to prepare a full and detailed defense to the charges.

[6,7] All three of these assignments of error run to proceedings before the administrative board. But the case has been fully heard by the superior court, which was authorized to exercise its independent judgment on the evidence. Thus there has been a full and fair judicial hearing, and the claimed errors of mere procedure before the administrative body cannot now be asserted. *Cooper v. State Board of Medical Examiners*, 35 Cal.2d 242, 246-247, 217 P.2d 630, 18 A.L.R.2d 593.

[8] Appellant argues that four departmental regulations (Cal.Admin.Code, Tit. 17, §§ 280, 285, 293, 294), shown to have been violated, are beyond the rule making power of the department. These regulations require keeping of proper records of patients, limit admissions to patients under the care of a person licensed to diagnose and treat human illness, require adequate personnel, and prescribe the qualifications of the person in charge of nursing care. Appellant's argument is that the legislative act does not authorize such regulation. The act provides: "The State department * * * shall make and promulgate * * * reasonable rules and regulations to carry out the purposes of this chapter, classifying hospitals and prescribing minimum standards of safety and sanitation in the physical plant, of diagnostic, therapeutic and laboratory facilities and equipment for each class of hospitals." Health & Safety Code, § 1411. It cannot be questioned that this section authorizes regulations concerning design and construction of a hospital building. *West Covina Enterprises, Inc., v. Chalmers*, 49 Cal.2d 754, 760, 322 P.2d 13. Appellant appears to argue that the board's regulatory authority is limited to design and construction. This argument seeks an unreasonably narrow construction of the code section itself, and, further, overlooks the fact that Section 1411 specifically authorizes regulations "to carry out the purposes of this chapter." The purpose of the act is "to provide for the better protection of the public health * * * by providing for state licensing, inspection, regulation, and supervision of * * *

hospitals." Stats.1945, Chap. 1418, § 1, p. 2667. It would be absurd to hold that such purpose would be attained by requiring construction in accordance with accepted safety and sanitation practices, while ignoring the factors of safety and sanitation in maintenance and operation of a hospital within the structure when completed and used. We are satisfied that the act adequately prescribes the field of regulation, and sets out sufficient standards therefor. *Dickey v. Raisin Proration Zone No. 1*, 24 Cal.2d 796, 151 P.2d 505, 157 A.L.R. 324; *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 641 et seq., 91 P.2d 577.

[9,10] Appellant was found to have violated the regulation that "Sufficient personnel shall be employed to give adequate care to patients both day and night. Provisions shall be made for nursing coverage during vacations or other relief periods." Cal.Admin.Code, Tit. 17, § 293. She argues that the first sentence is void for uncertainty in its references to "adequate care." It may be noted that the violation of the requirement of the second sentence, which is not disputed, clearly involves failure to provide sufficient personnel for adequate care. Further, the word "adequate" is not so uncertain as to render a penal statute invalid. *People v. Kiser*, 112 Cal.App.2d Supp. 903, 245 P.2d 1125. The evidence clearly shows violation of even a minimal requirement under this regulation.

[11] Appellant also was found to have violated departmental regulations by admitting a "drug addict," "alcoholics," and "persons with mental diseases." Cal.Admin. Code, Tit. 17, § 235. She asserts that the terms just quoted are so vague and uncertain as to render the regulation invalid. We do not agree. The terms are in common usage, and the testimony of experts showed that the uncertainties, if any, can be resolved.

We find no merit in appellant's contention that three other regulations, found to have been disregarded by her, were unrelated to public health.

[12] Appellant's final arguments concern the rule that intentional and arbitrary discrimination in the enforcement of a statute fair on its face is a violation of the equal protection clause of the 14th Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. She argues that she has established such discriminatory enforcement here. But she overlooks the qualification that "mere laxity of enforcement, although it may result in the unequal application of the law to those who are entitled to be treated alike, is not a denial of equal protection in the constitutional sense." *Wade v. City and County of San Francisco*, 82 Cal.App.2d 337, 339, 186 P.2d 181, 182. This question of fact was presented to the trial court, which declined to make a finding of arbitrary discrimination.

[13] Appellant also asserts error in the quashing of a subpoena to respondent requiring production of all correspondence between agents of the department and each of the five other nursing homes in Marin County, all reports of "inspections, investigations and/or visits" by department agents of or to each home, and all notes or memoranda in the department files concerning "the owners, operators, managers, operation or management" of each home, all for the period May 1, 1953, to November 9, 1956. The question of the relevancy of this mass of material clearly was for the trial court. The hearing officer, who denied appellant's request for production of like information, pointed out that a great quantity of "comparison evidence" had been admitted. The transcript of this testimony of persons familiar with the operation of the several homes was before the trial court, which thus was in a position to determine whether there was any indication of a reasonable basis for further evidence upon appellant's claim of arbitrary discrimination. If appellant's contention were sustained, every proceeding for revocation of a professional license would call for review of the file of every licensee in the state. Extended to criminal cases, such a rule would involve the trial courts

in endless inquiry into immaterial matters. The mere fact that some others are not prosecuted is not a defense. In the absence of some definite offer to show that there is a discrimination which is in fact arbitrary, the court was not compelled to invoke its process and consume its time in a mere fishing expedition. Still further, the code prohibits disclosure by the department of most of the information sought by appellant. Health and Safety Code, § 1416; see also Code Civ.Proc. § 1881 (5). We are satisfied that appellant was in no way prejudiced by the quashing of the subpoena.

[14, 15] Appellant's real complaint appears to be that the penalty is too severe. However, the extent of penalty is within the discretion of the board (Code Civ.Proc. § 1094.5), and where the trial court, on substantial evidence, concludes that the board has acted within its jurisdiction and has not abused its discretion, the matter of punishment is not reviewable here. *Nardon v. McConnell*, 48 Cal.2d 500, 507, 310 P.2d 644.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J.,
concur.



162 Cal.App.2d 761

Louis GARCIA and Pak Hoy Wong,
Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION
of the State of California, Juan Santiago
and State Compensation Insurance Fund,
Respondents.

Civ. 18238.

District Court of Appeal, First District,
Division 2, California.

Aug. 14, 1958.

Hearing Denied Oct. 10, 1958.

Proceedings on petition for review and
annulment of an order, made by commis-

328 P.2d—36

sion denying a petition for attorney's fees. The District Court of Appeal, Kaufman, P. J., held that since ultimate award of compensation had been same as award that had originally been ordered by commission and since imposition of lien for services rendered by attorneys for claimant after subsequent injuries fund petitioned to reopen thus only amounted to a reallocation or redistribution of funds to be paid under original award of compensation, commission had had jurisdiction to allow lien, even though more than five years had elapsed since date of injury.

Order annulled with direction.

1. Workmen's Compensation §1985

Labor Code section, providing for lien on compensation award in amount of attorney's fee, extends continuing jurisdiction of commission beyond Labor Code sections granting commission continuing jurisdiction but prohibiting alteration or amendment of compensation award after five years; and under that section lien may be allowed for reasonable attorney's fee for legal service pertaining to any compensation claim before any appellate court; and such lien may be allowed against subsequent injuries fund, as well as against employer or his carrier. West's Ann.Labor Code, §§ 15, 4901, 4903(a), 5803, 5804.

2. Workmen's Compensation §1985

Notwithstanding use of quoted word in Labor Code section providing that commission "may" allow lien for attorney's fee, commission has only limited discretion with respect to allowance or disallowance of lien claims, and while it may do so on proper grounds, it does not have discretion to disallow lien where it is established that attorneys did furnish services of value within one of categories specified in Labor Code section. West's Ann.Labor Code, §§ 4903, 4906.

3. Workmen's Compensation §51

The Workmen's Compensation Act is to be liberally construed for purpose of extending benefits of act for protection of

persons injured in course of their employment.

4. Workmen's Compensation ☞1985

It would be inequitable to deny lien for attorney's fee even though workmen's compensation claimant had indicated his willingness to pay fee. West's Ann.Labor Code, §§ 4903, 4906.

5. Workmen's Compensation ☞1985

Where ultimate award of compensation was same as award that had originally been ordered by commission and imposition of lien for services rendered by attorneys for claimant after subsequent injuries fund petitioned to reopen would thus only amount to a reallocation or redistribution of funds to be paid under original award of compensation, commission had jurisdiction to allow lien, even though more than five years had elapsed since date of injury. West's Ann.Labor Code, §§ 15, 4901, 4903 (a), 5803, 5804.

Garcia & Wong, San Francisco, for petitioner.

Everett A. Corten, Daniel C. Murphy, Melvin S. Witt, San Francisco, for respondent Industrial Accident Comm.

KAUFMAN, Presiding Justice.

Petitioners, attorneys for the successful employee, seek review and annulment of an order made by the respondent commission denying their petition for attorneys' fees.

Initially, the respondent commission had issued an order on October 6, 1952, awarding to the employee, benefits (\$2,340) based on a permanent disability rating of 19½% for his industrial injury of June 26, 1951. The respondent commission also found that employee suffered a permanent disability of 100% as the result of the combination of the permanent disability caused by the industrial injury of June 26, 1951, and the permanent disability pre-existing the industrial injury. Benefits (\$30 a week commencing one week after the termination of the 78 weekly payments due from the carrier, and continuing until 322 weekly payments

had been made to the employee totaling \$9,660, and thereafter a life pension at the rate of \$18.46 a week) were accordingly awarded to the employee from the Subsequent Injuries Fund (hereinafter referred to as the Fund) based on a pre-existing permanent disability rating of 80½%.

On June 15, 1956, eleven days before the lapse of five years from the date of the employee's industrial injury, the Fund simultaneously filed two petitions to reopen. One was for the purpose of reducing the 80½% pre-existing permanent disability rating, and the other for the purpose of dismissing the Fund from any and all liability. As a result of these filings, payments to the employee, as provided for in the award issued on October 6, 1952, were stopped, and no payments provided for under that award have been made to the employee.

On July 10, 1956, more than five years after the date of injury, petitioners were substituted as attorneys for the employee for the purpose of resisting the Fund's petitions to reopen. Petitioners represented the employee in the following proceedings, all of which took place more than five years after the injury:

1) They filed an answer to the Fund's petition to reopen.

2) Thereafter, they represented the employee at two hearings before the respondent commission. At the conclusion of these hearings, the referee granted the petition of the Fund dismissing and discharging it from any further liability.

3) Thereafter, they filed a petition for reconsideration on the employee's behalf which the Fund answered.

4) Thereafter, they filed a reply to the Fund's answer to petition for reconsideration. On April 12, 1957, the respondent commission affirmed its award of October 6, 1952, for lack of jurisdiction to modify an award after the lapse of five years from the date of injury. The fund filed a petition for reconsideration.

5) Thereafter, they filed an answer to the Fund's petition for reconsideration. The fund's petition for reconsideration was

denied by the respondent commission. The Fund then petitioned this court (Div. One) for a writ of review.

6) Thereafter, they filed an answer to the Fund's petition for writ of review. They also participated in the oral argument on the writ of review before the District Court of Appeal. The Commission's decision was affirmed in *State v. Industrial Accident Commission*, 1957, 155 Cal.App.2d 551, 318 P.2d 194. The Fund then filed a petition for hearing before the Supreme Court.

7) Thereafter, they filed an answer to the Fund's petition for hearing before the California Supreme Court. The Supreme Court denied the Fund's petition for hearing on January 23, 1958.

Petitioners, on February 13, 1958, formally requested via petition for attorneys' fees, that the respondent commission determine and allow them \$500 for services rendered in their capacity as attorneys for the successful employee. Previously, on December 9, 1957, petitioners requested by letter that the respondent commission make a supplemental award in connection with this matter to provide for attorneys' fees. Petitioners allege that as of February 13, 1958, the accrued payments, due and payable, under the order of October 6, 1952, to the employee were \$2,550.

On February 24, 1958, the respondent commission denied petitioners' petition for attorneys' fees, for the reason that it was without jurisdiction to allow a lien for attorneys' fees. Petitioners filed a petition for reconsideration which was subsequently denied by the respondent commission, and they now seek relief here via a petition for writ of review.

The sole question presented here is whether or not the respondent commission was correct in its determination that it had no jurisdiction five years after the date of injury, to allow a lien for attorneys' fees to the petitioners. This question is one of first impression.

In connection with the continuing jurisdiction granted to the commission by Labor Code, section 5803, respondent commission

submits that such continuing jurisdiction cannot be utilized in the instant case because of the five year limitation contained in Labor Code, section 5804. Section 5804 prohibits alteration or amendment of a prior award of compensation after five years. An allowance of a lien for attorneys' fees would constitute an alteration or amendment of the prior award of compensation made to the employee on October 6, 1952. Therefore, section 5804 prohibits the commission from allowing a lien for attorneys' fees in the instant case. In other words, allowance of the lien would constitute an alteration or amendment of the 1952 award, inasmuch as the prior award would have to be amended or altered to provide a specific amount for the attorneys' fees, and to provide for reduction of such amount from the compensation payable to the applicant.

[1] Section 4901 of the Labor Code provides that "[n]o claim for compensation nor compensation awarded, adjudged, or paid, is subject to be taken for the debts of the party entitled to such compensation except as hereinafter provided." One of the exceptions to this general provision is subdivision (a) of section 4903 of the Labor Code, which provides as follows: "The commission may determine, and allow as a lien against any amount to be paid as compensation: * * * A reasonable attorney's fee for legal services pertaining to any claim for compensation either before the commission or before any of the appellate courts, and the reasonable disbursements in connection therewith." This provision, on its face, extends the continuing jurisdiction of the commission beyond the provisions of sections 5803 and 5804, of the Labor Code. A lien may be allowed for a reasonable attorney fee for legal service pertaining to any compensation claim before any of the appellate courts. The lien may be allowed against the Fund as well as against the employer or his carrier. Cf. *Gonzales v. Industrial Accident Commission*, 50 Cal.2d 360, 325 P.2d 993.

[2] The commission has limited discretion with respect to the allowance of

disallowance of lien claims. The fact that section 4903 of the Labor Code provides that the commission "may" allow a lien, despite the definition of "may" as "permissive" by section 15 of the Labor Code, does not invest the commission with power arbitrarily to disallow a proven lien. It may do so on proper grounds, but it does not have discretion to disallow a lien where it is established as in the instant case that the attorneys did furnish services of value within one of the categories specified in section 4903 of the Labor Code. *Bryant v. Industrial Accident Commission*, 37 Cal. 2d 215, at page 220, 231 P.2d 32.

"The Commission frowns upon fee agreements as indication of a possible intent to exact a larger fee than that allowed by the Commission. For many years it was the custom of Commission referees to inquire at the beginning of each case as to the existence of any fee arrangement between the claimant and his attorney, and this practice is still followed by some referees. Attorneys generally have become aware of the commission's attitude on this subject and only rarely are fee agreements now encountered." (Hanna, "The Law of Employee Injuries etc.", Vol. 1, p. 326.)

"Fee agreements are not forbidden by the language of Labor Code, section 4906, nor by other statutes. On the contrary, their legality is tacitly recognized, both by statute and by court decision. However, the restriction of their validity to such sums as the Commission may determine to be reasonable effectively eliminates such agreements as instruments of value in compensation cases. They are not improper *per se*, but are ordinarily futile in view of the Commission's power to determine the value of services and to fix fee allowances." (Hanna, "The Law of Employee Injuries etc.", Vol. 1, p. 323.)

"The attorney's lien is allowed, as a rule, without application, based upon services rendered. Supplemental allowances are made, upon application, if additional services were rendered after the original fee allowance. Any charge, claim or agreement for services in excess of a reasonable

amount is not valid or binding, the question of reasonableness being for the Commission to determine. An attorney is entitled to have the value of his services carefully appraised in the light of the responsibility assumed, care employed, time devoted and results obtained, and although he is not obligated to present evidence as to the value of his services, he must be afforded an opportunity to do so if he wishes." (Hanna, "The Law of Employee Injuries, etc.", Vol. 2, p. 123-124.)

It is true, apparently, that in the instant case the employee signed his consent to the lien for attorneys' fees (\$500), thereby indicating his willingness to pay the fee. If the employee were to refuse to pay the fee, petitioners could bring suit in the civil courts. Therefore, the commission maintains, petitioners' belief that their fee cannot be collected is unjustified. This procedure in certain situations, is pregnant with some risks to an attorney. If the fee charged by the attorney is excessive, the commission may issue an order to show cause why such excess fee should not be returned to the claimant-employee. If the attorney is ordered to make restitution and is unable to promptly do so, action looking toward suspension or disbarment will be taken by the Commission, in addition to the possibility of other action through the State Bar. See *Goldstone v. State Bar of California*, 214 Cal. 490, 6 P.2d 513, 80 A.L.R. 701; *Barbee v. State Bar of California*, 213 Cal. 296, 2 P.2d 353.

[3,4] The Workmen's Compensation Act is to be liberally construed for the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment, and injured employees as a class will receive better and more willing legal service if remuneration for such services from an employer or insurance carrier is assured to attorneys. The result reached by the respondent commission in the instant case is arbitrary and inequitable. As a practical matter, holding that counsel are not entitled to a lien for the reasonable value of their services, would tend to deny em-

ployees under similar facts and circumstances the aid of counsel.

In *Pacific Employers' Ins. Co. v. French*, 212 Cal. 139, at page 141, 298 P. 23, at page 24, the Court said: "Any party in interest may file with the commission his application, in writing, stating the general nature of any dispute or controversy concerning compensation, or concerning any right or liability arising out of, or incidental thereto, jurisdiction over which is vested by the Compensation Act in the commission. (Section 17a.) The commission may fix and determine and allow as a lien against any amount to be paid as compensation the reasonable expense incurred by or in behalf of the injured employee, as defined in subsection (a) of section 9. (Sec. 24 [b] [2].) In any case where it appears that a lien should be allowed upon a claim to which the lien remedy applies, the commission may order the payment of such claim to be made directly to the person entitled, and the award to such person shall constitute a lien against unpaid compensation due at the time of service of said award. (Section 24 [c].)"

"The provisions of the statute to which we have referred clearly indicate that the determination by the commission of the amount of the reasonable value of medical services rendered, and the imposition of a lien therefor, presupposes the making of an award to the employee or to his dependents entitled to compensation. The lien is wholly incidental to the principal award, and without such award there can be no lien. * * *'" *Independence Indemnity Co. by Mitchell v. Industrial Accident Commission*, 2 Cal.2d 397, at pages 401-403, 41 P.2d 320.

[5] The award of compensation to the employee is not altered or amended within

the intended meaning of sections 5803 and 5804 by the allowance of the attorneys' lien after the five year period. The ultimate award of compensation in the instant case is the same as the award of compensation that was originally ordered to the employee by the respondent commission. The imposition of the attorneys' lien after the five year period would only amount to a reallocation or redistribution of the funds to be paid under the original award of compensation, i. e., the award of compensation is the same, only its payments are ultimately redirected by the imposition of a charge upon the award as security for the reasonable fee allowed by the commission for legal services performed on behalf of the employee by his attorneys. The Commission's reasoning, if logically applied, would deny a lien for the reasonable living expenses of the injured employee's wife or minor children, where such employee has deserted or is neglecting his family after the five year period. See Labor Code, § 4903(e).

"In order that the beneficial purposes of the Workmen's Compensation Law may not be destroyed, the provisions on limitation should not be interpreted in a manner which will result in the right being lost before it accrues unless the language of such provisions clearly compels such interpretation. (Citations.)" *Bianco v. Industrial Accident Commission*, 24 Cal.2d 584, at page 590, 150 P.2d 806, at page 809.

The order of the respondent commission denying attorneys' fees is annulled, and the respondent commission is directed to award petitioners a lien for the reasonable value of their services against the award to the employee herein.

DOOLING and DRAPER, JJ., concur.

164 Cal.App.2d 790

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Moody Lorenzo BROWN, Defendant and
Appellant.

Cr. 6210.

District Court of Appeal, Second District,
Division 3, California.

Nov. 5, 1958.

Defendant was convicted of offense of selling heroin. The Superior Court, Los Angeles County, Richard C. Fildew, J., entered judgment and defendant appealed from judgment and from order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that it was not an abuse of discretion to deny new trial of defendant convicted of offense of selling heroin, on ground of newly discovered evidence that heroin transaction between defendant, confidential informant, and police officer had never been engaged in by confidential informant, where there was no showing as to why confidential informant could not have been located and subpoenaed at time of trial.

Affirmed.

1. Criminal Law ☞938(1)

In order for trial court to grant new trial of criminal prosecution on ground of newly discovered evidence, defendant must show that the evidence, and not merely its materiality, is newly discovered, that the evidence is not merely cumulative, but is such as to render a different result probable on a retrial, and that he could not with reasonable diligence have discovered and produced it at the trial, and these facts must be shown by the best evidence of which the case admits. West's Ann.Pen. Code, § 1181, subd. 8.

2. Criminal Law ☞939(2)

It was not an abuse of discretion to deny new trial of defendant convicted of offense of selling heroin, on ground of newly discovered evidence that heroin

transaction between defendant, confidential informant, and police officer had never been engaged in by confidential informant, where there was no showing as to why confidential informant could not have been located and subpoenaed at time of trial. West's Ann.Pen.Code, § 1181, subd. 8.

Minsky, Garber & Rudof, Los Angeles,
for appellant.

Edmund G. Brown, Atty. Gen., Lynn
Henry Johnson, Deputy Atty. Gen., for re-
spondent.

SHINN, Presiding Justice.

Moody Lorenzo Brown was indicted for and in a court trial convicted of an offense of selling heroin and was sentenced to state prison. Brown appeals from the judgment and the denial of his motion for new trial.

The evidence consisted of the transcript of the proceedings before the grand jury and additional evidence introduced at the trial. Justin B. Burley, a Los Angeles County sheriff's deputy assigned to the narcotics detail, was the chief witness for the People. The following is the substance of his testimony. The officer received information from a Sergeant Kiho that a man called Moody Malek was selling narcotics. On June 21, 1957, Burley and a confidential informant, Eddie Jordan, drove to 106th Street and Avalon Boulevard in Los Angeles. The officer placed a telephone call to Moody Malek at Pleasant 54380 and listened over the earpiece to a conversation between Jordan and Malek. At 2:30 p. m., Burley and Jordan drove to 105th Street and Stanford, where they met Malek. Jordan gave Malek \$10; Malek gave the informer a paper bundle which Jordan handed to the officer. At 10 p. m., Burley and Jordan drove back to 106th and Avalon and placed another telephone call to Malek. A few minutes later they drove to 105th and Stanford. The officer handed \$10 to the informer. Jordan left the au-

tomobile and walked over to Malek, who was standing 15 or 20 feet away from the car. Malek and Jordan "exchanged something", whereupon the latter returned to the car and handed a second paper bundle to Officer Burley. The two bundles were proved to contain heroin. They were introduced in evidence without objection.

In his testimony before the grand jury, Burley described Moody Malek as a male Negro, about six feet tall and weighing between 160 and 170 pounds, having straight hair and a light complexion. The officer testified at the trial that his previous description of Malek was incorrect. He identified appellant Brown as the man he saw on June 21st and stated that the voice he heard over the telephone was that of appellant. Upon being asked Jordan's whereabouts at the time of trial, the officer replied that he did not know where Jordan was.

Brown testified in his own behalf that he did not sell any narcotics to Eddie Jordan. He denied knowing Jordan and denied using the name Moody Malek. He stated that he was five feet seven inches tall and weighed 140 pounds. On cross-examination, he admitted that the telephone number at his residence was Pleasant 54380.

Appellant made a motion for new trial upon the ground of newly discovered evidence. He submitted to the court an affidavit of one Eddie Jordan in support of the motion. The affidavit was dated 30 days after the conclusion of the trial. Jordan averred in his affidavit that if called as a witness he would testify that he did not engage in a narcotics transaction with Officer Burley and appellant either on June 21st or at any other time. The motion for new trial was denied by the court.

The sole contention presented on the appeal is that the court should have granted appellant's motion for new trial.

[1] Penal Code, section 1181, subdivision 8, authorizes the court to grant a new trial when new evidence is discovered material to the accused, and which he could not, with reasonable diligence, have discovered and produced at the trial. The defendant must show that the evidence, and not merely its materiality, is newly discovered, that the evidence is not merely cumulative, that it is such as to render a different result probable on a retrial, and that he could not with reasonable diligence have discovered and produced it at the trial; these facts must be shown by the best evidence of which the case admits. *People v. Sutton*, 73 Cal. 243, 15 P. 86; *People v. McGarry*, 42 Cal.2d 429, 433, 267 P.2d 254.

[2] The court did not abuse its discretion in denying the motion for new trial. It was incumbent on appellant to show that Jordan could not, despite the exercise of reasonable diligence, have been produced as a witness at the trial. Appellant was obviously aware that Jordan was a potential witness for some time prior to the trial. Appellant did not file his own affidavit in support of his motion. The only affidavit filed was that of Eddie Jordan. There was a total failure to make a showing that the prospective evidence was newly disclosed or that it could not have been produced at the trial in the exercise of reasonable diligence. The court was warranted in denying the motion for lack of a showing of diligence. *People v. Lindsey*, 90 Cal.App. 2d 558, 568-569, 203 P.2d 572; *People v. Beard*, 46 Cal.2d 278, 282, 294 P.2d 29.

Appellant does not question the sufficiency of the evidence to support the judgment.

The judgment and order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.

50 Cal.2d 702

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Cecil Herman WARD, Defendant and
Appellant.

Cr. 6203.

Supreme Court of California,
In Bank.

Aug. 19, 1958.

Rehearing Denied Sept. 17, 1958.

Defendant was convicted in Superior Court, Kern County, Gordon L. Howden, J., of first degree murder, and he appealed. The Supreme Court, Shenk, J., held that the statute providing for proceedings, after verdict in capital cases, for purpose of determining whether punishment should be death or life imprisonment, merely altered conditions deemed necessary for orderly and just conduct of criminal trials, and did not deprive defendant, who was tried after effective date of statute for homicide committed before such date, of any substantial personal right within meaning of constitutional prohibitions of ex post facto laws.

Judgment and order affirmed.

1. Homicide Ⓒ253(1)

Evidence sustained conviction for first degree murder. West's Ann.Pen.Code, §§ 187, 189.

2. Constitutional Law Ⓒ197

Generally, any law passed after commission of offense for which party is being tried is an "ex post facto law", when it inflicts a greater punishment than the law annexed to the crime at time it was committed, or alters situation of accused to his disadvantage. West's Ann.Const. art. 1, § 16; U.S.C.A.Const. art. 1, § 9, cl. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Ex Post Facto Law".

3. Constitutional Law Ⓒ199

Changes which may be designated as procedural do not, as a rule, come within ex post facto doctrine, but that in itself is not the true test. West's Ann.Const.

art. 1, § 16; U.S.C.A.Const. art. 1, § 9, cl. 3.

4. Constitutional Law Ⓒ203

Criminal Law Ⓒ1206(1)

Statute providing for proceedings, after verdict in capital cases, for purpose of determining whether punishment should be death or life imprisonment, merely altered conditions deemed necessary for orderly and just conduct of criminal trials and did not deprive defendant, tried after effective date of statute for homicide committed before such date, of any substantial personal right within meaning of constitutional prohibitions of ex post facto laws. West's Ann.Pen.Code, § 190.1; West's Ann.Const. art. 1, § 16; U.S.C.A.Const. art. 1, § 9, cl. 3.

5. Criminal Law Ⓒ829(3)

In murder prosecution, defendant could not complain that certain of his offered instructions relating to elements of murder in first degree were not given by court, where court properly instructed jury as to elements of crime charged and adequately covered points of law included by defendant in his proposed instructions.

6. Criminal Law Ⓒ655(1)

In murder prosecution, court did not err in stating to jury, at beginning of trial, that evidence would be taken relating to defendant's previous record, where court explained that he used word "record" not to imply that defendant had bad record, but in reference to defendant's background.

7. Criminal Law Ⓒ796

In murder prosecution, statement by court advising jury that a prisoner sentenced either to death or life imprisonment may be pardoned or have his sentence reduced by governor, and that prisoner serving life sentence may be paroled but not until he has served at least seven years, was not objectionable.

8. Criminal Law Ⓒ796

In murder prosecution, instruction that, with respect to penalty, no burden of proof is cast upon the people or the defendant to show by any particular quantum of evi-

dence which penalty should be imposed by jury, sufficiently advised jurors that question of penalty was matter resting within their sole discretion. West's Ann.Pen.Code, § 190.

9. Criminal Law ⇨1171(1)

In murder prosecution, conduct of district attorney in referring, while attempting to introduce photographs into record, to "appellate courts", was not prejudicial, as against defendant's contention that right of appeal was not proper subject for consideration by jury, and that remarks were intended to induce jury to place lighter estimate on their duties than otherwise would have been indicated.

10. Criminal Law ⇨706, 1171(1)

In murder prosecution, conduct of district attorney in offering defendant's wife as witness for prosecution, to which offer defendant's objection was sustained, was improper and unwarranted, but in consideration of entire record was not so seriously reprehensible as to require reversal. West's Ann.Pen.Code, § 1322.

Robert A. Farrell and J. Richard Thomas, Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is an appeal from a judgment imposing the death penalty after verdicts finding that the defendant was guilty of murdering Nell and Brenda Parris as charged in two counts of an indictment and that the murders were of the first degree. Following these verdicts proceedings were then taken pursuant to section 190.1 of the Penal Code for the purpose of determining the punishment. The penalty of death was imposed as to each count. Thereafter, on his plea of not guilty by reason of insanity as to each count, the defendant was found to be sane at the time of the commission of the offenses. A motion for a new trial or modification of the judgment was denied.

It appears that during the afternoon of August 18, 1957, the defendant procured a gun. Prior to that time he had made statements concerning his intention to kill members of his wife's family. At about 8:30 he appeared at the back door of the home of Nell Parris, his mother-in-law. In addition to the defendant's wife, Bobbie Ward, and their infant son, there was present in the house at that time Brenda Parris, who was the 13-year old sister of Bobbie. The defendant demanded that his wife leave the premises with him. Upon her refusal to do so he broke in the back door. His wife fled by way of the front door. The defendant pursued and caught up with her a few hundred feet away. During his pursuit an automobile driven by Joe Shatto arrived on the scene. In addition to Mr. Shatto the automobile was occupied by Nell Parris, by Mrs. Shatto who was the sister of Nell Parris, and by three children. Mrs. Shatto got out of the car and approached the defendant and his wife. The defendant had a revolver in his hand and threatened to kill his wife if she would not go with him. All three persons returned to the house and the defendant and his wife went in. She asked for time to get ready to leave and upon the defendant's refusal to grant her request she again ran out of the house and away from the premises the defendant following her. Nell Parris alighted from the automobile for the declared purpose of telephoning the police, and Brenda Parris came out of the house and was entering the automobile with the defendant's infant son in her arms. The defendant approached the automobile and stated that if his wife would not come with him he would shoot Brenda. Without further delay he put the gun close to her head and shot her. Thereupon Nell Parris attempted to strike him with her hand and he shot her also. He fired several shots into her body as she lay on the ground. Both Nell and Brenda Parris died as a result of the gunshot wounds so inflicted. The defendant was apprehended shortly after the homicides, and at about 3:30 the following morning made a statement in which he admitted

that he procured the gun for the purpose of killing his wife, and that he shot Nell Parris and someone he thought to be Brenda.

The defendant was represented at the trial by appointed counsel. He did not testify in his own defense. Following the verdicts of guilty on the issues raised by the pleas of not guilty, the trial proceeded before the same jury for a determination of the penalties. After the verdicts were returned fixing the penalty at death the trial again proceeded before the same jury on the issues raised by the pleas of not guilty by reason of insanity. The jury received the evidence of three medical examiners appointed by the court, and, as stated, found the defendant to have been sane at the time the offenses were committed.

[1] The defendant contends without elaboration that there is insufficient evidence to warrant a conviction of first degree murder on either count. That contention is without merit. There can be no question as to the identity of the perpetrator of the crimes or that the offenses were committed "with malice aforethought." Pen.Code, § 187. The question then for the jury was whether the defendant had acted with deliberation and premeditation. Pen. Code, § 189. There was ample evidence of his intention formulated prior to the time he arrived at the premises to take a life or lives of members of his wife's family and of an intention continuing to the time of the homicides. Those intentions were disclosed by evidence on the part of numerous witnesses of the defendant's actions and of his direct threats. There was no substantial evidence to contradict the showing of premeditation and deliberation. The verdicts are supported by overwhelming evidence.

The defendant contends that trying him pursuant to the provisions of section 190.1 of the Penal Code constituted the imposition of an *ex post facto* law as to the offenses charged and was in violation of the state Constitution. Art. I, § 16; see also United States Constitution, art. I, § 9, cl. 3, to the same effect. Section 190.1 was

added to the Penal Code by Statutes 1957, page 3509. It became effective on September 11, 1957, after the commission of the offenses charged but prior to the trial. The section provides in its pertinent parts: "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. * * * If the defendant has pleaded not guilty by reason of insanity at the time of commission of the offense, the trier of fact, after the determination of the penalty, shall thereupon determine whether or not defendant was sane at the time of commission of such offense. * * * If the defendant was convicted by a jury, the trier of fact on the issue of penalty and the issue of sanity, if any, shall be the same jury * * *." No contention is made that proceedings were not taken in accordance with the above provisions of the Penal Code.

[2,3] In general, "any law which was passed after the commission of the offence for which the party is being tried is an *ex post facto* law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed [citations]; or which alters the situation of the accused to his disadvantage * * *." In *re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 387, 33 L.Ed. 835. Changes which may be designated as procedural do not, as a rule, come within the *ex post facto*

doctrine, but that in itself is not the true test. In *Thompson v. State of Utah*, 170 U.S. 343, on pages 351 and 352, 18 S.Ct. 620, on page 623, 42 L.Ed. 1061, the following appears: "It is sufficient now to say that a statute belongs to that class which by its necessary operation and 'in its relation to the offence, or its consequences, alters the situation of the accused to his disadvantage.' [Citations.] Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed. And therefore it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence charged against him. Cooley in his *Treatise on Constitutional Limitations*, after referring to some of the adjudged cases relating to *ex post facto* laws, says: 'But, so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.' * * * The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the constitution,

as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offence charged against him."

The defendant contends that during that portion of the present proceeding conducted for the purpose of determining penalty, evidence of his jail and juvenile court records was admitted; that such evidence had no relevancy to the cause and would not have been admissible under the rules of evidence in effect prior to the adoption of section 190.1 (see *People v. Barclay*, 40 Cal.2d 146, 157, 252 P.2d 321), and that the change in procedure thus altered the situation to his substantial disadvantage and constitutes the enactment of an *ex post facto* law.

Changes of a similar nature have heretofore been approved as not constituting *ex post facto* laws in this state. In *People v. Mortimer*, 46 Cal. 114, a change in the law which permitted the prosecution to both open and close the argument to the jury was approved. In *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042, it was held that article VI, section 4½ of the California Constitution was applicable to offenses committed prior to its adoption and was not violative of the federal constitutional provision prohibiting the passage of an *ex post facto* law. And in *People v. Talkington*, 8 Cal.App.2d 75, 81-83, 47 P.2d 368, it was held that section 19 of article VI of the state Constitution, which permits comments by the judge on the evidence and the testimony and credibility of the witnesses, was applicable to crimes committed prior to the adoption of the amendment and was not an *ex post facto* law.

The United States Supreme Court has declared the following changes not to be *ex post facto* within the meaning attributed to that clause in the federal Constitution: A change in inflicting the death penalty from hanging to electrocution (*Malloy v. State of South Carolina*, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905); a change which permitted witnesses who previously were incompetent to testify to thereafter testify

to the commission of a crime (Hopt v. People of Territory of Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262); a change which provided for an appeal by the state where none existed before (Mallett v. State of North Carolina, 181 U.S. 589, 21 S.Ct. 730, 45 L.Ed. 1015); a change which provided for a separate trial of persons jointly indicted (Beazell v. State of Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216); a change in the place of trial (Gut v. State of Minnesota, 9 Wall. 35, 19 L.Ed. 573); and a change which extended the applicable statute of limitations (Falter v. United States, 2 Cir., 23 F.2d 420, certiorari denied 277 U.S. 590, 48 L.Ed. 528, 72 L.Ed. 1003). Most pertinent to the defendant's contention that the doctrine includes a change in the law which permits the reception of evidence which previously would have been excluded, is the decision of the United States Supreme Court in Thompson v. State of Missouri, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204. In that case the defendant was convicted of murder in the first degree largely upon the evidence of his authorship of a certain prescription for strychnine and a threatening letter written to the deceased, a victim of strychnine poisoning. The defendant's authorship was established by a comparison with letters written by the defendant to his wife. The Supreme Court of Missouri held that it was error to admit in evidence the letters to the defendant's wife and reversed the judgment. Prior to the second trial the Legislature passed an act which permitted the letters to be put in evidence and the defendant was again convicted. The judgment was affirmed by both the Supreme Court of Missouri and the Supreme Court of the United States. As against a contention that the change in the law of evidence which permitted new and different evidence to be heard, the Supreme Court of the United States stated beginning at page 386 of 171 U.S., at page 924 of 18 S.Ct.: "Applying the principles announced in former cases * * * we adjudge that the statute of Missouri relating to the comparison of writings is not *ex post facto* when applied to prosecutions for crimes

committed prior to its passage. If persons excluded upon grounds of public policy at the time of the commission of an offence, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify [see Hopt v. People of Territory of Utah, *supra*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262], we cannot perceive any ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offence was committed. The Missouri statute, when applied to this case, did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offence criminal that was not criminal at the time he committed the murder of which he was found guilty. It did not change the quality or degree of his offence. Nor can the new rule introduced by it be characterized as unreasonable; certainly not so unreasonable as materially to affect the substantial rights of one put on trial for crime. The statute did not require 'less proof, in amount or degree,' than was required at the time of the commission of the crime charged upon him. It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state, as a condition of its right to take the life of an accused, must overcome the presumption of his innocence, and establish his guilt beyond a reasonable doubt."

The holding in the Thompson case was followed in Ohio in a decision very much in point. In Beckman v. State, 122 Ohio St. 443, 5 N.E.2d 482, 484, a statutory change contrary to prior law provided that in a criminal trial proof of acts by the defendant of a nature similar to that with which he was charged could be made "notwithstanding that such proof may show or tend to show the commission of another or subsequent crime by the defendant."

The Supreme Court of that state held that the statute did not constitute an *ex post facto* law when applied to an offense committed prior to its enactment.

[4] From the foregoing it is apparent that the Legislature in enacting section 190.1 "did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evidence, and require less or different evidence than the law required at the time of the commission of the offense; and did not deprive the accused of any substantial right or immunity possessed by" the defendant at the time of the commission of the offense. *Mallett v. State of North Carolina*, supra, 181 U.S. 589, 597, 21 S.Ct. 730, 733, 45 L.Ed. 1015; see, also, *People v. Adams*, 274 N.Y. 447, 9 N.E.2d 46. The changes effected by the enactment constituted merely an alteration in the conditions deemed necessary for the orderly and just conduct of criminal trials and did not deprive the defendant of any substantial personal right within the meaning of the constitutional prohibitions of *ex post facto* laws.

[5] The defendant complains that certain of his offered instructions relating to the elements of murder of the first degree were not given by the court. But he does not point to what, if any, portion of the instructions which were given he objects to; nor does he state in what manner they are claimed to be deficient. The court properly instructed the jury as to the elements of the crime charged and adequately covered the points of law included by the defendant in his proposed instructions.

[6] Complaint is made of certain statements made by the trial judge relating to the penalties which might be imposed. At the beginning of the trial he stated to the jury that the proceedings would be in three phases. As to the second phase he said that evidence would be taken relating to the defendant's background, his previous rec-

ord, and his activities prior to the time of the commission of the offenses charged. Upon objection that such a statement inferred that the defendant had a previous "record" the court explained that "I merely mentioned it in the sense that each one of us has a previous record. It may be an excellent record, and it may be a poor record, and I am not advised, I have no knowledge of what Mr. Ward's record is. I spoke of record in the term of history. So the jury will understand I am not telling you that the defendant has any particular bad record, but you are going to hear it, if the occasion calls for it, what the defendant's background has been." No error is apparent in this statement.

[7] Objection is made to a statement by the court advising the jury "that a prisoner sentenced either to death or life imprisonment may be pardoned or may have his sentence reduced by the governor and that a prisoner serving a life sentence may be paroled but not until he has served at least seven years." The comment was not objectionable. *People v. Barclay*, supra, 40 Cal.2d 146, 158, 252 P.2d 321.

[8] It is contended that the court did not fully advise the jurors that the question of penalty was a matter resting within their sole discretion. In this connection the court instructed as follows: "With respect to the penalty no burden of proof is cast upon the people or the defendant to show by any particular quantum of evidence which penalty should be imposed by you. The Supreme Court of the State of California has explained the matter in this language: 'Section 190 does not impose the death penalty leaving discretion with the jury to substitute a lesser penalty. It imposes neither death nor life imprisonment, but with a perfectly even hand presents the two alternatives to the jury. The legislature perhaps because of the very gravity of the choice has formulated no rules to control the exercise of the jury's discretion.' " No error appears in this instruction.

[9] It is contended that the district attorney was guilty of prejudicial misconduct.

In attempting to introduce into the record certain photographs of the deceased persons, the prosecutor stated as his reasons, " * * * not only is it material from the standpoint of identifying the body, of course, although we have the stipulation here, we have the appellate courts to go through whenever we have an—." The objections of defense counsel cut short the prosecutor's further remarks. The court sustained the objection to the admission of the photographs but did not order the prosecutor's remarks relating to the appellate courts stricken from the record. The defendant now claims that the right of appeal was not a proper subject for consideration by the jury, and was intended to induce the jury to place a lighter estimate on their duties than otherwise would have been indicated, relying on *People v. Beggs*, 178 Cal. 79, 92, 172 P. 152. The remarks in the *Beggs* case held to be "improper" related to the People's inability to take an appeal in that case and at that time and in no way had a bearing on the issues in the present case. Moreover the criticized remarks were held not to have prejudiced the defendant in that case.

[10] The defendant contends that the district attorney was also guilty of prejudicial misconduct in offering the defendant's wife as a witness for the prosecution. An objection to her competency as a witness was sustained and she did not testify. Section 1322 of the Penal Code provides: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both * * *." There are other exceptions not here applicable. Similar action on the part of the district attorney was held to be "improper and unwarranted" but not prejudicial in *People v. Klor*, 32 Cal.2d 658, 663, 197 P.2d 705, 708. Under more aggravated circumstances it was held to be prejudicial in *People v. Wilkes*, 44 Cal. 2d 679, 284 P.2d 481. The conduct of the district attorney in this respect in the present case is subject to the same criticism and

should not have taken place, but in consideration of the entire record it was not so seriously reprehensible as to require a reversal.

Other claims of misconduct on the part of the district attorney are without merit. The defendant received a fair and impartial trial, and the evidence in support of the verdicts as stated is overwhelming. The record herein presented appears to be the first to be reviewed by this court wherein the provisions of section 190.1 of the Penal Code have been applied. The trial court correctly followed the provisions of that section. In doing so the defendant was not deprived of any right, constitutional or statutory, to which he was entitled at the time the offenses were committed.

The judgment and order denying the motion for a new trial are affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



163 Cal.App.2d 63

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

George L. HORTON, Defendant and
Appellant.

Cr. 3503.

District Court of Appeal, First District,
Division 2, California.

Aug. 19, 1958.

Defendant was convicted of a sale of heroin. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., entered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that where case was tried

on theory of defendant that sale to informer was not made by defendant, and case was argued to jury on that question alone, and jury found that sale was made by defendant to informer, defendant's knowledge of the narcotic character of the substance sold to the informer was not open to reasonable doubt, and defendant could not successfully contend on appeal that there was no evidence sufficient to support a finding that defendant had knowledge of the narcotic character of the substance and that it was prejudicial error not to instruct jury that knowledge of narcotic character of the substance sold was an essential element of the offense.

Judgment affirmed.

Criminal Law ⇨1173(2)

Poisons ⇨9

Where prosecution for sale of heroin was tried on theory of defendant that sale to informer was not made by defendant, and case was argued to jury on that question alone, and jury found that sale was made by defendant to informer, defendant's knowledge of the narcotic character of the substance sold to the informer was not open to reasonable doubt, and defendant could not successfully contend on appeal that there was no evidence sufficient to support a finding that defendant had knowledge of the narcotic character of the substance and that it was prejudicial error not to instruct jury that knowledge of narcotic character of the substance sold was an essential element of the offense.

David R. Fuller, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury of a sale of heroin. On January 9, 1957, the witness Goodrum was working as an undercover narcotics agent with an informer

named Randolph. The two met appellant in a pool hall and in Goodrum's hearing Randolph told appellant that he wanted to get some "stuff" (narcotics). Appellant replied: "* * * I'll sell to you, but I'm not going to sell to him [indicating Goodrum] because I don't know him." Randolph asked for "a half spoon" and a meeting place on the street was arranged. Randolph and Goodrum drove to this meeting place and appellant arrived shortly afterward. Appellant stood about ten feet from the parked automobile. Randolph got out and with \$20 in currency in his right hand visible at all times to Goodrum walked to where appellant was standing. Goodrum from the automobile in which he remained seated saw Randolph hand appellant the \$20 in currency and saw appellant place a small white packet in Randolph's left hand. With his left hand visible Randolph walked directly back to the automobile, opened his left hand and from it gave Goodrum the white packet, which analysis showed contained heroin.

Appellant argues: 1. that there is no evidence sufficient to support a finding that appellant had knowledge of the narcotic character of the substance (People v. Winston, 46 Cal.2d 151, 293 P.2d 40); and 2. that it was prejudicial error not to instruct the jury that knowledge of the narcotic character of the substance sold is an essential element of the offense.

The case was tried on the theory that the sale was not made. Appellant testified that he knew Randolph but denied the sale to him. It was argued to the jury on that question alone. Under all of the circumstances of this case if the jury found, as they did, that the sale was made as testified appellant's knowledge of the narcotic character of the substance was not open to reasonable doubt. Once the jury found the sale the giving of the instruction on knowledge would not have resulted in a different verdict under the facts of this case.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

162 Cal.App.2d 434

SAN FRANCISCO UNIFIED SCHOOL DISTRICT, a California school district,
Plaintiff and Appellant,
v.

CALIFORNIA BUILDING MAINTENANCE CO., a California corporation, Defendant
and Respondent.

Civ. 17602.

District Court of Appeal, First District,
Division 1, California.

July 31, 1958.

Hearing Denied Sept. 24, 1958.

School district brought action against maintenance company to recover amounts paid by school district in satisfaction of judgments against it in favor of company's window washer, who was injured in fall while washing defective window in school, and company's insurance carrier and for amount expended by school district in defending action against it, on ground that company breached contract with school district providing that company was responsible for payment of any damages resulting from its operations because company allegedly permitted window washer to wash window without adequate safety equipment. The Superior Court, City & County of San Francisco, Daniel R. Shoemaker, J., entered judgment adverse to the school district, and the school district appealed. The District Court of Appeal, Peters, P. J., held that question whether school district should be precluded from recovery by reason of its conduct, that is, whether conduct of district helped to bring about the damage, was a question of fact for the jury.

Judgment reversed.

1. Schools and School Districts ⇨86(2)

In action by school district against maintenance company to recover amounts paid by school district in satisfaction of judgments against it in favor of company's window washer, who was injured in fall while washing defective window in school, and company's insurance carrier and for amount expended by school district in de-

fending action against it, on ground that company breached contract with school district providing that company was responsible for payment of any damages resulting from its operations, because company allegedly permitted window washer to wash window without adequate safety equipment, evidence supported finding that company breached contract by permitting window washer to wash windows without safety equipment and that his injuries were caused, at least in part, by such breach.

2. Workmen's Compensation ⇨2142

School district, which had been compelled to pay damages to maintenance company's window washer for injuries sustained by him in fall while washing defective window in school, could seek indemnity from maintenance company, which, in violation of its contract with school district, negligently permitted window washer to wash window without adequate safety equipment, though exclusive remedy of window washer against company was under the Workmen's Compensation Act, and effect of permitting school district to recover from company was indirectly to permit window washer to recover from company in tort action. West's Ann.Labor Code, § 3201 et seq.

3. Judgment ⇨632

Judgment against school district in prior action against school district by maintenance company's window washer and company's insurance carrier to recover for injuries sustained by window washer while washing defective window in school, was res judicata in subsequent action by school district against company to recover amounts paid by school district in satisfaction of judgment in favor of window washer and company's insurance carrier and for amount expended by school district in defending action against it, though company was not a party to the prior action.

4. Contribution ⇨5

One joint tort-feasor cannot ordinarily seek contribution from the other, but there are exceptions to the rule.

5. Indemnity Ⓒ13(1)

Even if provision of window washing contract between maintenance company and school district that company was responsible for payment of any and all damages resulting from operations of company did not amount to an express contract to indemnify school district for damages caused to it by a breach of contract by company, such a warranty or agreement to indemnify would necessarily be implied.

6. Schools and School Districts Ⓒ86(2)

In action by school district against maintenance company to recover amounts paid by school district in satisfaction of judgments against it in favor of company's window washer, who was injured in fall while washing defective window in school, and company's insurance carrier and for amount expended by school district in defending action against it, on ground that company breached contract with school district providing that company was responsible for payment of any damages resulting from its operations, because company allegedly permitted window washer to wash window without adequate safety equipment, question whether school district should be precluded from recovery by reason of its conduct, that is, whether such conduct helped to bring about the damage, was a question of fact for the jury.

Dion R. Holm, City Atty., George E. Baglin, Deputy City Atty., San Francisco, for appellant.

Boyd & Taylor, Frederic G. Nave, San Francisco, for respondent.

PETERS, Presiding Justice.

The San Francisco Unified School District appeals from a judgment of nonsuit rendered in favor of the California Building Maintenance Co.

The record shows that the Maintenance Company had a written contract with the city of San Francisco to wash the windows of many of the public buildings located in the city, including the windows of all of the

city high schools. One Richard Dubay was employed by the Maintenance Company as a window washer. Dubay, while washing the windows in Galileo High School, fell and was injured when the window he was washing came loose from its fastenings. The insurance carrier of the Maintenance Company paid Dubay compensation benefits. Subsequently Dubay and this insurance carrier brought an action against the School District, alleging that it had failed to supply Dubay with a safe place in which to work. Judgments totaling over \$30,000 were recovered by the two plaintiffs in that action. These judgments were satisfied by the School District paying the two plaintiffs the sum of \$25,000. These judgments are final and their validity is not involved on this appeal. These judgments necessarily decided that, as between Dubay and the School District, the latter had been negligent in failing to supply Dubay a safe place in which to work.

The present action by the School District against the Maintenance Company seeks to recover from the Maintenance Company the \$25,000 paid to settle the judgments of Dubay and the insurance company, and also to recover \$2151.86 expended by the School District in defending against the Dubay action. The present action is one for damages for breach of contract, that is, to recover damages caused by the Maintenance Company's claimed breach of its contract with the School District. The theory of the action is that the Maintenance Company permitted Dubay to wash the window in question without adequate safety equipment and in a manner in direct violation of the terms of its contract with the School District. The Maintenance Company in its answer alleged as a first defense that the Dubay action necessarily determined that the School District was negligent; that such negligence was a proximate cause of the accident to Dubay; that Dubay was not contributively negligent; that such determinations were *res judicata* in this action, and that such determinations bar any recovery in the present action under the common law principle that

one joint tortfeasor cannot secure contribution from the other. The second defense alleged was that the Workmen's Compensation Act provides the exclusive remedy of an employee against his employer for injuries received in the course and arising out of the employment, and that to permit the School District to recover in this action would be to impose on the Maintenance Company, indirectly, liability for injuries to its employee, Dubay. The trial court granted the motion for a nonsuit.

The contract between the School District and the Maintenance Company was based upon the acceptance of a competitive bid whereby the Maintenance Company contracted and agreed to wash the windows of many of the public buildings in San Francisco for an agreed price. One of the buildings specified was the Galileo High School, a building equipped with the Hauser type of window sash. The contract contains several provisions here relevant. It required the Maintenance Company to "furnish all labor, materials, and equipment necessary to perform in a first-class manner the work outlined." It also provided that in school buildings all exterior windows should be "cleaned inside and outside." Of particular importance is the specific provision that: "In all schools that have Hauser window sashes, stepladders must be used from inside." It is also provided that: "All windows broken by cleaners are to be replaced at the expense of the Contractor, and the Contractor is held responsible for payment of any and all damages resulting from his operations."

[1] There is ample evidence in the record to support a finding that the Maintenance Company breached this contract in the manner in which it permitted its employees to wash the windows in Galileo High School, and to support a finding that the injuries to Dubay were caused, at least in part, by such breach.

On the day Dubay was injured he was washing windows at Galileo High School. This school is equipped with Hauser windows. This is an awning-type, reversible

window, about five feet in height. It opens from the bottom. The top of the window is held to the window frame by two wing bolts. Each bolt screws into a metal plate attached to the sash by three wood screws. The wing portion of each bolt rests in a slot attached to each side of the window frame. The window may be opened from the bottom and completely reversed. As the window is opened the wing portions of the two wing bolts slide down in the slots. As additional support for the window when opened, on each side of the sash, there is a metal arm, one end attached to the middle of the sash, the other to the bottom side of the window frame. As the top of the window comes down and the window reverses, the window pivots on these metal arms and on the wing bolts. The window is reversed by pushing it to a horizontal position and then hooking the end of a window pole over the bottom edge of the window and then bearing down on the pole.

Dubay testified that he pulled the window upon which he was working into a horizontal position. He then washed the window by standing on the sill and leaning out over the window. At the time of the accident his right foot was not on the sill and considerable of his weight was on the window. The wing nut sheered off when he placed his weight on the window. This caused the entire window to fall out and Dubay fell to the ground two stories below. Dubay also testified that his foreman, a Mr. Keough, did not instruct him to use a stepladder in washing these windows, nor did Keough ever give him a safety line to use while washing the windows. Dubay had not been instructed not to lean or put his weight upon a horizontally pivoted window, nor had he been instructed to use a safety device when standing or sitting on a window sill.

Keough, the foreman in charge of window cleaning for the Maintenance Company, testified that it was his duty to supply the equipment needed by the washers to perform the job in a safe manner. Mr. Vaughan was his superior. Keough was told to clean the windows and that the

washers should use stepladders from the inside in washing Hauser windows. In general, he knew of the contract provisions. He also knew the safety rules applicable, and knew that his employer was required to comply with them. He knew that the safety rules required that a window washer use a safety belt and line tied to a radiator when working on a window sill from certain positions, and he admitted that he never furnished Dubay with a belt or line. He also admitted that he never told Dubay to use the safety devices required by the rules, nor did he tell him to use a stepladder in washing Hauser windows. He knew that Dubay did not use safety devices or a stepladder. Although he was not present when Dubay fell, he knew how the windows had been washed in the past. He knew that the washer customarily leaned out from the sill with his weight upon the window to wash it, and at the time of the accident did not know that this was not proper because the windows had always been washed in that fashion. When asked as an expert on window washing whether it would not have been safer for the men, if they were to wash the windows in this fashion, to tie themselves to the radiator, he stated that it would have been.

On the other hand, Keough testified at the time of trial that it was not customary for washers of Hauser windows to use a safety line, although in a deposition he had stated that that was the custom. In his opinion it would not be safe to wash a Hauser window from a stepladder because the ladder would be too far from the window. He also stated that it was not practical for the washer to tie himself to a radiator. He admitted that he knew that he was supposed to carry out the terms of the contract, and that he knew that the terms of the contract were not being carried out. He testified that he reported to his superior, Mr. Smith, and probably to Mr. Vaughan, that ladders were not being used "because we couldn't work off of them."

Vaughan, general manager and vice-president of the Maintenance Company, denied that it was his function to give or-

ders to Keough, that being the duty of Mr. Elliot, manager of the San Francisco division of the company, and denied knowing how the windows were washed. He admitted, however, knowing that it was the general practice for the washer to lower the window into a horizontal position, lean over it and wash it with his weight on the window.

A fellow workman of Dubay had washed windows at this high school and had never encountered a window not in good working condition. He was never told to wash Hauser windows from the inside from a ladder. On prior occasions he had not used a ladder or a safety line while washing such windows.

There was ample evidence that it was practical to wash the windows from the inside while on a ladder, and that it was the proper thing to use a safety line if the window was washed while the washer stood on the sill. A former safety engineer for the Division of Industrial Safety so testified, and also testified that the method used by Dubay was not a safe method because the pivot rod on the window is not constructed to support the weight of a man.

In the first trial and in this trial the evidence was to the effect that the threads of one of the wing nuts on the window being washed by Dubay were partially stripped. The fellow workman, after the accident, discovered that this wing bolt had sheered off so that the entire frame of the window gave way when Dubay's weight was put upon it. Joseph Russell, a civil engineer employed by the State Division of Industrial Safety as a construction safety engineer, investigated the accident. He found the window in question hanging on the outside of the building supported by the lever arms. He found the wing nut that had given way and concluded that it had been torn loose by a force which pulled the lug out of its threads, and which also tore the slot. In his opinion the three threads closest to the shoulder were not screwed into the plate upon the sash. The condition of the window was, in his opinion, one of the causes of the accident. He also believed that it

would be desirable for the window washer, if he washed the window from the sill, to attach himself to some object in the room.

On this evidence the jury could have found that the Maintenance Company was negligent in permitting Dubay to wash the windows by standing on the window sill without safety equipment. The holding in the prior case and the evidence in this one shows that the School District was negligent in failing to supply to Dubay a safe place in which to work. It is also clear that the evidence is sufficient to show that the Maintenance Company breached its contract with the School District when it failed to furnish its window washers stepladders and failed to require the washers to use ladders while washing Hauser windows. The question presented is whether or not, under such circumstances, the School District, having been compelled to pay Dubay damages, may seek indemnity from the Maintenance Company, Dubay's employer, when the evidence is sufficient to show that the Maintenance Company was not only negligent but guilty of a breach of contract in the manner in which it performed its contract obligations.

This type of problem has come before the courts on several occasions. There are quite a number of cases permitting the third party to recover under such circumstances from the one who breached the contract, even in the absence of an express contract of indemnification. The precise theory upon which recovery is permitted in such cases is not too clear. Some cases, as we shall see, treat the third party and the contract breaker as joint tortfeasors, but permit recovery by one joint tortfeasor from the other by creating an exception to the rule of non-contribution, finding that the parties are not *in pari delicto*, or that the third party is guilty of only "passive" or "secondary" negligence while the employer is guilty of "active" or "primary" negligence. Other cases hold that the contract between the third party and the contract breaker amounts to an implied contract to indemnify, and that the contract breaker is liable on this implied contract and that in

such cases the non-contribution rule has no application.

Before discussing these cases there are several issues presented that should first be discussed. The Maintenance Company maintains that it cannot be liable to the School District because the Workmen's Compensation Act provides the exclusive remedy of an injured employee against his employer, and that if the employer were compelled to pay the School District the damages paid by that district to Dubay, then Dubay would be indirectly recovering from his employer in a tort action. The employer, of course, is not liable to its employee in tort.

This precise problem has not been directly passed upon by the California courts, but the Supreme Court has decided an analogous problem. In *Baugh v. Rogers*, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043, the court held that although an injured employee could not recover in tort against her employer (who was driving a borrowed car and who negligently drove and injured her employee) because of the compensation act, she could recover in tort from the owner of the automobile, and that then the owner could recover from the employer under section 402(d) of the Vehicle Code and the law of bailments. Section 402(d) of the Vehicle Code provides that the owner may recover from the negligent operator where the owner is compelled to pay the injured person. In the *Baugh* case the court stated that the right thus conferred becomes an integral part of every contract of bailment of a motor vehicle in this state. The majority of the court then discussed the precise problem here involved as follows (24 Cal.2d at page 216, 148 P.2d at page 642):

"There is nothing in the Labor Code which abrogates this obligation imposed on the bailee by the law of bailments. If the owner of a motor vehicle, without fault on his part, suffers a judgment based on the imputed negligence of his bailee, he becomes entitled to recover the amount of that judgment and costs from the negligent bailee. What may have been the relation-

ship between the plaintiff in the original action and the bailee is immaterial in an action between the bailor and the bailee, based exclusively upon their independent, correlative rights and obligations.

"It has been suggested that this holding may tend to impose double liability upon the negligent operator; i. e., liability to his employee for workmen's compensation and to the owner for the amount of the judgment against him arising out of the same injury. But the conclusion is not sound. The owner will be entitled to have credited on the judgment against him any amount paid by the operator (or his insurance carrier) by way of compensation for the injury, and the amount to be recovered by the bailor-owner from the bailee-operator necessarily will be reduced *pro tanto*."

[2] In the instant case there is no statute comparable to section 402(d) of the Vehicle Code applicable, but that statute was used in the Baugh case simply to create a term of the contract of bailment and to provide a remedy for its breach. In the present case we do not need a statute to create the term of the contract. The parties entered into a written contract to wash Hauser windows from a step-ladder. Nor do we need a statute to create a remedy. The law of contracts provides a remedy for breach of contract. Thus the case of Baugh v. Rogers, *supra*, seems controlling in the instant case.

The United States Supreme Court has passed on this precise problem in *Ryan Stevedoring Co. v. Pan-Atlantic Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133. There a shipowner was required to pay damages to a stevedore injured in the course and scope of his employment. The shipowner was negligent in failing to supply the stevedore with a safe place in which to work. The stevedoring company had a contract with the shipowner. It was negligent in the stowage of the cargo. The shipowner sought reimbursement from the stevedoring company. The court stated the problem as follows (350 U.S. at page

128, 76 S.Ct. at page 234): "The first question is whether the Longshoremen's Compensation Act [33 U.S.C.A. § 901 et seq.] precludes the assertion by a shipowner of a stevedoring contractor's liability to it, where the contractor is also the employer of the injured longshoreman." By a divided court it was held that it did not. The rationale of the majority opinion is that the Compensation Act provides the exclusive remedy of the employee against his employer, but in no way affects the rights of third persons against the employer. The Act gives the employee the right to sue third persons, but in no wise limits the rights of third persons to contract with an insurance company or the employer to indemnify the third person in case he is held liable. The reasoning is sound. (See also *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491, decided by a unanimous court and written by one of the dissenting judges in the Ryan case, reaching the same conclusion as the Ryan case.)

[3] Something should also be said about the doctrine of *res judicata* and the doctrine of collateral estoppel. Are the issues determined in the action by Dubay against the School District, *res judicata* in this action by the School District against the Maintenance Company? We think they are, that is, whatever was determined in the prior action is *res judicata* in the instant case although the Maintenance Company was not a party to that action.

The leading case on this subject in this state is *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892, in which the Supreme Court overruled the older cases holding that the plea of *res judicata* is available only when there is both privity and mutuality of estoppel. In so doing, Mr. Justice Traynor, the author of the opinion, stated (19 Cal.2d at page 811, 122 P.2d at page 894): "The criteria for determining who may assert a plea of *res judicata* differ fundamentally from the criteria for determining against whom a plea of *res judicata* may be asserted. The requirements of

due process of law forbid the assertion of a plea of *res judicata* against a party unless he was bound by the earlier litigation in which the matter was decided. [Citations.] He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. Ibid. There is no compelling reason, however, for requiring that the party asserting the plea of *res judicata* must have been a party, or in privity with a party, to the earlier litigation." At page 813 of 19 Cal.2d, at page 895 of 122 P.2d the court then listed the proper requirements for the plea of *res judicata*, as follows: "In determining the validity of a plea of *res judicata* three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

If these tests be applied to the present case it is quite clear that the determination that the School District failed to furnish a safe place in which the window washers were to work is *res judicata* in the present case.

Thus, we come to the basic problem here involved. The School District, as a matter of law, was negligent in failing to supply a safe place in which Dubay was to work. The Maintenance Company contracted and agreed to wash the windows in a certain way. The windows were washed in a manner in direct violation of this contract. Was the trial court correct in holding that, as a matter of law, the Maintenance Company is not liable for damages for breach of its contract, the damages obviously being the amount that the School District was obligated to pay to Dubay and to the workmen's compensation insurance carrier?

The parties argue this question as if the School District and the Maintenance Company were joint tortfeasors, and disagree as to whether an exception to the rule of no contribution between joint tortfeasors exists in this case. Both parties

agree that on the date of the injury to Dubay—February 6, 1952—the law in California was that there was no right of contribution between joint tortfeasors. In 1957 this common law rule was modified in this state by statute (§§ 875–880, Code Civ.Proc.) but by express terms the modifying statutes were made applicable only to causes of action "accruing on or after January 1, 1958." § 880, Code Civ.Proc. These statutes are, therefore, not here involved.

[4] There can be no doubt that the School District and the Maintenance Company are joint tortfeasors. The normal common law rule is that one joint tortfeasor cannot seek contribution from the other. The trial court granted the nonsuit in the belief that this doctrine was applicable to the facts here involved.

The rule of non-contribution has some exceptions. In 140 A.L.R. 1306 there is an annotation on the subject "Contribution or indemnity between joint tort-feasors where injury to third person results from violation of a duty which one tort-feasor owes to other." After quoting the general rule of non-contribution the annotation states (at page 1306):

"To these exceptions to the application of the general rule, the courts in a few cases have added another exception to the effect that where the injury which resulted to a third person, as to whom both of the parties were negligent or guilty of a wrongful act, arose from a violation by the defendant of a duty owing by him to the plaintiff, or that where the defendant was a wrongdoer to the plaintiff but the plaintiff was not a wrongdoer to the defendant, although both were liable to the person injured, the plaintiff may recover contribution or indemnity, as the case may be, from the defendant notwithstanding the fact that his negligence also contributed to the third person's injury. [Citations.]

"The cases expressly basing the decision allowing contribution or indemnity upon the ground of a breach by the defendant of a duty owing by him to the plaintiff are

rare; but in numerous cases the courts, under facts involving such a duty either in contract or in tort and breach thereof, have reached the same conclusion, without however, basing their decision upon the violation of such duty owing to the plaintiff, but upon some recognized exception to the general rule, as that the parties were not in *pari delicto* as to each other, or that the negligence of one was primary or direct or active, while that of the other secondary, indirect, passive or constructive."

Numerous cases are cited in support of these rules. Other cases can be referred to. In *Phoenix Bridge Co. v. Creem*, 102 App.Div. 354, 92 N.Y.S. 855 (affirmed without opinion 185 N.Y. 580, 78 N.E. 1110), a pedestrian was injured. The main contractor was held entitled to be indemnified by the subcontractor, even though there was no express contract of indemnity. It was contended that the contractor and subcontractor were joint tortfeasors. The court held (92 N.Y.S. at page 856): "While there are some expressions in opinions which may seem to give color to the contention stated, I think the general trend of the decisions is adverse, and that the liability which results from the mere omission of a legal duty is to be distinguished, for the purposes of this case, from that which results from personal participation in an affirmative act of negligence, or from a physical connection with an act of omission by knowledge of or acquiescence in it on the part of the original contractor, or by his failure to perform some duty in connection with it which he may have undertaken by virtue of his agreement. In other words, while both the plaintiff and the defendants were equally culpable and equally liable to the traveling public for the omission of duty which resulted in the injury, yet, as between themselves, the plaintiff was entitled to rely upon the defendants to discharge the duty because of their contractual relations, and the former could only be deprived of the right of indemnity by proof that it did in fact participate in some manner in

the omission, beyond its mere failure to perform the duty imposed on both by the law."

In *Otis Elevator Co. v. Maryland Casualty Co.*, 95 Colo. 99, 33 P.2d 974, an elevator company contracted with the owner of a building to install an elevator and to keep it in repair. It failed to do so. The owner was compelled to pay damages to passengers injured when the elevator fell. The owner was entitled to reimbursement from the elevator company even though the owner had been negligent in failing to inspect the elevator. The court held that the doctrine of joint liability was not applicable for the reason that the failure of the owner to inspect the elevator (33 P.2d at page 977) "would have resulted in no damage, without a primary cause, which was established by competent evidence as the negligence of Otis Company in failing to install the hoisting cables in a careful manner."

Another interesting case is *Seaboard Air Line Ry. Co. v. American District Electric Protective Co.*, 106 Fla. 330, 143 So. 316. There a railroad employee was injured and recovered damages from his employer because of failure to warn the employee of a sagging wire. This wire was negligently maintained by a contractor in violation of its contract with the railroad. The employer was held entitled to reimbursement. The court stated (143 So. at page 316): "The relation of master and servant and the breach of the master's duty toward the servant with regard to warning him of the negligence of the signal company in leaving in his path a sagging wire gave rise to one kind of liability from the master to the servant. But the negligence of the signal company, in breaching its duty not to let the wire sag to the injury of the railroad company's servants for which the railroad company might become liable, gave rise to tort action by the railroad company against the signal company, not for the breach of the duty which the signal company owed the injured railroad employee, but for a breach of the duty which the signal company owed the railroad company

under the contractual relationship which had been brought into existence between them."

In *Busch & Latta Paint Co. v. Woermann Const. Co.*, 310 Mo. 419, 276 S.W. 614, a painting contractor paid damages to its employee when the employee fell from a defective scaffold which the painting company failed to inspect. The painting company was held to be entitled to indemnity from the company that built the scaffold. The court declared (276 S.W. at page 619): "In all cases where one party creates the condition which causes the injury, and the other does not join therein, but is exposed to liability, and suffers damages on account of it, the rule that one of two joint tort-feasors cannot maintain an action against the other for indemnity does not apply."

The United States Supreme Court has recently met this problem. It allowed the third person to recover from an employer where the employer, as in the instant case, breached its contract with the third person and an employee was injured. There was no express contract of indemnification between the third person and the employer. The case is *Weyerhaeuser Steamship Co. v. Nacirema Operating Co. Inc.*, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491, decided in March of this year. In that case a stevedoring firm contracted to furnish the shipowner stevedoring services. In an action by the longshoreman against the shipowner the latter was found to be negligent and damages awarded. The shipowner paid the damages and sought indemnity from the stevedoring company. That is precisely the problem here presented. The court, in an unanimous opinion, held that the shipowner was entitled to indemnity. The reasoning of the court was that the stevedoring company had contracted with the shipowner to furnish stevedoring services; that such a contract necessarily implied an obligation to perform the work involved with reasonable safety and to discharge foreseeable damages resulting to the shipowner from the contractor's improper performance. Thus

the court found an implied agreement to indemnify. It reasoned that the Contractor breached its contract with the shipowner; that such breach foreseeably led to damages being recovered from the shipowner; that under such circumstances the shipowner "was entitled to indemnity absent conduct on its part sufficient to preclude recovery" (at page 441 of 78 S. Ct.); that whether the shipowner's negligence was sufficient to preclude recovery was a jury question. The court also stated (at page 442 of 78 S.Ct.): "In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate."

The Supreme Court placed its main reliance on the case of *Ryan Stevedoring Co. v. Pan-Atlantic Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L.Ed. 133, decided, on rehearing, in January of 1956. In that case the shipowner had a contract with a stevedoring firm for stevedoring services. A longshoreman was injured because of faulty stowage of the cargo. He sued the shipowner and recovered \$75,000 damages. The shipowner sought indemnity from the stevedoring firm. After first holding that the Longshoremen's Compensation Act was not a bar to the action, the court held that the contract of the stevedoring company with the shipowner included, by implication, a provision to save the shipowner harmless from any damages flowing from a breach of the contract and not flowing from the shipowner's negligence. The court held that the stevedoring firm had contracted to stow the cargo with reasonable safety "and thus to save the shipowner harmless from petitioner's failure to do so." (350 U.S. at page 130, 76 S.Ct. at page 235.) The court pointed out that if the shipowner had purchased a formal bond of indemnity from an insurance firm, it could clearly recover if the terms of the bond were violated, because such "a liability springs from an independent contractual

right. It is not an action by or on behalf of the employee * * *. It is a simple action to recover, under a voluntary and self-sufficient contract, a sum measured by foreseeable damages occasioned to the shipowner by the injury or death of a longshoreman on its ship." (350 U.S. at page 130, 76 S.Ct. at page 235.) The court pointed out (350 U.S. at page 131, 76 S.Ct. at page 236): "The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third-party complaint is grounded upon the contractor's breach of its purely consensual obligation *owing to the shipowner* to stow the cargo in a reasonably safe manner."

The court then pointed out that, although both the shipowner and the stevedoring firm owed a duty to the injured stevedore, the action was not based on a violation of that duty but upon the stevedoring company's contractual obligation to the shipowner. Thus "the shipowner's claim here also is not a claim for contribution from a joint tortfeasor." (350 U.S. at page 133, 76 S.Ct. at page 237.) The court stated that the stevedoring company, by necessary implication, contracted to stow the cargo properly and safely—such was "the essence of petitioner's stevedoring contract" (350 U.S. at page 133, 76 S.Ct. at page 237.) And again "The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service." (350 U.S. at page 134, 76 S.Ct. at page 237.) The court, on the same page, concluded: "Petitioner suggests that, because the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage of the cargo and did not do so, it now should be barred from recovery from the stevedoring contractor of any damage caused by that contractor's uncorrected failure to stow the rolls 'in a reasonably safe manner.' Accepting the facts and obligations as above stated, the shipowner's present claim against the con-

tractor should not thereby be defeated. Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach." See also *London Guarantee & Accident Co., Limited of London, England v. Strait Scale Co.*, 322 Mo. 502, 15 S.W.2d 766, 64 A.L.R. 936; *American President Lines v. Marine Terminals Corp.*, 9 Cir., 234 F.2d 753; *Wise Shoes v. Blatt*, 107 Pa.Super. 473, 164 A. 89.

[5,6] The reasoning of these cases, particularly of the two decided by the United States Supreme Court, is quite convincing. The Maintenance Company contracted and agreed to wash the Hauser windows from the inside from stepladders. This contract was breached. Stepladders were not furnished to employees, nor were they instructed to use them. The contract also provided that the Maintenance Company "is held responsible for payment of any and all damages" resulting from its operations. Even if this did not amount to an express contract to indemnify the School District for damages caused to it by a breach of the contract by the Maintenance Company, such a warranty or agreement to indemnify would necessarily be implied. Whether the School District should be precluded from recovery by reason of its conduct, that is, whether the conduct of the District helped to bring about the damage, is at least a question of fact and should have been left to the jury. Under such circumstances it was error to grant the nonsuit.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

162 Cal.App.2d 655

Leroy B. MARTELLI, doing business under the fictitious name and style **Seaside Disposal Service**, Plaintiff,
v.

George D. POLLOCK et al., Defendants.

George D. Pollock, Mary S. White and W. B. White, a co-partnership doing business as **Community Garbage Service**, Cross-Complainants and Appellants,

City of Seaside, Municipal Corporation, **Jack W. Oldemeyer, John E. Craige, Joe A. Cota, G. T. Cunningham, Saul M. Weingarten and Gordon W. Howe**, Cross-Defendants and Respondents.

No. 17749.

District Court of Appeal, First District,
Division 1, California.

Aug. 11, 1958.

Action brought for damages and for injunctive relief against interference with plaintiff's city garbage collection franchise. Defendants joined additional parties and cross-complained for alleged wrongful interference with their county franchise for collection of garbage in area which had, subsequent to grant of county franchise, been incorporated as city. The Superior Court, Monterey County, Anthony Brazil, J., rendered summary judgment for the individual cross-defendants, and cross-complainants appealed. The District Court of Appeal, Fred B. Wood, J., held that the cloak of official immunity covered all of the activities complained of.

Summary judgment affirmed and appeals from orders dismissed.

1. Municipal Corporations ⇨170

That city officials might have labored under some misapprehension as to scope of their powers would not necessarily deprive them of their immunity from liability toward persons affected thereby.

2. Municipal Corporations ⇨170

City council had power to pass ordinance, and members thereof could not be held liable for interfering with garbage collector's rights under pre-existing con-

tract with county, even if they acted from wrongful motive in enacting ordinance authorizing making of contract for collection of garbage in that portion of county which had, subsequent to county contract date, been incorporated as city.

3. Municipal Corporations ⇨170

Where ordinance authorized making of contract for collection of garbage in that portion of county which had been incorporated as city and empowered city council to provide for inclusion in such contract of such terms as it deemed necessary to protect interests of city, members of council acted, in fixing terms of contract and rejecting bid, in an administrative capacity requiring exercise of discretion and judgment, and doctrine of immunity was applicable to their exercise of that function, and therefore they could not be held liable for alleged wrongful interference with garbage collection franchise awarded by county prior to incorporation of area as city.

4. Officers ⇨114

The rule of absolute immunity, notwithstanding malice or other sinister motive, is not restricted to public officers who institute or take part in criminal actions but extends to all executive public officers when performing, within scope of their power, acts which require exercise of discretion or judgment.

5. Municipal Corporations ⇨170

Cloak of immunity covers city attorney discharging duties of his office by giving legal advice to other city officials, and likewise covers clerk-administrator of city in performance of his administrative and ministerial functions; and neither of such officials could be held liable for allegedly wrongful interference with pre-existing county franchise for collection of garbage merely by reason of fact that city attorney had advised city council as to legality of awarding contract for collection of garbage in that portion of county which had thereafter been incorporated as city or by reason of clerk-administrator's activity in carrying out directions of city council with regard to contract.

6. Judgment ⇨181(6)

Where it conclusively appeared that there was an absolute defense to cause of action alleged, factual conflicts upon other aspects of case would not deprive (cross) defendants of right to summary judgment.

7. Appeal and Error ⇨882(6), 889(2)

Even if immunity had not been specially pleaded as defense to (cross) action against city officials, it was not error to predicate summary judgment for such officials on that ground where parties had tried motion for summary judgment upon theory that official immunity was an issue; and, in any event, (cross) complainants, who had filed, on appeal, memorandum stating that record raised immunity issue, were in no position to claim error in that regard.

8. Pleading ⇨150

In verification of answer to cross-complaint, answerer should have been identified as a "cross-defendant" rather than as "plaintiff" and term "answer to cross-complaint" should have been used; but such discrepancies were properly treated as typographical errors.

9. Appeal and Error ⇨863

Whether answer to cross-complaint would have been vulnerable as a pleading, when appropriately challenged as such, because of alleged denial on information and belief of allegations of facts ascertainable by inspection of public record, was not significant on appeal from summary judgment for cross-defendants.

10. Judgment ⇨183

Cross-defendants' motion for summary judgment was not subject to claimed infirmities of speaking in terms of motion to strike cross-complaint and of not purporting to be under appropriate Civil Procedure Code subsection. West's Ann.Code Civ. Proc. § 437c.

11. Appeal and Error ⇨93

A mere order granting a motion for summary judgment is not appealable.

George D. Pollock, Salinas, for appellants.

Saul M. Weingarten, City Atty. of City of Seaside, Seaside, for respondents.

FRED B. WOOD, Justice.

Monterey County awarded defendants a franchise for the collection and disposal of garbage and refuse in a certain area of the county. A portion of that area later was incorporated upon the formation of the City of Seaside. Subsequently, the City of Seaside awarded plaintiff the exclusive franchise for the collection and disposal of garbage and refuse within the city limits. Finding that defendants continued to make collections within the city limits, plaintiff brought this action for damages and to enjoin interference with his alleged franchise.

Defendants cross-complained against plaintiff, also joining as cross-defendants the City of Seaside, the members of the city council,¹ the city attorney and the clerk-administrator of the City of Seaside.

All of the cross-defendants except plaintiff moved for a summary judgment against the cross-complainants. The motion was granted as to all of them except the City of Seaside; that is, in favor of the mayor, the members of the city council, the city attorney and the clerk-administrator. Cross-complainants have appealed.

(1) *Does the record show an absolute defense to the cross-complaint with no issue of fact to be tried? Yes.*

The gist of the cross-complaint is that the cross-defendants "acting in unison, concert and collusion pursuant to a conspiracy with intent to damage cross-complainants without lawful authority adopted" an ordinance pursuant to which the franchise was issued to plaintiff; also, that cross-defendants "acting in concert in furtherance of said conspiracy to damage cross-complainants, without lawful authority, adopted" a resolution "directing the City Clerk" to cause notification "for bids under the terms of said" ordinance, and that "in furtherance

1. One defendant councilman also acted as mayor.

of said conspiracy with intent to damage cross complainants" the city clerk published the notification for bids, the city council accepted plaintiff's bid, the cross-defendants caused the city to enter into an agreement with plaintiff for the exclusive collection and disposal of garbage and rubbish and breached the agreement with cross-complainants and usurped the garbage collection franchise of cross-complainants.

Cross-defendants' affidavit in support of their motion for summary judgment contained these significant statements: "That heretofore cross-complainants collected garbage, refuse and trash in the area which, being then in the County of Monterey, was administered by the County Board of Supervisors; that said area became incorporated as the City of Seaside, thus coming under the legislative control of the City Council of said city and being withdrawn from the legislative control of the County Board of Supervisors; that said City Council did consider various proposals for the collection of garbage, refuse and trash within the said City of Seaside and did thereafter enact the ordinance setting forth sanitary requirements which is attached to Cross-Complaint herein; that under the terms of said ordinance, a contract was entered into with Leroy B. Martelli, dba Seaside Disposal Service, after competitive bids had been called for and during which cross-complainants had submitted a bid which was not accepted by said City Council;

"That the only actions of the said individually named cross-defendants were in their official capacities as City Councilmen, City Attorney and City Clerk, respectively, to wit, that the said named cross-defendant City Councilmen considered the various matters concerned with garbage disposal and, acting in their official capacities, exercised their discretion as indicated herein; that said named cross-defendant City Attorney advised said City Council as to the legality of their said action; that said named cross-defendant City Clerk carried out the direction of said named City Council." (Emphasis added.)

The facts thus stated by cross-defendants were not controverted in any affidavit filed on behalf of cross-complainants. Instead, they made an oblique attack, averring that their franchise contract with the county had not been extinguished; therefore, the city and its council had no authority to grant anyone else a franchise for the same service "and its act in so doing was without authority, wrongful unlawful and malicious * * * The making of the additional garbage collection contract by the City Council was Ultra Vires and was void and for which the municipal corporation of the City of Seaside cannot be held liable, consequently city officials and employees participating in Ultra Vires acts lose their immunity to damages and become personally liable for all damages caused by their acts." This does not gainsay the fact (shown by the cross-defendants' affidavit) that the city councilmen, the city attorney and the clerk-administrator acted in their official capacities.

[1,2] In performing their official functions they may have labored under some misapprehension as to the scope of their powers but that would not necessarily deprive them of their immunity from liability toward persons affected thereby. "If government, operating through the individuals who form it, is afforded immunity from private suit only when its actions are beyond any question, and losses that immunity upon mere allegation of improper motives or unlawful acts in a complaint seeking damages, then those persons who form government are subject to the threat of personal liability in any matter in which their discretion is exercised." *Hancock v. Burns*, 158 Cal.App.2d 785, 323 P.2d 456, 460. In the *Burns* case the court held that legislative immunity protected a member of the state legislature when sued for inducement of a breach of contract, in the face of allegations of malice and exceeding the scope of authority. Here there is no question but that the council was empowered to pass ordinances and despite the allegations of wrongful motive are protected by the doctrine of legislative immunity. We

perceive no different considerations present in the case of a city legislator than a state legislator. (See 4 McQuillin, Municipal Corporations (3d ed.) p. 183, § 12.222.)

[3,4] The ordinance authorized the making of a garbage collection contract and empowered the council to "provide for the inclusion in such contract of such terms as it deems necessary to protect the interests of the City." In fixing the terms of the contract, and rejecting cross-complainants' bid, the council was acting in an administrative capacity requiring the exercise of discretion and judgment. The doctrine of immunity would protect them in this function as well. The Supreme Court stated in *Hardy v. Vial*, 48 Cal.2d 577, 582, 311 P.2d 494, 496: "The rule of absolute immunity, notwithstanding malice or other sinister motive, is not restricted to public officers who institute or take part in *criminal* actions. First recognized for the protection of judges (*Bradley v. Fisher*, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646), it has been extended by the federal decisions to all executive public officers when performing within the scope of their power, acts which require the exercise of discretion or judgment. [Citing cases.] In this state *Downer v. Lent*, 6 Cal. 94 [65 Am. Dec. 489], and *Oppenheimer v. Arnold*, 99 Cal.App.2d 872, 874, 222 P.2d 940, recognize the same wide immunity."

[5] These principles apply similarly with equal force to the other city officials: to the city attorney when discharging the duties of his office by giving legal advice to the other city officials (see *Pearson v. Reed*, 6 Cal.App.2d 277, 288, 44 P.2d 592; *White v. Brinkman*, 23 Cal.App.2d 307, 313, 73 P.2d 254; *Norton v. Hoffmann*, 34 Cal. App.2d 189, 93 P.2d 250); and to the clerk-administrator in the performance of his administrative and his ministerial functions (*Dawson v. Martin*, 150 Cal.App.2d 379, 309 P.2d 915).

[6] In view of this total defense which flows from official immunity, no amount of factual conflicts upon other aspects of the case could affect the result.

[7] In their opening brief cross-complainants claimed that immunity was not an issue below because not specially pleaded as a defense. A sufficient answer to that contention is that the parties tried the motion upon the theory that official immunity was an issue. Moreover, in a memorandum later filed upon this appeal counsel for cross-complainants says that "the record herein consisting of the cross-complaint and two affidavits, raises a number of issues, and includes the issue of sovereign or other immunity * * *"

(2) *Cross-complainants present a number of points of practice and procedure that are lacking in substance and do not affect the result.*

[8] For example, they contend that the answer to the cross-complaint was ineffectively verified. The verification states that Gordon H. Howe, the city clerk is "one of the plaintiffs above named; that he has read the foregoing Complaint and knows the contents thereof * * *" The terms "cross-defendants" and "answer to cross-complaint" should have been used. It is apparent that the discrepancy was a typographical error and was so treated by the trial court.

[9] Cross-complainants also object to the denial on information and belief of certain allegations of the cross-complaint, on the ground that these embraced facts which may be ascertained by inspection of a public record. Whether or not that renders the answer vulnerable as a pleading, when appropriately challenged as such, is not significant here.

[10] Cross-complainants say the motion for summary judgment did not purport to be under section 437c of the Code of Civil Procedure and spoke in terms of a motion to strike the cross-complaint. A complete answer is that it spoke in terms of a motion for "summary judgment" and noted upon it or appended to it was a citation of section 437c.

[11] Several orders are under appeal. A minute order of October 19, 1956, grant-

ed the motion for summary judgment in favor of all of the cross-defendants except the plaintiff. It was amended by a minute order of October 26, 1956, denying the motion as to the City of Seaside. Also filed on October 26 was a written order for summary judgment. On the same day a "summary judgment," signed by the clerk, was filed. A mere order granting a motion for summary judgment is not appealable. *Shea v. Leonis*, 29 Cal.App.2d 184, 190, 84 P.2d 277. Accordingly, the judgment is affirmed and the appeals from the orders are dismissed.

PETERS, P. J., and BRAY, J., concur.



162 Cal.App.2d 685

**Eugene A. TALIAFERRO, Plaintiff and
Appellant,**
v.

Glen SALYER et al., Defendants,

**Mrs. Francis McCarthy, Defendant and
Respondent.**
No. 17490.

District Court of Appeal, First District,
Division 1, California.
Aug. 12, 1958.

Action by property owner against adjoining property owners for building structures on adjoining property allegedly interfering with plaintiff's alleged easement of light and air and encroachment on his property. From a judgment of the Superior Court, Contra Costa County, Homer W. Patterson, J., entered on an order sustaining a demurrer to the complaint, the plaintiff appealed. The District Court of Appeal, Bray, J., held that a landowner has no easement over adjoining lands for light and air and limitations in building code do not confer on a landowner any such easements,

and he cannot recover damages from an adjoining landowner who constructs a house and fence above the limits prescribed by building regulations for alleged interference with light and air.

Judgment affirmed.

1. Pleading ⚡208

Where ambiguity and uncertainty, misjoinder of parties defendant, and improper uniting of several causes of action were stated as special grounds for demurrer but no specifications or particulars were included, lack of such specifications required that special demurrer be disregarded. *West's Ann.Code Civ.Proc. § 430.*

2. Appeal and Error ⚡1040(10)

If a complaint fails to state a cause of action and a general demurrer is properly sustainable, error in not sustaining special demurrer is immaterial.

3. Adjoining Landowners ⚡10(1)

Municipal Corporations ⚡645

A landowner has no easement over adjoining lands for light and air, and limitations in building code do not confer on a landowner any such easements, and he cannot recover damages from adjoining landowner who constructs a house and fence above limits prescribed by building regulations for alleged interference with light and air.

4. Easements ⚡19

Easements for light and air cannot be created by implication but only by express grant or covenant.

5. Fences ⚡1

Municipal Corporations ⚡601(28)

A local government, in exercise of police power, can impose restrictions on maximum height of buildings for purpose of securing adequate light to promote public health in general, and government can restrict height of fences.

6. Municipal Corporations ⚡645

In order to state a cause of action based upon a violation of the building code, plaintiff must show that he has suffered some exceptional damage other than that suffered by public generally.

7. Nuisance ⇨1

Fact that value of plaintiff's property was damaged by proximity of unlawful structures on adjoining property did not entitle him to damages or to have structures declared a nuisance.

8. Adjoining Landowners ⇨6**Municipal Corporations** ⇨666

Even if adjoining property owner constructed her building within set-back lines required by ordinance, plaintiff had no right to go on adjoining property owner's land to repair his building or for any other purpose and he had no cause of action against adjoining property owner for allegedly building so close to plaintiff's property as to render it physically impossible for plaintiff to repair his building.

9. Adjoining Landowners ⇨9(1)

A property owner may maintain an action against an adjoining owner who constructs a building which encroaches upon the former's land.

10. Adjoining Landowners ⇨9(2)

Complaint by property owner against adjoining owners, who constructed structures and buildings on their land, was insufficient to state a cause of action for encroachment of such structures and buildings upon plaintiff's property.

11. Pleading ⇨200

Mere clerical error by use of double negative in demurrer stating that "Fourth, Fifth, Sixth counts of six amended complaints, nor any of them, do not state a cause of action," was properly disregarded.

Eugene A. Taliaferro, in pro. per.

Masterson & Edwards, Richmond, for respondent.

BRAY, Justice.

Plaintiff appeals from judgment on order sustaining demurrer of defendant Mrs. Francis McCarthy to sixth amended complaint.

Questions presented.

1. May a special demurrer which lacks specifications of grounds of objections be considered?

2. Was it error to sustain the demurrer to the fourth, fifth and sixth counts?

3. Was defendant's general demurrer insufficient?

1. Special demurrer.

[1] The demurrer was both general and special. The special grounds were stated in the words of section 430, Code of Civil Procedure, as "a misjoinder of parties [defendant]," "several causes of action * * improperly united, and not separately stated," the complaint "is ambiguous" and "uncertain." No specifications or particulars were included. It is well settled that lack of such specifications requires that the special demurrer be disregarded. See *Coons v. Thompson*, 75 Cal.App.2d 687, 171 P.2d 443; *O'Callaghan v. Bode*, 84 Cal. 489, 495, 24 P. 269; 2 *Witkin, California Procedure*, p. 1480; 39 *Cal.Jur.2d* 224, 225.

[2] We have no way of knowing whether or not the trial court sustained the special demurrer.¹ It would have been error to do so. Such error would be immaterial if the complaint failed to state a cause of action and a general demurrer was properly sustainable.

2. Fourth Count.

[3] There are nine counts in the sixth amended complaint. However, defendant is expressly excluded from all but the fourth, fifth and sixth counts.²

1. See *Blair v. Mahon*, 1951, 104 Cal.App. 2d 44, 49, 230 P.2d 832, 836, where the court said referring to the practice of the trial courts not to disclose the grounds on which a demurrer is sustained, that it is "a practice which is not at all helpful to a reviewing court * * *".

2. Plaintiff's opening brief, page 2, states: "None of the other causes of action made mention of Respondent [defendant McCarthy] or charged her in any way with complicity or liability."

The substance of the various counts, other than counts fourth, fifth and sixth, is that the defendants named in each, who include the building inspector of Contra Costa County, formed a conspiracy to destroy and impair the rental and market value of plaintiff's described real property, by certain described acts, for which acts plaintiff seeks damages. In the fourth count, plaintiff alleges that all defendants including defendant McCarthy conspired to interfere with plaintiff's property rights in his house and lot to impair their value, and that pursuant to such conspiracy defendants McCarthy and Giannini "built and constructed structures upon their lots immediately adjacent to plaintiff's property * * * in violation of the Building Codes of the County of Contra Costa and considerably in excess of the height of plaintiff's building * * * so as to interfere with and cut off plaintiff's easement for light and air." Also the two last mentioned defendants "constructed a fence greatly in excess of a height of six feet immediately adjacent to plaintiff's property * * * and in such a manner to interfere with and cut off plaintiff's easement for light and air * * *" Plaintiff does not know the exact height of the fence and it is constructed in violation of the county's building code; the interference with and cutting off of plaintiff's easement of light and air has made plaintiff's property completely valueless. Alleging that defendants' conduct was malicious, plaintiff prays for \$5,000 compensatory damages and \$20,000 punitive damages, and the elimination of any interference with plaintiff's "easement of light and air." Thus the gravamen of this count is the construction of buildings and a high fence on the properties of defendants Giannini and McCarthy in violation of the building code and in pursuance of a conspiracy with the other defendants to damage plaintiff's property by cutting off the light and air on plaintiff's property. Plaintiff states in his opening brief that he "was not endeavoring to set up any

easement in a technical sense arising by implication."³ He contends, however, that the county building laws and regulations in establishing set back lines and a fence height of six feet create "mutual rights and obligations existing concurrently as between two adjoining landowners" and that a violation of any of those regulations will give rise to a cause of action by one of those landowners against the one causing the violations and gives to each a "right to the free and uninterrupted passage of light and air above the heights fixed by the maximum height provisions of the Building Code." Thus, the question posed by this count is, can an adjoining property owner recover damages from an adjoining landowner who constructs a house and fence above the limits prescribed by county building regulations for alleged interference with light and air. The answer is no, for the reason that one landowner has no easement over adjoining land for light and air. The limitations in a building code do not confer on an adjoining landowner any such easement. As one landowner has no right to light and air from adjoining land, he cannot claim damages when the adjoining landowner does something strictly on his own property which shuts off the air and light previously coming over the first landowner's property.

[4] It is well settled in California that easements for light and air cannot be created by implication but only by express grant or covenant. *Kennedy v. Burnap*, 1898, 120 Cal. 488, 52 P. 843, 40 L.R.A. 476; *Bryan v. Grosse*, 1909, 155 Cal. 132, 99 P. 499; *Clark v. Mountain States Life Ins. Co.*, 1934, 1 Cal.App.2d 301, 36 P.2d 848.

Plaintiff has cited no case to the effect that the building of a structure on one's property in excess of the height permitted by a building ordinance gives rise to a cause of action by an adjoining owner because of interference with the latter's light and air. As to the construction of a fence over 6 feet in height, plaintiff principally relies upon *Bar Due v. Cox*, 47 Cal.App. 713, 190

3. He further states: "Appellant recognizes that such an easement does not ex-

ist in this State. *Kennedy v. Burnap*, 120 Cal. 488, 52 P. 843."

P. 1056, where an adjoining property owner built a fence at the property's dividing line in excess of 10 feet in height. The reviewing court upheld a judgment of the trial court finding that the maintenance of the fence was malicious and constituted a private nuisance to the adjoining owner and that it must be removed. The court, however, was applying an act of the Legislature of 1913 (Stats.1913, p. 342) which provides that any fence or structure in the nature of a fence, unnecessarily exceeding 10 feet in height, maliciously erected or maintained for the purpose of annoying the occupants of adjoining property, shall be deemed a private nuisance for the abatement of which such occupant may enforce the remedies prescribed by the Civil Code, § 1 et seq. This statute is not applicable here, as there is no contention that the fence is 10 feet or over high, and there is no law making the maintenance of a 6 foot division fence on one's own property a private nuisance. In *Haehlen v. Wilson*, 11 Cal.App.2d 437, at page 441, 54 P.2d 62, at page 64, the reviewing court, reversing a judgment of the trial court which found that the maintenance of a 6½ foot division fence constitute a private nuisance to the adjoining property owner, said: "The doctrine of 'ancient lights' does not apply in California, but in any event it could not be held that a fence six and one-half feet in height would violate such a right, even if it were a recognized rule in California.

"We therefore can find no invasion by defendants of any right of plaintiffs. Defendants may use their land for all lawful purposes to which such lands may be applied providing they exercise ordinary care to prevent unnecessary injury to the adjoining land owner. Surely the erection of a fence six and one-half feet in height to protect their property from trespassers is not an unusual or unlawful act."

[5-7] In the exercise of the police power a local government can impose restrictions on the maximum height of buildings for the purpose of securing adequate sunlight to promote public health in general.

See *Brougher v. Board of Public Works*, 1930, 107 Cal.App. 15, 290 P. 140. And likewise such government can restrict the height of fences. However, a violation would not necessarily give a private individual a cause of action therefor. In order to state a cause of action based upon a violation of the building code, plaintiff must show that he has suffered some exceptional damage other than that suffered by the public generally. As plaintiff has no easement of light and air he cannot complain, in the absence of a statute or of circumstances such as appear in *Griffin v. Northridge*, 67 Cal.App.2d 69, 153 P.2d 800, none of which are alleged here, giving him the right to complain, of the shutting off of light and air to his property. Also, the fact that plaintiff's complaint alleges the value of his property is damaged by the proximity of the unlawful structures does not entitle him to damages nor to have the structures declared a nuisance. See *Biber v. O'Brien*, 138 Cal.App. 353, 361, 32 P.2d 425; *Severy v. Central Pac. R. Co.*, 51 Cal. 194; *Bigley v. Nunan*, 53 Cal. 403.

Fifth Cause of Action.

[8] This contains allegations similar to those in the fourth cause, but alleges additionally that coconspirators McCarthy and Giannini built structures upon their lots immediately adjacent to plaintiff's property in violation of the building codes, so close to the sidewall on plaintiff's property "as to render it physically impossible for any human being to secure ingress and egress between the two buildings for the purpose of making repairs or for any other purpose whatever * * *" It then alleges the repairs essential to the maintenance of plaintiff's building which he cannot make because he cannot get between the two buildings, thereby causing his building to deteriorate, for which he asks damages and also injunctive relief. Plaintiff has cited no cases which hold that set back lines required by a building ordinance creates a servitude or gives an adjoining property owner the right to use for any purpose of his own the portion of the other owner's land included within the set back

line. Even if defendant had constructed her building within the set back lines required by ordinance (if there be any such requirements) plaintiff would have no right to go on her property to repair his building or for any other purpose. See Favot v. Kingsbury, 1929, 98 Cal.App. 284, 291, 276 P. 1083; Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp., 1927, 202 Cal. 56, 67, 259 P. 444, 56 A.L.R. 264. Hence any violation by defendant of the ordinance in this respect could not possibly give any cause of action to plaintiff.

Sixth Cause of Action.

[9, 10] This includes most of the allegations of the preceding cause and alleges additionally that the structures and buildings erected by defendants McCarthy and Giannini "encroach" upon plaintiff's property. At first blush it might appear that this count states a cause of action for, of course, a property owner may maintain an action against an adjoining owner who constructs a building which encroaches upon the former's land. However, it appears from the other allegations that there is no actual encroachment in the sense of any portion of defendants' structures being on plaintiff's property, that plaintiff is referring to the interference with light and air to his property and to the construction of a building on defendants' own property, thereby preventing plaintiff from going between plaintiff's building and defendants' building to repair plaintiff's building.

Neither the fourth, fifth or sixth counts state a cause of action and hence the general demurrer to them was properly sustained. It would seem that, having amended his complaint six times, if there were any facts which could constitute a cause of action plaintiff would have alleged them. Plaintiff does not claim to have facts additional to those pleaded. Therefore, the trial court was well justified in sustaining the demurrer without leave to amend.

3. Defendant's Demurrer.

[11] Plaintiff contends that because of a double negative in the demurrer the demurrer must be completely disregarded.

It states that the " * * * Fourth, Fifth, Sixth * * * Counts of the Sixth Amended Complaint, *nor any of them, do not state a cause of action * * **" (Emphasis added.) While this is poor grammar, it is obvious that it is a mere clerical error, which the trial court properly should have disregarded and did.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



Manuel SILVA and Pauline Hatfield,
Petitioners and Respondents,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Russell S. Munro, Director of Alcoholic Beverage Control, Alcoholic Beverage Control Appeals Board, Ralph J. McGill, as Chairman of said Alcoholic Beverage Control Appeals Board, and Donald H. Bonar and Coleman E. Stewart, as members thereof, Respondents and Appellants.*

Civ. 17983.

District Court of Appeal, First District,
Division 1, California.

Aug. 18, 1958.

Rehearing Denied Sept. 17, 1958.

Hearing Granted Oct. 15, 1958.

Proceeding on application by alcoholic beverage licensees for a writ of mandate directing Alcoholic Beverage Control Appeals Board to hear licensees' appeals from revocation of their licenses. The Superior Court, County of Alameda, Cecil Mosbacher, J., entered judgment in favor of licensees and respondents appealed. The District Court of Appeal, Fred B. Wood, J., held that notices of appeal filed with Department of Alcoholic Beverage Control on the forty-first day after mailing of notices of decision of revocation were untimely, since section of Code of Civil Procedure pertaining to manner in which

* Opinion vacated 333 P.2d 18.

service by mail should be made does not extend by a period of one day the time for filing of such appeal where place of mailing of decision of department and place of receipt are over a certain distance apart.

Judgment reversed with directions.

1. Intoxicating Liquors ☞72

Under statute pertaining to appeal from a decision of the Department of Alcoholic Beverage Control, time for filing an appeal is not extended past 40-day period provided therein, even if notice of the decision is sent by mail. West's Ann.Bus. & Prof.Code, §§ 23081, 25760; West's Ann.Code Civ.Proc. § 1013.

2. Intoxicating Liquors ☞108(10)

Notices of appeal filed with Department of Alcoholic Beverage Control on the forty-first day after mailing of notices of decision of revocation of licenses were untimely, since section of Code of Civil Procedure pertaining to manner in which service by mail should be made does not extend by a period of one day the time for filing of such appeal where place of mailing of decision of the department and place of receipt were over a certain distance apart. West's Ann.Bus. & Prof.Code, §§ 23081, 25760; West's Ann.Code Civ.Proc. § 1013.

Edmund G. Brown, Atty. Gen., Wiley Manuel, Dep. Atty. Gen., San Francisco, for appellants.

Golden & Stefan, Theodore Golden, Robert N. Stefan, Oakland, J. Bruce Fratis, San Francisco, for respondent.

FRED B. WOOD, Justice.

The principal question is whether or not the petitioning licensees effected a timely filing with the respondent department of their notices of appeal from two decisions of revocation of licenses. On October 18, 1956, the department mailed copies of the decisions to the licensees. On November 28 the licensees filed their notices of appeal with the department and the Appeals Board; i. e., on the forty-first day after

the mailing of the notices of decision. The Appeals Board dismissed these appeals upon the ground that they were filed too late.

The trial court held otherwise, upon the ground that section 1013 of the Code of Civil Procedure applies and extends the period by one day, the place of mailing and the place of receipt being 84 miles apart.

The applicable statute declares that "[w]ithin 40 days after the decision * * is delivered or mailed to the parties, any party aggrieved * * * may appeal * * ." Bus. and Prof.Code, § 23081. "Notice of any act of the department required * * * to be given * * * may be made personally or by mail. If made by mail, service shall be made *in the manner* prescribed by Section 1013 of the Code of Civil Procedure. In case of service by mail, the *service is complete at the time of deposit in the United States Post Office.*" Bus. and Prof.Code, § 25760, emphasis added.

As to the *manner in which* service by mail is required to be made, section 1013 prescribes deposit "in the United States post office, or a mail box, sub-post office, substation, or mail chute, or other like facility * * *, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his office address as last given by him * * * otherwise at his place of residence."

[1,2] Section 1013 then proceeds to deal with the question: When is service complete? In that regard it says, as does section 25760: "The service is complete at the time of the deposit" but differs from section 25760 by extending the time limited for the doing of an act thereafter, according to the number of miles between the place of deposit and the place of receipt of the mailed notice. This latter, we think, has nothing to do with the "manner" of giving notice by mail, emphasized by the very fact that the section which adopts by reference the *manner* prescribed by section 1013, expressly declared that "service is complete at the time of the deposit"

(without extending the time otherwise limited for the doing of an act thereafter). Why such a declaration if its subject matter was already covered by the reference to the "manner prescribed by Section 1013"? See *Hollywood Circle v. Department of Alcoholic Beverage Control*, 153 Cal.App.2d 523, 526-527, 314 P.2d 1007; *Van De Veer v. Department of Alcoholic Beverage Control*, 155 Cal.App.2d 817, 820-822, 318 P.2d 686; *Anderson v. Department of Alcoholic Beverage Control*, 159 Cal.App.2d 413, 324 P.2d 24.

We conclude that the notices of appeal were not filed in time. It is, therefore, unnecessary to consider other questions discussed by the parties.

The judgment appealed from is reversed with directions to discharge the alternative writ of mandate and deny the application for a peremptory writ of mandate.

PETERS, P. J., and BRAY, J., concur.



163 Cal.App.2d 8

Nicholas P. APOSTOLOS, Plaintiff and Appellant,

Theodore Corsones, Judgment lien creditor, Appellant,
v.

Antonio ESTRADA, and Railway Express Agency, a corporation, Defendants and Respondents.
Civ. 22764.

District Court of Appeal, Second District,
Division 3, California.

Aug. 18, 1958.

Rehearing Denied Sept. 8, 1958.

Hearing Denied Oct. 15, 1958.

Personal injury action, during pendency of which plaintiff's creditor was granted a lien upon plaintiff's cause of action and any judgment subsequently rendered in favor of plaintiff to the extent of a certain

amount. Lien claimant and plaintiff appealed from order of the Superior Court of Los Angeles County, Wallace L. Ware, J., denied their several motions to vacate order granting defendants' motion for new trial. The District Court of Appeal Patrosso, J. pro tem., held that where creditor is made a lien claimant under provisions of statute but did not seek and was not granted a right to intervene in action, he was not a party thereto and it was not necessary to serve a copy of notice of intention to move for new trial upon lien claimant.

Affirmed.

1. New Trial ⚡138

Judgment creditor of plaintiff who was granted, pursuant to statute, lien on plaintiff's cause of action and any judgment subsequently rendered in plaintiff's favor, but who did not seek and was not granted right to intervene in action, was not a party to action between plaintiff and defendant and it was not necessary for defendant to serve upon him notice of intention to move for new trial. West's Ann. Code Civ.Proc. §§ 659, 688.1.

2. Judgment ⚡776

Statute permitting court to grant to judgment creditor a lien on plaintiff's cause of action and any judgment subsequently rendered in favor of plaintiff against defendant is remedial in character and should be liberally construed to give effect to remedy which it authorizes. West's Ann.Code Civ.Proc. §§ 659, 688.1.

3. Parties ⚡46

Judgment creditor being granted a lien by court on plaintiff's cause of action becomes party to proceeding insofar as it involves establishment of lien, but does not become a party to main action in absence of order permitting him to intervene therein. West's Ann.Code Civ.Proc. § 688.1.

Austin, Austin, Jones & Chaffee, and Richard M. Hawkins, Compton, for appellant Nicholas Apostolos.

P. Basil Lambros, Los Angeles, for appellant Theodore Corsones.

Newlin, Tackabury & Johnston and Willis E. Urick, Jr., Los Angeles, for respondents.

PATROSSO, Justice pro tem.

This is an appeal by the plaintiff and a judgment creditor of the latter from an order denying their several motions to vacate an order granting defendants' motion for new trial.

This litigation was initiated by plaintiff Apostolos against the defendants Estrada and Railway Express Agency to recover damages for personal injuries allegedly sustained by the plaintiff as a result of the negligence of the defendants named.

During the pendency of the action and prior to trial, the appellant Corsones (hereinafter referred to as lien claimant) pursuant to proceedings had under the provisions of section 688.1 of the Code of Civil Procedure, was granted a lien upon plaintiff's cause of action and any judgment subsequently rendered in the action in favor of the plaintiff and against the defendants to the extent of \$1,123.62 plus interest thereon. The lien claimant, however, did not seek and was not granted the right to intervene in the action. Thereafter trial was had before a jury resulting in a verdict and judgment in favor of the plaintiff and against the defendants in the sum of \$15,000, following which, within the time allowed by law, defendants filed and served upon the plaintiff in the action the notice of intention to move for a new trial upon the grounds of the insufficiency of the evidence to justify the verdict and excessive damages. A copy of the notice of intention to move for new trial was not served upon the lien claimant or his counsel. Upon the hearing of the motion for new trial the same was granted upon the ground of the insufficiency of the evidence. Thereupon plaintiff and the lien claimant made several motions to set aside the order granting a new trial upon the ground that the court was without jurisdiction to

make the order by reason of the fact that notice of intention to move for a new trial was not served upon the lien claimant or his counsel, which motions, as previously indicated, were denied.

The question presented is whether a judgment creditor of a plaintiff who, pursuant to section 688.1 of the Code of Civil Procedure, is granted a lien upon plaintiff's cause of action and any subsequent judgment rendered thereon thereby becomes a party to the action. As we have concluded that this question must be answered in the negative there is no occasion to consider the further question discussed in the briefs as to whether such lien claimant's interest in the litigation is adverse to the defendants.

The argument in appellant's brief proceeds upon the assumption that the order granting the lien claimant a lien upon any judgment that might be rendered in the action between the plaintiff and defendants had the effect of making him a party to the action. They then seek to prove that this is so by reference to decisions in this state defining the term "adverse party" as that term is used in Code of Civil Procedure, section 659. These decisions, however, do not discuss the question as to when one is to be considered a party to an action. They determine no more than that, in the particular situations therein presented, one or more of the *parties to the action* were adverse to another party or parties to the action. Insofar as our research reveals each and every case wherein one has been held to be an "adverse party" it will be found that he was a party to the action either in the role of plaintiff, defendant or intervener. Patently this is so, for before one may be said to be an "adverse party" in a proceeding he must be a party thereto.

The statement in appellants' brief that *MacDonald v. Superior Court*, 1929, 101 Cal.App. 423, 281 P. 672, holds that a lien claimant under Code of Civil Procedure, section 688.1, is a party to the proceeding even if he does not seek intervention is

erroneous. Code of Civil Procedure, section 688.1, was not involved in that case. Indeed it was not enacted until more than 10 years after that decision was rendered. Aside from this, the case affords no support for appellants' position. That was a proceeding in certiorari to review the action of the superior court in dismissing an appeal from a judgment rendered in the justice's court. The action in the justice's court was one instituted against a number of defendants and resulted in a judgment in favor of the plaintiff against one of the defendants only. The defendant against whom the judgment was rendered appealed to the superior court but failed to serve notice of appeal upon his codefendants and it was held that the latter were adverse parties entitled to receive notice of appeal because upon a trial *de novo* in the superior court judgment might be rendered against them.

Neither does Title Insurance & Trust Co. v. California Development Co., 1915, 171 Cal. 173, 152 P. 542, 551, support appellants' assertion that one may be an "adverse party" within the meaning of that term as used in Code of Civil Procedure, section 659, even though he is not a party to the action. This assertion is predicated upon the sentence in the opinion reading "An 'adverse party' is *one* whose 'interest in the subject-matter of the motion [for a new trial] is adverse to or will be affected by the granting of the motion or changing the former decision of the court.'" The suggestion that by the use of the word "one" the court intended to declare that a person not a party to the action may be considered an "adverse party" merely because he has an interest therein is unwarranted, for it is obvious that the word "one" as it appears in the quoted sentence refers back to the word "party." All doubt upon this score is removed when regard is had to the fact that the persons and the corporation there held to be adverse parties and entitled to service of notice of intention to move for a new trial were defendants in the action.

"With reference to judicial proceedings, the word 'party' is generally used as meaning one of two opposing litigants, he or they by or against whom a suit is brought, whether at law or in equity; the plaintiff or defendant, whether natural or legal persons. In a larger legal sense the term 'party' or 'parties' has been defined as any or all persons who have a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies, and this definition is especially applicable to persons on whom a judgment is conclusive under the rules of res adjudicata, as discussed in Judgments § 768. * * * In its primary legal sense, and as used in some of the codes, the term 'party' means an interested litigant or person whose name is designated on the record as plaintiff or defendant or in some other equivalent capacity. It refers only to those who are parties named in the record, and one who is not so named is not a party, although he may be interested." 67 C.J.S. Parties § 1, pp. 886-887.

[1,2] Tested by the foregoing definition the lien claimant here was not a party to the action between the plaintiff and defendants. He had no right to control the proceedings or to adduce evidence or cross-examine witnesses upon the trial. Indeed, he was without right to take any part in the trial of the action between the plaintiff and the defendant. Moreover, the very language of section 688.1 makes clear that the order establishing his lien did not operate to make the appellant Corsones a party to the action. The section expressly authorizes the trial court in its discretion to permit such a lien claimant to intervene in the action, which suggests that in the absence of an order granting permission so to do one whose lien is established thereunder does not thereby become a party to the action. If the Legislature had intended that the order establishing the lien should have the effect of making the lien claimant a party to the action, there would have been no necessity for the provision

conferring upon the trial court discretionary power to permit him to intervene as a party. This is pointed out in *McClearn v. Superior Court*, 1955, 45 Cal.2d 852, 291 P.2d 449, which has not been cited by either party. There the court said (45 Cal. 2d at page 856, 291 P.2d at page 451): "As noted above, the lien was sought under section 688.1 of the Code of Civil Procedure, which provides that 'the court or judge thereof may, in his discretion, order that the judgment creditor be granted a lien * * * and * * * may permit said judgment creditor to intervene therein.' *The language of the section thus permits, but does not require, intervention.* The section is remedial in nature and should be liberally construed to give effect to the remedy which it authorizes. *Code Civ.Proc. § 4; Finance & Construction Co. of California v. City of Sacramento*, 204 Cal. 491, 493, 269 P. 167; *Cullerton v. Mead*, 22 Cal. 96, 98; see 23 Cal.Jur. 801. Ordinarily a lien claimant would have no reason to participate in the main action, and in most instances his needs would be satisfied by the granting of a lien against the prospective judgment. While it might be proper for the court, under some circumstances, to require intervention as a condition to obtaining a lien, there is nothing in the record to indicate that such a condition was imposed here. Moreover, any noncompliance with such a condition by the lien claimant would relate to the propriety of the denial of a lien rather than to the appealability of the order of denial. A lien claimant is obviously a party to the proceeding on his motion for a lien, even though he does not seek by intervention to become a party to the main action, and his failure to pursue the optional remedy of intervention cannot be considered as having any adverse effect upon his right to appeal from a denial of his motion." (Emphasis added.)

[3] As we understand the foregoing, it means that although a judgment creditor proceeding under section 688.1 becomes a party to the proceeding in so far as it involves the establishment of his lien, he

does not become a party to the main action in the absence of an order permitting him to intervene therein.

Nor do we see any merit in appellants' suggestion that by instituting proceedings to establish his lien the lien claimant became and is in effect an intervener. As previously noted, section 688.1 clearly distinguishes between a motion whereby a creditor seeks merely to establish his lien and one where, in addition thereto, the creditor seeks to intervene in the action as a party. Presumably counsel for the lien claimant was conversant with his right to request permission to intervene and he did not elect to avail himself of the right to do so. Without undertaking to divine the reasons for his decision in this regard, it may well be that it was occasioned by his unwillingness to have his client incur the risk of becoming liable for costs in the event defendants should ultimately prevail (See *People ex rel. Bledsoe v. Campbell*, 1902, 138 Cal. 11, 23, 70 P. 918.) Moreover, if it were to be conceded that making the motion to establish his lien constituted an intervention, it was such only for that limited purpose and did not make the lien claimant a party to the action generally. See *Elliott v. Superior Court*, 1904, 144 Cal. 501, 507, 77 P. 1109.

Finally appellants contend that the lien claimant would in any event have had the right to intervene at the hearing of the motion for new trial and that by reason of the defendants' failure to serve him with notice of intention to move for a new trial he was deprived of the right to do so. Assuming without deciding that he would have had the right to make application to intervene in the action at that time, the fact remains that, as he was not a party to the action at the time of the filing of the notice of intention to move for a new trial, the defendants were not required to serve him with a copy thereof.

The order appealed from is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

163 Cal.App.2d 58

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Samuel Louis JOHNSON, Defendant and
Appellant.

Cr. 3429.

District Court of Appeal, First District,
Division 2, California.

Aug. 19, 1958.

Hearing Denied Oct. 15, 1958.

Defendant was found guilty of possessing and selling narcotics on two different occasions, and his motion for new trial was denied. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered judgment imposing prison terms, and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that where no direct evidence showed that papers retained by defendant after sales to state undercover agent contained heroin but that inference could be drawn from circumstantial evidence, and trial court failed to instruct jury that where circumstantial evidence was susceptible of two constructions, both reasonable, jury was to adopt construction pointing to innocence rather than that indicating guilty, jury, by verdict against defendant, did not necessarily find facts supporting charges of possession independently of those of sale and conviction of both possession and sale was improper.

Judgment reversed as to counts charging possession and affirmed as to those charging sale.

1. Criminal Law §1209

Applicability of Penal Code provision prohibiting punishment, under more than one penal provision, if same act is made punishable in different ways by different provisions of code depends upon whether separate and distinct act can be established as the basis of each conviction, and it is only when the two offenses are committed by the same act or when that act is essential to both that they may not both be punished.

328 P.2d—51½

2. Criminal Law §824(9)

Where no direct evidence showed that papers retained by accused after sales to state undercover agent contained heroin but circumstantial evidence would permit such inference, it was duty of trial court, upon its own motion, to instruct jury that when circumstantial evidence was susceptible of two constructions, both reasonable, the jury was to adopt the construction pointing to innocence rather than that indicating guilt.

3. Poisons §9

Where no direct evidence showed that papers retained by accused after sales to state undercover agent contained heroin but that inference could be drawn from circumstantial evidence, and trial court failed to instruct jury that where circumstantial evidence was susceptible of two constructions, both reasonable, the jury was to adopt construction pointing to innocence rather than that indicating guilt, jury by verdict against defendant, did not necessarily find facts supporting charges of possession independently of those of sale and conviction of both possession and sale was improper. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law §1137(5)

Where answer to question asked upon cross-examination by accused, who elected to conduct questioning himself, was responsive, he could not complain on appeal.

5. Criminal Law §1037(1), 1044

Where impropriety, if any, in argument of district attorney could have been cured by admonition, but no objection or motion to strike had been made, claimed error could not be asserted on appeal.

6. Criminal Law §1036(1), 1044

Where error, if any, in admitting evidence could have been cured by admonition, but no objection or motion to strike had been made, claimed error could not be asserted on appeal.

James W. Funsten, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerney, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

On May 9, 1957, the appellant was indicted on six counts as follows: "1) Unlawful possession of narcotics on April 10, 1957; 2) Unlawful sale of narcotics on April 10, 1957; 3) Unlawful transportation of narcotics on April 10, 1957; 4) Unlawful possession of heroin on April 16, 1957; 5) Unlawful sale of heroin on April 16, 1957; 6) Unlawful transportation of heroin on April 16, 1957 (Health and Safety Code, § 11500)". Appellant entered a plea of not guilty and denied the prior narcotic convictions charged by the indictment as subsequently amended. At the trial, on motion of the district attorney, the transportation counts (No. 3 and 6) and the allegations of two of the prior convictions were dismissed. Appellant then admitted the remaining prior felony convictions. The jury found the appellant guilty of the remaining four counts, possession of narcotics on April 10, 1957, sale of narcotics on April 10, 1957; possession of narcotics on April 16, 1957, and sale of narcotics on April 16, 1957. Appellant's motion for a new trial was denied. The court sentenced the appellant to the State prison for the term prescribed by law, with the terms for Counts 1 and 2 for sale and possession on April 10, 1957 to be served concurrently with each other, but consecutively with the terms for Counts 1 and 2 for sale and possession on April 16, 1957. This appeal is taken from the judgment and the order denying appellant's motion for a new trial.

The facts are as follows: John Keys testified that in 1957, he was working as an undercover agent for the State Bureau of Narcotics, in the Fillmore area of San Francisco. To avert suspicion, he arranged to be seen around the neighborhood with a girl named "Candy" who was known as a narcotic addict. Keys had been informed that the appellant was a peddler of narcotics. Around April 7 or April 8, Keys was introduced to the appellant by a man known as "Scotty". On April 10, 1957, Keys saw the appellant in a pool hall next door to the Manor Plaza Hotel. Keys asked the appellant if he

could buy a five dollar "paper". Appellant agreed to make the sale. They walked to a lavatory in the rear of the pool hall. Appellant pulled out a finger stall containing four or five "papers" and sold one to Keys. Keys left the pool hall, returned to his hotel and put the purchase into a locked compartment in his room. The following day, Keys gave the paper to an inspector of the State Bureau of Narcotic Enforcement. On analysis by the State Chemist, the "paper" was found to contain a grain and a half of heroin. About a week later, on April 16, Keys again met the appellant by chance in the pool hall. Again, he and the appellant went to the lavatory, where the appellant sold him a "paper" for \$5, from several in a finger stall. On this occasion there were several other people in the lavatory. The second "paper" on analysis by the State Chemist, was found to contain one and a half grains of heroin.

The appellant was the only witness in his own behalf. He testified that he had been introduced to Keys by "Scotty" and that Keys had then asked him about buying some narcotics. He said he knew nothing about such a sale. He had seen Keys around the neighborhood with "Candy" and that he had occasionally played pool with Keys. He admitted seeing Keys in the pool hall on April 10, and April 16, but denied possessing narcotics on the days or making a sale to Keys on either occasion. Appellant stated that the substance of his conversations with Keys on the dates in question was a girl and some money which Keys tried to borrow from the appellant to buy narcotics for a girl. On cross-examination, appellant indicated that he was familiar with various terms used by narcotics addicts.

[1] Appellant contends that under the rule of *People v. Roberts*, 40 Cal.2d 483, 254 P.2d 501 he was improperly convicted of both possession and sale of narcotics, as the alleged possession was merely incidental to the sale. As pointed out in *People v. Branch*, 119 Cal.App.2d 490, at pages 495 and 496, 260 P.2d 27, at page 30:

"The case [People v. Roberts] is based upon the interpretation of section 654 of the Penal Code as made by the Supreme Court in People v. Knowles, 35 Cal.2d 175, 217 P.2d 1, and People v. Kehoe, 33 Cal.2d 711, 204 P.2d 321. See, also, People v. Logan, 41 Cal.2d 279, 260 P.2d 20; People v. Greer, 30 Cal.2d 589, 184 P.2d 512; People v. Clemett, 208 Cal. 142, 280 P. 681. That code section embodies a rule of law somewhat broader than the double jeopardy rule and its corollary of included offenses. It provides that 'An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one'. Under the rule of this section, as interpreted by the Supreme Court, a single criminal act, whether it gives rise to included offenses or not, can only be punished once. By this section, it is indispensable in order to impose separate punishments that there be evidence of separate and divisible acts that are not incidental to each other. In determining this question the courts have refused to dissect the evidence minutely in an attempt to find separate offenses, but, on the contrary, have held that a broad transactional approach should be made."

In People v. Moore, 143 Cal.App.2d 333, at page 341, 299 P.2d 691, at page 696, this court said, quoting from In re Chapman, 43 Cal.2d 385, 389, 390, 273 P.2d 817: "'The applicability of section 654 depends upon whether a separate and distinct act can be established as the basis of each conviction. (citation) * * * It is only when the two offenses are committed by the same act or when that act is essential to both that they may not both be punished.'"

[2, 3] Respondent argues that the proof necessarily established possession distinct from that incidental to the sale to Keys. The argument is that appellant, on each

occasion here involved, sold Keys but one of several "papers." The others, which appellant retained after the sales, are claimed to have contained heroin. Thus, says respondent, the rule of People v. Tenney, Cal.App., 328 P.2d 254, and of People v. Holliday, 120 Cal.App.2d 562, 261 P.2d 301 applies and there is clear evidence that the convictions of possession were based upon different facts than the convictions of sale. But in those cases, possession independent of the other offense charged was conclusively shown. Here, if the jury believed that appellant selected at random the paper sold to Keys, it could infer that the papers Keys retained contained heroin. But the jury was not instructed upon this issue, and we cannot say that the jury must, as a matter of law, have drawn this inference. Thus our case differs from those cited. There was no direct evidence that the papers retained by appellant contained heroin and, to determine this to be the fact, the jury could act only upon circumstantial evidence. In such case the court must, upon its own motion, instruct that where circumstantial evidence is susceptible of two constructions, both reasonable, the jury must adopt the construction pointing to innocence rather than that indicating guilt. People v. Merkouris, 46 Cal.2d 540, 297 P.2d 999; People v. Bender, 27 Cal.2d 164, 163 P.2d 8. No such instruction was here given. Thus we cannot accept respondent's contention that the jury necessarily found facts which would support the charges of possession independently of those of sale.

[4-6] Appellant complains of some items of evidence admitted. In one instance, the answer was clearly responsive to a question asked upon cross-examination by appellant, who elected to conduct questioning himself, in addition to the examination by his counsel. In the other instances, as in the case of the claimed impropriety in argument by the district attorney, neither objection nor motion to strike was made. In each instance the error, if any, could have been cured by admonition.

Thus the claimed error cannot be asserted here.

The judgment is reversed as to the counts charging possession, and affirmed as to those charging sale.

DOOLING and DRAPER, JJ., concur.



163 Cal.App.2d 83

Louis A. CHASE, Sam Green, Robert M. Felton and Bertie Felton, Plaintiffs
and Appellants,

v.

The SUPER-COLD CORPORATION, a corporation; Nicholas A. Kessler; Frederick R. Waingrow; U. S. Industrial Tool Co., a corporation, and Union Enterprises, Inc., a corporation, Defendants and Respondents.

Civ. 22906.

District Court of Appeal, Second District,
Division 1, California.

Aug. 21, 1958.

As Modified on Denial of Rehearing
Sept. 16, 1958.

Hearing Denied Oct. 15, 1958.

Stockholders' derivative actions seeking to impose a trust on all assets of defendant corporation which were held in names of individual defendants or of their substantially owned corporations. The Superior Court, Los Angeles County, Kenneth N. Chantry, J., dismissed the action because stockholder failed to furnish security for the probable reasonable expenses of the defendants within the time allowed, and stockholder appealed. The District Court of Appeal, Fourn, J., held that the statute requiring stockholder to furnish security is constitutional.

Affirmed.

1. Corporations ⇨203

Statute requiring plaintiffs in stockholders' derivative action to furnish security for defendants' costs if court finds there is no reasonable probability that actions would benefit corporation or its security holders is not unconstitutional. West's Ann.Corp.Code, § 834.

2. Corporations ⇨202

In stockholders' derivative action, cause of action, if any, belongs to corporation and not to stockholder. West's Ann.Corp.Code, § 834.

3. Trusts ⇨110

In stockholders' derivative action seeking to impose a trust on all of assets of corporation which were held in names of individual defendants or of their substantially owned corporations, evidence was insufficient to establish that individual defendants as directors and officers of corporation did not exercise their powers in good faith in view of the best interests of the corporation. West's Ann.Corp.Code, §§ 820, 834.

4. Corporations ⇨214

In stockholders' derivative action seeking to impose a trust on all of the assets of corporation which were held in names of individual defendants or other substantially owned corporations, trial court properly found that there was no reasonable probability that the prosecution of the cause of action, or any other causes of action, alleged in complaint against defendants, or any of them, would benefit corporation or its security holders and did not abuse its discretion in ordering stockholder to furnish security for probable reasonable expenses of defendants. West's Ann.Corp.Code, §§ 820, 834.

5. Corporations ⇨619

Where liquidation of corporation was conducted under direct supervision of board of directors, of which individual defendants were members, the proper standard of conduct required of them in discharge of their fiduciary responsibilities was that of corporate officers and directors rather than as trustees of an express trust.

Gendel & Raskoff, by Donald L. King, Los Angeles, for appellants.

Turcotte & Goldsmith, Los Angeles, for respondent The Super-Cold Corp.

Mitchell, Silberberg & Knupp, Los Angeles, for respondents Kessler, Waingrow, U. S. Industrial Tool Co., and Union Enterprises, Inc.

FOURT, Justice.

This is an appeal from a "judgment of dismissal" due to the failure of plaintiffs to comply with an order requiring plaintiffs to furnish security for the reasonable expenses which might be incurred by the defendants in said action, pursuant to section 834, Corporations Code. The plaintiffs, as shareholders of The Super-Cold Corporation (hereinafter referred to as Super-Cold), instituted a derivative action against Super-Cold; Nicholas A. Kessler, an officer and director of Super-Cold; U. S. Industrial Tool Co., a corporation substantially owned by Kessler; Frederick R. Waingrow, an officer and director of Super-Cold; and Union Enterprises, Inc., a corporation substantially owned by Waingrow. By their action, plaintiffs sought to impose a trust on all of the assets of Super-Cold which were held in the names of the individual defendants or of their substantially owned corporations, and to recover certain of the assets of Super-Cold which were alleged to have been improperly distributed to the individual defendants.

Each of the defendants separately moved the court for an order requiring plaintiffs to furnish security for costs under the provisions of section 834, Corporations Code, upon the basis that there was no reasonable probability that the prosecution of the cause of action would benefit Super-Cold or its security holders; and on March 28, 1957, after a full hearing, the court ordered security for the probable reasonable expenses, including attorneys' fees, to be incurred in the defense of the action in the sum of \$7,000 as to defendant Super-Cold, in the sum of \$35,000 as to defendants Nicholas A. Kessler and U. S. Industrial Tool Co., and in the sum of \$15,000 as to defendants Frederick R. Waingrow and Union Enterprises, Inc.

It was ordered that said security be furnished by plaintiffs within sixty days after service upon plaintiffs of written notice of the signing of the order. Written notice of the signing and entry of the order was served on plaintiffs on April 1,

1957, and the plaintiffs having failed to furnish security as ordered, the court dismissed the above-entitled action on June 14, 1957.

[1] The constitutionality of section 834 of the Corporations Code was determined by the Supreme Court in *Beyerbach v. Juno Oil Co.*, 42 Cal.2d 11, at page 21, 265 P.2d 1, at page 7, the court stating that "every stockholder who, like plaintiff, is unable to induce the corporation, through its board of directors, to institute a particular action on its own behalf, and who undertakes as its volunteer representative to sue on the cause asserted by him, may be required to furnish security." The court further stated (at pages 23-24 of 42 Cal.2d, at page 8 of 265 P.2d): "In these circumstances the Legislature, for the protection of third persons who have dealt with the corporation as well as for the protection of the corporation and its officers and employees, can constitutionally require that the stockholder who would act as in the nature of a guardian ad litem must, as a condition of prosecuting the action on behalf of the corporation, either show a reasonable probability that the suit will be successful or secure the payment of the defendants' expenses should they prevail. The Legislature, of course, can attribute some weight to the fact that the corporation has not seen fit to institute action on a cause which either belongs to it or to no one."

[2] It was further emphasized in *Melancon v. Superior Court*, 42 Cal.2d 698, 708, 268 P.2d 1050, 1057, that in actions where the shareholder is required to post security pursuant to the provisions of section 834 of the Corporations Code, the cause of action, if any, belongs to the corporation and not to the plaintiff. See *California Corporation Laws, 1950 Supplement* (by Ballantine, Sterling & Harriet R. Buhler), § 98.5, *Derivative Actions by Shareholders—Comment on Section 834*; § 98.6, *Qualifications of Plaintiff*; *demand and disclosure—Comment on Subdivision (a) of Section 834*.

[3-5] In this appeal it is contended that the requirements for the granting of a motion for security for costs as set forth in section 834 of the Corporations Code have not been satisfied in that, as a matter of law, the finding of the trial court that there was no reasonable probability that there would be a benefit to the "plaintiff-stockholders" was erroneous. Actually, the finding of the court was "there is no reasonable probability that the prosecution of the cause of action, or any of the causes of action, alleged in the Complaint against the moving parties, or any of them, *will benefit the corporation or its security holders.*" (Emphasis added.) Appellant contends that at the time the decision to liquidate Super-Cold was reached on September 27, 1954, the defendants Kessler and Waingrow became and at all times thereafter were trustees of an express trust, the trust res consisting of all of the assets of Super-Cold. The record before us clearly indicates, however, that the liquidation was conducted under the direct supervision of the Board of Directors, of which Kessler and Waingrow were members. Under the circumstances the proper standard of conduct required of said defendants in the discharge of their fiduciary responsibilities is that of corporate officers and directors.

Appellants have cited many cases pertaining to different types of trustees, such as trustees of a testamentary trust, executors and others, but they have not directed us to any authority on the subject with which we are immediately concerned, namely whether a director, since the enactment of Corporations Code, § 820, is a trustee as that term is used, for example, in a testamentary trust.

This court, in the case of *Crespinel v. Color Corporation of America*, 160 Cal. App.2d 386, 325 P.2d 565, at page 567, had occasion to comment upon the fiduciary obligation owed by corporate directors to the corporation, and stated, among other things:

"The former rule of disqualification of a director to deal in any way with the corporation was found by a State Bar Committee in 1930 to be unreasonably severe and unduly to hamper legitimate business; and this led to the

adoption of Civil Code, section 311, in 1931, which in amended form is now Corporations Code, § 820. This section is commented on in Ballantine and Sterling, *California Corporation Laws*, 1949 edition (at pages 103-104), as follows: 'Directors are on longer subject to the disqualification and disabilities of a trustee when contracting with or on behalf of the corporation as declared in various cases heretofore. *Directors are fiduciaries, but are not strictly trustees.*' (Emphasis added.) It is further stated (at page 106), 'The general fiduciary rule is that the burden of proof as to reasonableness and fairness is on the fiduciary, but this is to be regarded as an elastic rule of common law rather than of statute. This section does not attempt to apportion the burden of proof under different circumstances, for example as to the fairness of a loan by directors to a corporation, or to provide what the effect of non-disclosure of adverse interest may be. Such questions must be left to the dictates of policy and fairness rather than to any hard and fast rule. There is not necessarily any presumption of fraud, inadequacy of consideration or unfairness unless the circumstances call for it.

" 'It had been held that the director of a corporation is not absolutely precluded from dealing directly with the corporation of which he is a director, if the corporation is represented by an independent majority, although any such transaction is subject to scrutiny and is voidable for any violation of his duty as director. This was true in spite of his failure to disclose his adverse interest unless the corporation sustained some detriment or he obtained some undue advantage.' " See, also, 37 Cal. L.Rev. 399; 40 Cal.L.Rev. 104; 31 Cal. L.Rev. 515; *Olson v. Basin Oil Co.*, 136 Cal.App.2d 543, 288 P.2d 952.

Further reference to California Corporation Laws, Ballantine and Sterling and Harriet R. Buhler, 1949 Ed., is pertinent here with regard to section 820 of the Corporations Code, where the following comments thereon appear in section 84 (at pp. 102-106):

"The first sentence of this section [Corp.Code, § 820] is declaratory of the general fiduciary duty of directors and officers to use their powers in good faith for the benefit of the shareholders. It is universally recognized, without the aid of statutory declaration, that directors are held to act in the highest good faith and loyalty and with a view to the best interests of the corporation which they represent. The powers of the directors must be exercised for the benefit of the shareholders generally and not for the benefit of themselves or of the promoters or of some favored few.

* * * * *

"The fiduciary duty is not relaxed by this section to the extent that a director may obtain any unfair advantage or profit for himself by misrepresentation, concealment or undue influence. He may not use his office for his own private advantage. He may, however, take part in transactions in which he or any corporation for which he acts has an interest adverse to the corporation, whether the corporation is represented by an independent board or agent or not. The non-disclosure of his adverse interest is not necessarily fraud, actual or constructive, though it is a circumstance to be considered. A director cannot deal with his corporation at arm's length even if it is represented by an independent majority and even if the director's presence or vote is not necessary. He cannot abdicate his duty and leave it to others to protect the corporation while he drives a harsh and unfair bargain by using his influence or bargaining skill for himself. He must account for unfair profits made or received in disregard of his duty.

"The second and third sentences of Section 820 declare in effect that a contract is not void or voidable merely by reason of the fact that an adversely interested director's vote is counted to make up a quorum or a majority of the board or committee which author-

izes such contract. Even though such participation by the adversely interested director is necessary, the contract will be neither void nor voidable if, (a) the director's interest is disclosed and noted in the minutes of the board or committee which authorizes, approves or ratifies such contract in good faith by a vote sufficient for such purpose without counting the vote or votes of such director; or (b) if disclosure of the director's interest is made to the shareholders and they approve or ratify the contract in good faith by a majority vote of the voting shares; or (c) if, in any case, the contract is just and reasonable as to the corporation at the time of its authorization or approval.

"This section thus abrogates the doctrine that a director is disqualified from participating in the authorizing of any transaction in which his personal interest is antagonistic to that of the corporation, so that his vote or his presence could not be counted toward a quorum or a majority of directors to adopt a resolution. Transactions so authorized will, however, still be voidable by the corporation by an affirmative act of disaffirmance in case the contract or transaction is not just and reasonable as to the corporation or is not ratified in good faith after due disclosure."

The record before us fails to establish that the directors and officers did not exercise their powers in good faith and with a view to the best interests of Super-Cold, or that the trial court abused its discretion in determining that "there was no reasonable probability that the prosecution of the causes of action, or any of the causes of action, alleged in the complaint against the said defendants, or any of them, would benefit the corporation or its security holders."

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.
Hearing denied; TRAYNOR, J., dissenting.

163 Cal.App.2d 100

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Carol LA GRANGE, Defendant and
Appellant.

Cr. 1348.

District Court of Appeal, Fourth District,
California.

Aug. 21, 1958.

Defendant was convicted in the Superior Court, San Diego County, C. M. Monroe, J., for involuntary manslaughter, as result of death immediately due to rupture of aneurysm and resulting hemorrhage following a battery, new trial was denied, and defendant appealed. The District Court of Appeal, Griffin, J., held that evidence sustained findings that death of victim was due to other than natural causes, and that death resulted from the battery committed by joint acts of defendant and his companions.

Affirmed.

1. Homicide Ⓒ236(1)

In prosecution for manslaughter based on death immediately due to rupture of aneurysm and resulting hemorrhage following battery allegedly committed by joint acts of defendant and companions, evidence justified jury's finding rejecting defendant's contention that there was reasonable doubt as to whether death was caused by other than natural causes, and that the victim's death resulted from battery committed by joint acts of defendant and companions. West's Ann.Pen.Code, § 192, subd. 2.

2. Criminal Law Ⓒ741(1)

The jury is the sole judge of weight of evidence.

3. Criminal Law Ⓒ556

The rule that the prosecution is bound by extrajudicial statements of defendant which are introduced in evidence by prosecution and which are irreconcilable with guilt is applicable only where there is no

other competent and substantial evidence which could establish guilt.

4. Criminal Law Ⓒ556

Defendant's statement to officer that defendant was third person to get out of automobile, that a fight started, that when he got out someone knocked him down and dragged him and that he finally got away was not necessarily irreconcilable with defendant's guilt, did not prove defendant's lack of participation in affray resulting in death, and was not binding on prosecution which introduced it in prosecution for involuntary manslaughter, although not rebutted. West's Ann.Pen. Code, § 192, subd. 2.

5. Homicide Ⓒ297, 304

In prosecution for manslaughter based on death immediately due to rupture of aneurysm and resulting hemorrhage following battery allegedly committed by joint acts of defendant and companions, defendant's proffered instructions on unavoidable accident and excusable homicide were not justified by evidence. West's Ann.Pen.Code, §§ 195, 199, 1127.

6. Criminal Law Ⓒ814(3)

The trial judge is only required to instruct on law relating to facts established in case and on matters vital to proper consideration of evidence. West's Ann. Pen.Code, § 1127.

7. Criminal Law Ⓒ829(4, 18)

In prosecution for manslaughter based on death immediately due to rupture of aneurysm and resulting hemorrhage following battery allegedly committed by joint acts of defendant and companions, where jury was informed of charge against defendant, fully and fairly informed as to the necessary elements of the offense, the law as to the burden of proof, aiding and abetting, and the right of self-defense, failure to give defendant's requested instructions on unavoidable accident, excusable homicide, proximate cause, and reasonable doubt as to identity of persons covered by other instructions was not prejudicial error.

Thomas Whelan, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay and John A. Vander Lans, Deputy Attys. Gen., for respondent.

GRIFFIN, Justice.

Defendant-appellant Carol La Grange was charged jointly with defendants Freshour, Bradley and Vickery and each was convicted by a jury of the crime of manslaughter (Viol.Pen.Code, Sec. 192, subd. 2) in that they feloniously, without malice, killed one John Barczuk. Appellant's motion for new trial and application for probation were denied. He, alone, appealed.

Barczuk was a co-owner of the Hawaiian Village Inn in Chula Vista. On May 12, 1957, at approximately 2:00 a. m., a Mr. and Mrs. Sumrall, Mrs. Joiner and Mr. Ostberg had been inside the inn until closing time and were standing in front of the restaurant talking, when Mr. Barczuk joined them. After a few minutes, a yellow Chevrolet convertible car, owned and driven by defendant Freshour, drove into the Inn parking area, near the main entrance. There were five people in the Chevrolet convertible. Mrs. La Grange was seated in the front seat next to the driver, Freshour. Vickery was on her right. Bradley was seated in the rear seat behind the driver. Apparently, La Grange was seated to his right. They had been drinking at other bars and ended up at this one just before closing time, while decedent and the customers were in conversation in the front. Mr. Ostberg was standing with his back to the parking area. Defendant driver nudged or struck his legs with the bumper of his car. He then backed up two or three feet and again came forward and hit him. Mr. Barczuk started walking toward the driver's side of the car. About that time the doors on both sides of the car "flew open" and two male persons got out of each side. Barczuk remarked "take it easy fellows", and one of the individuals from the car "piled on" him. Defendant Freshour hit Ostberg and some man who

got out of the driver's side of the car hit Barczuk in the face. Mrs. Joiner struck defendant Freshour on the head with her purse while he was fighting with Ostberg. Vickery came over and hit her on the side of her nose and cheek. Vickery departed up an alley. Ostberg came over to help Mrs. Joiner and defendant Freshour got back into the car and suddenly drove away with Mrs. La Grange. Appellant La Grange was left there, still fighting with Barczuk. One Adamek came out of the bar, saw appellant grappling with Barczuk. He saw appellant take hold of Barczuk and push him against a planter box wall with a hard shove. Adamek then took hold of Barczuk and eased him to the ground, believing him to have been stunned or injured. Appellant ran away down the alley.

Barczuk's face was bleeding profusely, he was bleeding from the head, and his left eye was filled with blood. His heart and pulse were beating fast. An ambulance was called, but Barczuk died on his arrival at the hospital. His body showed that his left hand had been bruised on both sides, in the palm and around the knuckle area. Gravel was in and about those bruised areas.

An officer went to the home of Mrs. La Grange's parents and arrested appellant. At that time he had a cut lip and some scratches on his back. Appellant told the officer on May 14th that he, Freshour, Bradley and Vickery were involved in a fight at the Hawaiian Village Inn; that he was knocked down and tried to get away, but somebody got hold of his feet and started dragging him.

[1,2] An autopsy was performed on May 12th on the body of Barczuk by an autopsy surgeon, revealing that he had several small superficial scratches or abrasions in the region of the bridge of the nose and a small area of bruising immediately over the bridge of his nose. There was also a blood clot on the area of the head in back of the left ear. He found a rupture of the berry aneurysm in the brain. In his opinion "Mr. Barczuk's death was immediately due to the rupture of the aneurysm and the re-

sulting hemorrhage in the subdural, sub-arachnoid and intraventricular portion of the brain. I believe that in view of the very close time sequence between the alleged blow in the frontal portion of Mr. Barczuk's head and possible rebound blow on the left occipital portion of Mr. Barczuk's head, and the loss of consciousness that occurred following that, that the role of trauma may well have contributed to a great degree in the rupture of this aneurysm." On cross-examination, however, he did testify that although it was his opinion that some force did contribute to the rupture, it was "equally probable that the rupture was spontaneous and due to natural causes." Appellant lays great stress on this portion of his testimony, contending that there was a reasonable doubt as to whether the death was caused by other than natural causes. The evidence produced and considered in connection with the testimony of the autopsy surgeon sufficiently justifies the finding of the jury in this respect. It was the sole judge of the weight of the evidence. *People v. Berkeley*, 9 Cal.App.2d 197, 48 P.2d 970.

The claim that the evidence was insufficient to sustain the jury's finding that the offense of manslaughter was committed by this appellant is equally untenable. The medical testimony, as well as the facts related by other witnesses, were sufficient to show that Mr. Barczuk's death resulted from the battery committed by the joint acts of appellant and his co-defendants and were sufficient to constitute the crime of involuntary manslaughter. *Pen.Code*, Sec. 192, subd. 2; *People v. McManis*, 122 Cal. App.2d 891, 898, 266 P.2d 134; *People v. Miller*, 114 Cal.App. 293, 300, 299 P. 742.

[3,4] Appellant also argues that the statement of appellant to the officer as to his activities is not rebutted by other evidence and it is, therefore, binding on the prosecution; and that even though he did not take the stand to testify, his statement proved his lack of participation in the affray. The rule of law in this respect is reflected in *People v. Acosta*, 45 Cal.2d 538,

542-543, 290 P.2d 1, 4, where the court remarked:

"The courts may sometimes say that the prosecution is 'bound by' extrajudicial statements of defendant which are introduced by the prosecution and which are irreconcilable with guilt, but this concept is applicable only where there is no other competent and substantial evidence which could establish guilt. (Citing cases.)" See also *People v. Silva*, 143 Cal.App.2d 162, 170, 300 P.2d 25.

Appellant's statement to the officer was substantially that as the car turned into the Village, an argument ensued; that he was the third person to get out of the car; that a fight started; that when he got out of the car, someone knocked him down and dragged him; that he finally tried to get away and finally did do so. Nowhere is it stated affirmatively that he took no part in the assault upon Mr. Barczuk with his companions. On the contrary, he admits jumping out of the car when the fight started. There is nothing in this claimed statement that is necessarily irreconcilable with appellant's guilt.

[5-7] The last complaint involves appellant's instructions offered and refused. Without specific enumeration, appellant claims the evidence as to him merely shows that Barczuk's death was the result of an unavoidable accident or that the homicide was excusable, and he was entitled to a proffered instruction on those subjects. Citing *Parker v. Womack*, 37 Cal.2d 116, 120, 230 P.2d 823; *People v. Hampton*, 96 Cal. App. 157, 158, 159, 273 P. 854; *People v. Carmen*, 36 Cal.2d 768, 773, 228 P.2d 281; *Pen.Code*, Secs. 195 and 199; *Caljic* 71-E. The claims of appellant that the death of the decedent was unavoidable or that the homicide was excusable under section 195 of the Penal Code, *supra*, does not have substantial evidentiary support. The trial judge in a criminal case is only required to instruct the jury on the law relating to the facts established in the case and on matters vital to a proper consideration of the evi-

dence. *People v. Buffum*, 40 Cal.2d 709, 724, 256 P.2d 317; *People v. Putnam*, 20 Cal.2d 885, 890, 129 P.2d 367; *Pen.Code*, Sec. 1127. The jury was informed of the charge against appellant (manslaughter), was fully and fairly, by other instructions, informed as to the necessary elements of the offense, the law in respect to the burden of proof, aiding and abetting, and the right of self-defense. Under the facts presented, we conclude no prejudicial error resulted. *People v. Wright*, 167 Cal. 1, 138 P. 349; *People v. Green*, 13 Cal.2d 37, 44, 87 P.2d 821; *People v. Young*, 70 Cal. App.2d 28, 37, 160 P.2d 132.

The other instructions offered on the question of proximate cause and reasonable doubt as to identity of persons, were sufficiently covered by other given instructions. No prejudicial error appears in the refusal of the court to give appellant's other proffered instructions.

Judgment and order affirmed.

MUSSELL, Acting P. J., and McCABE, J. pro tem., concur.



162 Cal.App.2d 755

Earl Reed McCARTHY, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF CONTRA COSTA, Respondents.

Civ. 18322.

District Court of Appeal, First District, Division 2, California.

Aug. 13, 1958.

Hearing Denied Oct. 10, 1958.

Proceeding for writ of prohibition to restrain court from proceeding to trial after preliminary examination, and for writ of mandate to compel court to order production and inspection of certain statement

made by petitioner to police officers immediately after arrest. The District Court of Appeal, Kaufman, P. J., held that failure to inform defendant, at preliminary examination, of his right to counsel notwithstanding the fact that he was allegedly informed of such right at his arraignment on previous day, rendered commitment illegal, and prisoner claiming that he was unable to recall contents of statement made to police was entitled to inspection of statement made after arrest.

Ordered that writs of prohibition and of mandate issue as prayed for.

1. Criminal Law ⇨232

Statute providing that a defendant may not be examined at preliminary examination unless represented by counsel, or unless he waives his right to counsel after being advised of his right thereto, is based on theory that a valid, intelligent waiver of a fundamental right cannot be made until after defendant has been advised of his right to counsel. *West's Ann.Pen.Code*, §§ 858, 859, 866.5; *West's Ann.Const. art. 1*, §§ 8, 13.

2. Criminal Law ⇨232

Where defendant was examined at preliminary examination without representation by counsel and had not been advised of his rights thereto, notwithstanding fact that he was allegedly advised of his right to counsel at arraignment on previous day, commitment was illegal. *West's Ann.Pen.Code*, §§ 858, 859, 866.5; *West's Ann.Const. art. 1*, §§ 8, 13.

3. Mandamus ⇨16(1)

Where petitioner sought both a writ of prohibition to restrain respondent court from proceeding to trial after preliminary examination, and writ of mandate to compel court to order production and inspection of certain statement made by petitioner to police officers, even though peremptory writ of prohibition was issued, in view of intention of prosecution to re-charge petitioner, request for writ of mandate was not rendered moot.

4. *Mandamus* ☞61

Defendant who claimed he could not remember details of statement given to police after his arrest was entitled to peremptory writ of mandate to compel court to order production and inspection of statement made by petitioner.

David N. Bortin, Concord, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Petitioner seeks both a writ of prohibition to restrain the respondent court from proceeding to trial after preliminary examination, and a writ of mandate to compel the respondent court to order the production and inspection of a certain statement made by the petitioner to police officers immediately after his arrest.

I. *The Writ of Prohibition.*

Petitioner was charged with a violation of Penal Code, section 447a (Arson) and at the preliminary hearing was held to answer. Defendant was not represented by counsel at the preliminary examination. Petitioner moved the respondent court for an order setting aside the information pursuant to Penal Code, sec. 995, on the ground that he had not been legally committed by a magistrate. The respondent court denied the motion and will proceed with the trial unless restrained.

The relevant portion of the preliminary examination is as follows:

"Mr. Sellar: And Mr. McCarthy has indicated a willingness to tell his story in this matter. It is my understanding he was arraigned yesterday. Is that correct?

"The Court: This is true.

"Mr. Sellar: May he tell his story under the proper admonition?

"The Court: Do you wish to admonish him?

"Mr. Sellar: If the Court so directs me, I will.

"The Court: All right.

Mr. Sellar: Mr. McCarthy, if you are willing to tell your story to the Court, the Court has asked me to tell you that if you do it, you must do it freely and voluntarily without any promises of immunity or reward. In other words, nobody can make a deal with you or do this or do that if you tell your story. Do you understand that?

"The Defendant: Yes, I understand.

"Mr. Sellar: And everything you say will be taken down by the court reporter here and it would result in your being convicted of the crime of which you are charged. Now, you understand everything I have said?

"The Defendant: Yes, I do.

"Mr. Sellar: Now, understanding that, are you still willing to tell your story to the court?

"The Defendant: Yes.

"Mr. Sellar: All right. Would you stand and be sworn?

"The Court: Are you willing to testify without the advice of Counsel?

"The Defendant: Sure."

Petitioner contends that because the court did not inform the accused of the right of counsel, ask him if he desired counsel, and allow him reasonable time to send for counsel, the preliminary examination deviated from the Constitutional and statutory requirements so as to infect with illegality any order of commitment based upon the examination, citing *In re James*, 38 Cal.2d 302, 240 P.2d 596; *Tupper v. Superior Court*, Cal.App., 324 P.2d 356; *People v. Williams*, 124 Cal.App.2d 32, 268 P.2d 156; and Penal Code, section 866.5. The prosecution contends that because petitioner was advised of his right to counsel at the arraignment on the preceding day, he knowingly and voluntarily waived his right to counsel at the preliminary examination, and the presumption of regularity of previous proceedings, citing *People v. Greene*, 108 Cal.App.2d 136, 238 P.2d

616; *People v. Rebolledo*, 93 Cal.App.2d 261, 209 P.2d 16.

[1] Our State Constitution, Article I, Sections 8 and 13, guarantees the right of every person charged with crime in any court whatever "to appear and defend, in person with counsel." In obedience to this constitutional mandate, the Legislature enacted Penal Code, sections 858, 859, and more recently in 1953, section 866.5. This section reads as follows:

"The defendant may not be examined at the examination, unless he is represented by counsel, or unless he waives his right to counsel *after being advised at such examination of his right to aid of counsel.*" [Emphasis supplied.]

The language of the statute is clear and apparently based on theory that a valid, intelligent waiver of a fundamental right cannot be made until after a defendant has been advised of his right to counsel. This view is supported by the only interpretation of this section, to date, in *People v. Williams*, 124 Cal.App.2d 32, 268 P.2d 156, 157. In that case, the defendant was informed of his right to counsel under Penal Code, section 858 at the arraignment which occurred the day before the preliminary hearing. At the preliminary hearing he was not again informed of his right to counsel in accordance with section 866.5 of the Penal Code, but only asked by the court: "You didn't want to hire an attorney to represent you, is that right." The defendant answered that, "He had 'no money to hire one.'" The court, in substance, held that the defendant was able-bodied and could work so that there was no justification for appointing an attorney at the taxpayer's expense. The appellate court upheld an order setting aside the information on the ground that the defendant had not been legally committed.

[2] In the instant case, there is nothing in the record to show what took place during the petitioner's arraignment. The prosecution argues that in the absence of

an affirmative showing to the contrary, it must be presumed that official duty was performed. However, the cases relied upon by the prosecution on this point, pre-date Penal Code, section 866.5 and its interpretation in the *Williams* case. As pointed out above, in that case the record clearly indicated that the defendant had been advised of his rights under Penal Code, section 858 at the arraignment. We think section 866.5 is clearly applicable in this case as a statutory right is a part of the due process of law to which a defendant is entitled. The defendant was not advised of his right to counsel at the preliminary and therefore did not waive his right.

The prosecution also makes much of the petitioner's familiarity with legal procedures and his mental ability to protect his rights. In *People v. Naphaly*, 105 Cal. 641, 39 P. 29, the defendant was a lawyer and the record indicated that he knew of his right to counsel and asked for a continuance to procure counsel. It was argued that these facts obviated the necessity of informing the defendant of his rights. The court set aside the information, pointing out that the rights of individuals under the Constitution are not to be gauged by their profession or occupation. Nor, may we add, can they be gauged by an individual's presumed knowledge thereof. We think that here, as in the *Tupper* and *Williams* cases, *supra*, there was a plain and palpable violation of a fundamental right which rendered the commitment illegal.

It follows that a peremptory writ of prohibition should issue herein.

II. *The Writ of Mandate.*

[3,4] The issuance of the peremptory writ of prohibition in this case does not make moot the petitioner's request for the writ of mandate, as the prosecution has indicated its intention of recharging the petitioner. Petitioner seeks a writ of mandate to compel the respondent court to order the production and inspection of a state-

ment made by the petitioner after his arrest. His affidavit alleges that he was "physically and mentally ill and in great distress of body and mind, and * * * unable to recall what he said in said statement * * * but has advised his attorney to the best of his recollection truthfully, fully and fairly as to the contents of the statement * * *." Counter-affidavits of a detective, a deputy sheriff and the district attorney allege that the petitioner made his statement voluntarily and gave no indication of physical or mental illness or distress to the arresting officer or to the officer taking the statement. Both sides have stipulated to the report of the examining psychiatrists, which set forth, among other details, that the petitioner has an I. Q. of approximately 75.

This case is governed by *Powell v. Superior Court*, 48 Cal.2d 704, 312 P.2d 698, recently followed in *Cordry v. Superior Court*, 161 Cal.App.2d 267, 326 P.2d 222, and *Schindler v. Superior Court*, 161 Cal. App.2d 513, 327 P.2d 68. The prosecution seeks to distinguish these cases on several grounds. First, it is argued that in the *Powell* and *Schindler* cases, no counter-affidavits were filed and therefore the matters averred in the petition were admitted. Second, it is argued that there is no showing that the statements were reduced to writing or signed by the petitioner, and that the petitioner is not entitled to the "raw notes" of the interrogator. Third, it is argued that the petitioner has not laid a proper foundation for the issuance of the writ as he has not averred that the statement is essential to his defense. Fourth, it is argued that on the basis of the conflicting evidence in the affidavit and counter-affidavits, the trial court properly exercised its discretion in denying petitioner's motion for inspection. We see no merit in any of these contentions. The petitioner's allegation that he was unable to recall what he said in the statement is not controverted by the counter-affidavits. Here, as in the *Cordry* case, *supra*, there was no finding by the trial court on the determinative issues. As pointed out in *Powell v. Su-*

perior Court, 48 Cal.2d 704, at page 707, 312 P.2d 698, at page 699:

"Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case. * * * To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts. (Citations.)' It is, of course, statutory law in California that a defendant be provided with a transcript of the evidence taken by a grand jury. (Pen.Code, § 925.)

"In the circumstances of the present case, to deny inspection of defendant's statements would likewise be to lose sight of the objective of ascertainment of the facts, and would be out of harmony with the policy of this state that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, however, odious, but rather, only through establishing the truth upon a public trial fair to defendant and the state alike. In the recent case of *Dowell v. Superior Court* (1956), 47 Cal.2d 483, 304 P.2d 1009, this court granted mandamus to compel inspection prior to trial of a personal injury action, of a statement taken from plaintiff in the hospital by defendant company's claims investigator the day after plaintiff had been injured. There, as here, plaintiff averred that he had forgotten what he had said in the statement. In holding that he was entitled to inspect and take a copy of the statement this court noted that the "trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings of which the inspection of documents is one method * * *" [Citations.], and comment-

ed further 'that the principles of equity enter into the determination of an application for discovery and also in a mandamus proceeding to compel appropriate action.' (At page 486 of 47 Cal.2d, at page 1011 of 304 P.2d.)"

It follows that a peremptory writ of mandate should issue herein.

Ordered that writ of prohibition and writ of mandate issue as prayed for by petitioner.

DOOLING and DRAPER, JJ., concur.



162 Cal.App.2d 836

PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Richard WILEY, Defendant and Respondent.
Cr. 6231.

District Court of Appeal, Second District,
Division 2, California.

Aug. 18, 1958.

Proceedings on motion to set aside information on ground that incriminating evidence against defendant had been obtained as result of unlawful search and seizure. The Superior Court, Los Angeles County, Albert E. Wheatcroft, J., granted the motion, and the People appealed. The District Court of Appeal, Fox, P. J., held that officers, who had seen three young men hasten away from parked automobile when police vehicle came to stop nearby, could have concluded that such conduct, in light of thefts and burglaries which had occurred in neighborhood, reasonably justified investigation; and held that when such officers saw defendant dropping yellow cigarette as he left vehicle they had reasonable cause for arresting defendant, and held that marijuana cigarette thereafter found in his shoe

could not be held to have been procured as result of unlawful seizure.

Order reversed.

1. Indictment and Information $\Rightarrow$ 140(1)

In testing, on motion to quash, sufficiency of showing made before magistrate, record before magistrate is decisive, and Superior Court cannot substitute its judgment as to weight of evidence for that of magistrate who conducted preliminary examination. West's Ann.Pen.Code, $\S$ 995.

2. Criminal Law $\Rightarrow$ 238

Indictment and Information $\Rightarrow$ 140(1)

Magistrate conducting preliminary examination may resolve conflicts, may give or withhold credence to witnesses and may weigh evidence; but Superior Court, passing upon motion to quash, cannot do those things. West's Ann.Pen.Code, $\S$ 995.

3. Arrest $\Rightarrow$ 63(4)

In considering question of reasonable or probable cause for action by police, court looks only to facts and circumstances presented to officer at time he was required to act.

4. Arrest $\Rightarrow$ 63(4), 71

Officers, seeing three young men hasten away from parked automobile when police vehicle came to stop near by, could have concluded that such conduct, in light of thefts and burglaries which had occurred in neighborhood, reasonably justified investigation; and when they observed defendant dropping yellow cigarette as he left parked automobile they had reasonable cause for arresting defendant, and marijuana cigarette thereafter found in his shoe could not be held to have been procured as result of unlawful seizure. West's Ann. Health & Safety Code, $\S$ 11500; West's Ann.Pen.Code, $\S$ 995.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan, Lewis Watnick, Robert Lederman, Deputy Dist. Attys., Los Angeles, for appellant.

David M. Hoffman, Beverly Hills, for respondent.

FOX, Presiding Justice.

Defendant was charged, in an information filed by the district attorney, with violating section 11500 of the Health and Safety Code, in that on January 17, 1958, he had in his possession a narcotic, to wit, marijuana. He made a motion, under section 995 of the Penal Code, to set the information aside on the ground that he had been held to answer without reasonable or probable cause. His motion was granted. The People have appealed from the order. The theory upon which the information was set aside was that the incriminating evidence against defendant was obtained as a result of unlawful search and seizure.

Shortly before 8:00 o'clock in the evening on December 18, 1957, Officers Hamner and Peterson, of the Los Angeles Police Department, were driving in the vicinity of 89th Street and Hobart Boulevard when they noticed a car parked southbound in front of 8901 Hobart. Defendant was sitting on the right front seat. Another young man was behind the wheel; three others were standing on the right side of the vehicle. Officer Hamner, who was driving, stopped his police car. When he did this, the three young men standing by the vehicle turned and "rapidly walked away" from it. Officer Peterson stepped from the police car and ordered the three departing men to stop, which they did. Officer Hamner walked to the left side of the car and ordered the defendant and the driver to get out of the car on the right side. When the defendant opened the door and started to get out of the car, the officer "observed something drop from his left hand." After both men had stepped out of the car, the officer walked around to the right side of the vehicle and from the street, directly under the door, he "picked up two cigarettes," one of which was white and the other yellow. There were no other objects or debris in the immediate vicinity where the cigarettes were lying except a little grass. After picking up the cigarettes the officer arrested defendant on suspicion of possession of narcotics. He was transported to the police station for interrogation.

There defendant was requested to remove his shoes, which he did. The officer "found a brown paper wrapped cigarette in the defendant's right shoe between his sock and shoe," which, upon analysis, proved to be a marijuana cigarette.

In conversation with Officer Peterson defendant explained that he had gone to the above address to meet one of the other men there for the purpose of purchasing marijuana cigarettes; that "he had just received the marijuana cigarette" when the officers arrived on the scene; that he did not know what to do with it so he put it in his shoe, where it remained until he was searched.

Officer Hamner testified that in the immediate area a number of thefts from automobiles and burglaries from homes had been reported to the police.

[1,2] The rule defining the functions of the trial court when passing on a motion to set aside an information under section 995 of the Penal Code is thus stated in *People v. Jackson*, 146 Cal.App.2d 553, at page 556, 303 P.2d 767, at page 769: "It is the record before the magistrate that is decisive. In arriving at his decision the magistrate may weigh the evidence, may resolve conflicts, and may give or withhold credence to witnesses. In testing the sufficiency of the showing made before him on motion to quash the superior court cannot do these things. [Citations.]" In *People v. Flanders*, 140 Cal.App.2d 765, at page 768, 296 P.2d 13, at page 15, it is stated: "On a motion to set aside an information, the court may not substitute its judgment as to the weight of the evidence for that of the magistrate conducting the preliminary examination." To the same effect, see *People v. Bradley*, 152 Cal.App.2d 527, 535, 314 P.2d 108. With these principles in mind, we have concluded that the court erred in setting aside the information.

[3,4] In considering the question of reasonable or probable cause for action by the police, the court looks only to the facts and circumstances presented to the officer at the time he was required to act. *People v. Paul*, 147 Cal.App.2d 609, 619, 305 P.2d

996; *People v. Kilvington*, 104 Cal. 86, 93, 37 P. 799; *People v. Hupp*, 61 Cal.App.2d 447, 449, 143 P.2d 84. "There is, of course, nothing unreasonable in an officer questioning persons outdoors at night * * *." *People v. West*, 144 Cal.App.2d 214, 219, 300 P.2d 729, 732; *People v. Simon*, 45 Cal.2d 645, 650, 290 P.2d 531; *People v. Blodgett*, 46 Cal.2d 114, 117, 293 P. 2d 57. Here the police had a number of reports of thefts from automobiles and burglaries in the immediate area. It was after dark, and when the police car stopped the three young men standing by the car in which defendant was seated "turned and rapidly walked away." From the conduct of the three young men, in their hasty retreat, the officers could reasonably infer that they were seeking to evade the officers and avoid being questioned. The magistrate properly could conclude that this conduct, plus the information that the officers had with respect to thefts and burglaries in the neighborhood, reasonably justified investigation. Such investigation properly included a request that the two young men in the car step out. The magistrate could conclude also that the furtive act on the part of the defendant in dropping something from his left hand, and the recovery by the officer, at that point, of two cigarettes from the street, reasonably justified the officer in suspecting that defendant was attempting to surreptitiously dispose of contraband. The officers were therefore justified in arresting defendant on the basis of what they had personally observed. There was, therefore, no unlawful search or seizure involved at this point. See *People v. West*, supra; *People v. Sterling*, 154 Cal.App.2d 401, 405, 316 P.2d 405; *People v. Martin*, 46 Cal.2d 106, 108, 293 P.2d 52; *People v. Wright*, 153 Cal.App.2d 35, 38, 313 P.2d 868.

"The right of peace officers to search persons lawfully arrested and to seize things connected with the crime is well established. [Citations.]" *People v. Woods*, 139 Cal.App.2d 515, 525, 293 P.2d 901, 908. Thus it was entirely proper for the officers to search the defendant. The

discovery of the marijuana cigarette in the defendant's shoe did not invade any of his constitutional rights. It was, therefore, admissible in evidence and clearly justified the committing magistrate in holding the defendant for trial in the superior court. It follows that the trial court erred in setting aside the information.

The order is reversed.

ASHBURN and HERNDON, JJ., concur.



163 Cal.App.2d 132

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

Travis SANDERS, Defendant and Appellant.

Cr. 3511.

District Court of Appeal, First District,
Division 2, California.

Aug. 25, 1958.

Prosecution for sale, possession, and transportation of marijuana by defendant who sold marijuana to an undercover agent on August 13 and who was arrested on October 15, at which time his automobile was seized and examined following day at which time a partially smoked marijuana cigarette was found in it. From adverse judgment of the Superior Court, San Mateo County, Frank B. Blum, J., the defendant appealed. The District Court of Appeal, Draper, J., held that such cigarette had some tendency to show knowledge by defendant of narcotic character of substance sold to agent and fact that it showed offense other than that charge did not render it inadmissible and it was not error to admit such evidence with instruction that it was not received to show distinct offenses or continuing criminality but only for such bearing as it might

have upon defendant's guilt or innocence of the offense with which he was charged.

Judgment affirmed.

1. Criminal Law §1030(1)

Claims of error not raised at trial cannot be availed of on appeal.

2. Criminal Law §370, 673(5)

In prosecution for sale, possession, and transportation of marijuana by defendant who sold marijuana to an undercover agent on August 13, and who was arrested on October 15, at which time his automobile was seized and examined following day at which time a partially smoked marijuana cigarette was found in it, such cigarette had some tendency to show knowledge by defendant of narcotic character of substance sold to agent and fact that it showed offense other than that charged did not render it inadmissible and it was not error to admit such evidence with limiting instruction.

3. Criminal Law §384

In prosecution for sale, possession and transportation of marijuana by defendant, who sold quantity of marijuana to undercover agent on August 13, and who was arrested on October 15 at which time his automobile was seized and examined on following day and a partially smoked marijuana cigarette was found in automobile, fact that cigarette was found after charged offenses did not destroy its admissibility and lapse of time did not render the evidence too remote to be relevant.

4. Criminal Law §823(4)

Poisons §9

In prosecution for sale, possession and transportation of marijuana, instruction that mere possession of one of the prohibited narcotics is a violation of the law and it is not required that accused have specific knowledge as to exact nature of drug possessed was erroneous but the error was not prejudicial in view of other instructions advising jury that defendant could be found guilty only if he knew narcotic character of the marijuana.

Nubar Tashjian, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

After jury trial, defendant was found guilty of sale, possession and transportation of marijuana, and was sentenced to prison. He appeals from the judgment.

One Henson, an undercover agent employed by the district attorney, testified that appellant shared with Henson and another the smoking of a marijuana cigarette to show Henson the quality of appellant's product, sold Henson a quantity of marijuana, drove Henson to the latter's home to hide the marijuana, and then shared the smoking of another such cigarette.

[1] Appellant asserts error in statements of the prosecuting attorney and in testimony of an inspector, all tending to show the integrity of Henson and the generally poor reputation of the area where the crimes were committed. It is doubtful that these claims of error are well founded. If they were, they could not avail appellant, since no objection was made at trial. (3 Cal.Jur.2d 604.)

[2,3] The offenses charged were committed August 13, 1957. Appellant was arrested October 15. His automobile was seized at that time and examined next day. A partially smoked marijuana cigarette was found in it, and was introduced in evidence over appellant's objection. Appellant asserts error in the admission of this evidence. The court instructed the jury that such evidence was not received to show distinct offenses or continued criminality, but only for such bearing as it might have upon appellant's innocence or guilt of the offenses here charged. (CALJIC 33.) The mere fact that the evidence showed an offense other than that charged does not render it inadmissible. *People v. Peete*, 28 Cal.2d 306, 314-315, 169 P.2d 924. Here the evidence had some tendency to show knowledge by appellant of the narcotic character

of the substance sold to Henson. Also, the partially smoked, hand rolled cigarette found in the car could be compared with the two similar remnants, already in evidence, of the cigarettes which Henson testified were smoked by appellant, jointly with others. The fact that the cigarette was found after the charged offenses does not destroy its admissibility. *People v. Freytas*, 157 Cal.App.2d 706, 321 P.2d 782; *People v. Bean*, 149 Cal.App.2d 299, 308 P.2d 27. Here the lapse of time was greater than in the cited cases, but we cannot say, as a matter of law, that the evidence is too remote to be relevant. This was primarily a question for the trial court. In the light of the instruction given, we see no prejudice to appellant.

[4] Appellant also urges error in the giving of an instruction that "the mere possession of one of the prohibitive narcotics is a violation of the law, and it is not required that the accused have specific knowledge as to the exact nature of the drug possessed." The first clause of this instruction may be subject to the construction that knowledge of the narcotic character of the article possessed is not necessary. To the extent that it carries this implication, it is erroneous. Knowledge of the narcotic character of the substance possessed, sold or transported is essential. *People v. Winston*, 46 Cal.2d 151, 161, 293 P.2d 40; *People v. Candiott*, 128 Cal.App.2d 347, 275 P.2d 500. The second clause of this instruction has no possible relevance to the facts of this case. The instruction is therefore disapproved. However, the error was not prejudicial. Other instructions fully advised the jury that appellant could be found guilty only if he knew the narcotic character of the marijuana. Appellant admitted some knowledge of marijuana, but denied personal participation in the transactions charged. He denied making any sale to Henson. But when the jury found that a sale was made, the price and the circumstances attending the transaction would necessarily imply knowledge by appellant of the narcotic nature of the substance sold, and therefore of the cigarette transported

as a sample and that later smoked. We find no prejudice to appellant in the instruction complained of. *People v. Winston*, *supra*; *People v. Perez*, 128 Cal.App.2d 750, 276 P.2d 72.

Judgment affirmed.

DOOLING, J., concurs.



162 Cal.App.2d 798

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Roy Diaz ADRIANO, Defendant and
Appellant.

Cr. 1237.

District Court of Appeal, Fourth District,
California.

Aug. 15, 1958.

Proceeding upon motion for order in nature of writ of mandamus. The Superior Court, Fresno County, George M. DeWolf, J., entered order denying motion, and petitioner appealed. The District Court of Appeal, Mussell, J., held that where issues raised on appeal were same as were raised on prior appeal pending in District Court of Appeal, wherein motion for order in nature of writ of mandate was denied, Superior Court's order of denial was correct.

Order affirmed.

Mandamus ☞187(9)

Where issues raised on appeal from order of Superior Court denying motion for order in nature of writ of mandamus were same as were raised on prior appeal, pending in District Court of Appeal, wherein motion for order in nature of writ of mandate was denied, Superior Court's order of denial was correct.

Roy Diaz Adriano in pro. per., and Rock Zaitzow, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

On May 6, 1953, petitioner was found guilty by a jury of the crime of robbery and apparently there was no appeal from the judgment in that action. On June 17, 1957, petitioner filed in the Superior Court of Fresno county a "Motion to Annul and Vacate and Set Aside Judgment." On July 17, 1957, the said Superior Court denied petitioner's motion and on July 30, 1957, he appealed from the order denying it. This appeal is now pending in this court (4th Criminal No. 1229). On October 16, 1957, petitioner filed in this court, in 4th Criminal No. 1229, a "Motion for Order in Nature of Writ of Mandate" in which he sought to compel the county clerk of Fresno county to prepare a certified clerk's and reporter's transcript of the proceedings in the robbery trial and to forward said transcript to him. On October 17, 1957, petitioner's motion for order in the nature of writ of mandate was denied by order of this court.

The present proceeding was commenced in Superior Court of Fresno county by the filing by petitioner on November 5, 1957, of a "Motion for Order in the Nature of Writ of Mandamus", in which petitioner sought an order compelling the county clerk of Fresno county to prepare and deliver to him the same transcripts sought in his application to this court filed on October 16, 1957. On December 30, 1957, the Superior Court of Fresno county denied petitioner's motion and the instant appeal is from the order denying it.

The record shows that the issues raised in petitioner's first pending appeal (4th Criminal No. 1229) are the same issues raised in the present appeal. We therefore conclude that the order of the Superior Court dated December 30, 1957, was correct under the circumstances shown by the record.

Order affirmed.

GRIFFIN, P. J., and McCABE, J. pro tem., concur.

163 Cal.App.2d 48

Sandra Marian SHEFFIELD, a minor, by her guardian ad litem, Clifford W. Sheffield, Plaintiff and Appellant,

v.

J. Floyd RUNNER, First Doe and Second Doe, Defendants and Respondents.

Civ. 17820.

District Court of Appeal, First District, Division 2, California.

Aug. 19, 1958.

Rehearing Denied Sept. 18, 1958.

Hearing Denied Oct. 15, 1958.

Malpractice action against physician for death of patient who died in her home from bronchial pneumonia with antecedent cause of chicken pox. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., granted judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that statement by physician before death of patient that case was a hospital case and physician's statement after death that he should have put patient in hospital made case sufficient for jury with respect to question whether failure to hospitalize patient was cause of her death.

Reversed.

1. Appeal and Error ⇨927(3)

In passing upon judgment of nonsuit in malpractice cases, evidence must be considered most favorable to plaintiff and defendant's contradictions of plaintiff's testimony must be disregarded.

2. Evidence ⇨265(7)

Physicians and Surgeons ⇨18(8)

In malpractice cases, expert testimony is required to establish standard of medical practice in community, such evidence may be found in testimony of defendant physician, and his judicial admissions have same effect as direct expert testimony.

3. Physicians and Surgeons ⇨18(9)

In malpractice action against physician for death of patient who died in her home from bronchial pneumonia with antecedent cause of chicken pox, alleged statement by physician before patient's death that case was a hospital case and physician's state-

ment after death that he should have put patient in hospital made case for jury with respect to question whether failure to hospitalize patient was cause of her death.

4. Physicians and Surgeons ⇨18(8)

Admissions of physician with respect to treatment of patient must do more than show an honest mistake in order for there to be recovery for malpractice.

5. Appeal and Error ⇨1001(1)

In civil cases, proof of reasonable probability is all that is necessary to support jury's finding.

6. Trial ⇨142

In civil cases, if evidence will support conflicting inferences, which inference shall be drawn is for jury.

7. Physicians and Surgeons ⇨18(8)

A plaintiff is not required in a malpractice case to demonstrate conclusively and beyond possibility of doubt that the negligence of physician resulted in injury.

William R. Lowery, San Francisco, for appellant.

Peart, Baraty & Hassard, Alan L. Bonnington, Salvatore Bossio, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff, through her guardian ad litem, appeals from a judgment of nonsuit in an action against defendant, a physician and surgeon, for malpractice resulting in the death of plaintiff's mother.

Respondent J. Floyd Runner, M.D., had been Margaret Sheffield's physician since 1948. He was called by her on February 14, 1954, at which time she complained of a rash, coughing and being sick all over. Respondent testified that an examination of Mrs. Sheffield resulted in a diagnosis of chicken pox and a bronchial cold.

Mrs. Phyllis Dodson testified that she visited Mrs. Sheffield at approximately 3 p. m. on February 14 and found her almost in a state of collapse, her breathing very labored. Mrs. Dodson telephoned Mrs. Sheffield's mother, Mrs. Wallis.

Mrs. Wallis testified that she arrived at her daughter's home about 10 p. m. At this time her daughter "looked awful," her skin was dark and she was gasping. Mrs. Wallis further testified that she telephoned respondent who told her that her daughter was very ill, that she had chicken pox "with pneumonia complicating it." There was testimony that after examining the patient on February 16, respondent stated "This is the worst case of chicken pox I have ever seen," and "This is a hospital case, but they won't take her on account of this other" (the chicken pox).

Mrs. Sheffield died at 7 a. m. February 17, 1954 and respondent arrived at her home at 8 a. m. Mrs. Wallis testified that, after respondent examined the deceased, he stated "I should have put her in the hospital." Respondent testified that on Tuesday the patient had a darkening of the skin over the hands and the membrane of the lips, that this indicated a cyanosis which is caused by "a poor aeration of the blood, which goes with pneumonia." This means that the oxygen is being cut off from the blood supply. "It isn't picking up the standard amount of oxygen." Respondent further testified that it is usual, where cyanosis is marked, to administer oxygen.

The administrator of the Community Hospital of San Mateo County (in which county decedent resided) testified that this hospital had a communicable disease ward in February 1954 and on the 14th, 15th and 16th of that month there were beds available in this ward. Oxygen equipment was available at this hospital. Respondent made no effort to learn if there were hospital facilities open to the decedent in San Mateo County.

The death certificate filled out and signed by respondent listed the immediate cause of death as bronchial pneumonia and the antecedent cause as chicken pox with an interval of five days between the onset of both conditions and the death. Respondent's medical record of the case also lists the onset of pneumonia as five days prior to death.

[1] Respondent contradicted the testimony above summarized in some important particulars but in passing upon a judgment of nonsuit in malpractice as in other cases we must consider the evidence most favorable to plaintiff and disregard such contradictions. *McCurdy v. Hatfield*, 30 Cal.2d 492, 183 P.2d 269.

The nonsuit was granted on the grounds that there was no proof that respondent failed to conform to medical practice in the community and no proof that the death was proximately caused by any such failure.

[2] While expert testimony is required in a case of this sort to establish the standard of medical practice in the community, this evidence may be found in the testimony of the defendant physician, and his extra-judicial admissions have the same effect as direct expert testimony. *Lashley v. Koerber*, 26 Cal.2d 83, 89, 156 P.2d 441; *Lawless v. Calaway*, 24 Cal.2d 81, 90, 147 P.2d 604; *Scott v. Sciaroni*, 66 Cal.App. 577, 582, 226 P. 827.

[3] Here the respondent testified that he found the decedent suffering from cyanosis and that where the cyanotic condition is marked it is usual to administer oxygen. There is testimony of his statement: "This is a hospital case but they won't take her on account of this other." There is testimony that there was an available hospital where they would accept her and that oxygen was available in this hospital; and there is testimony that after her death respondent said: "I should have put her in the hospital." Taking this evidence together it is more than adequate to support a finding that under the prevailing standard of care in the community decedent should have been placed in a hospital by respondent.

[4] While it is true, as argued by respondent, that the admissions of the physician must do more than show an honest mistake (*Lashley v. Koerber*, supra, 26 Cal. 2d at pages 89, 90, 156 P.2d at pages 444, 445), that case goes on at page 90 of 26 Cal.2d, at page 444 of 156 P.2d to say that in passing on a nonsuit "where the state-

ments are reasonably susceptible of more than one meaning, that meaning is to be placed on them which is favorable to plaintiff." Here, in addition to the other factors above outlined, we have the testimony of respondent's statement before death: "This is a hospital case * * *" and the statement after death: "I should have put her in the hospital."

Respondent argues that the statement after death does not prove knowledge before death that the decedent should have been hospitalized. But the statement after the death takes its color from the one made before death that "[t]his is a hospital case." The two statements taken together clearly make a case sufficient to go to the jury.

It is true as pointed out by respondent that there was no direct testimony that the failure to hospitalize decedent was the cause of her death. However the circumstantial evidence was strong from which the jury could reasonably have drawn the inference of proximate cause. Decedent was cyanotic, i. e. by reason of her pneumonia she was not getting enough oxygen in her blood. It is usual in such cases to administer oxygen. Oxygen was available in the hospital to which she could have been admitted. She died of the pneumonia. Respondent's statement immediately following the death: "I should have put her in the hospital" is another factor to be weighed by the jury in determining proximate cause.

[5-7] In civil cases proof of reasonable probability is all that is necessary. *Spolter v. Four-Wheel Brake Service Co.*, 99 Cal. App.2d 690, 693, 222 P.2d 307. "'It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the *only* conclusion that can fairly or reasonably be drawn therefrom * * *'" [Citation] "The plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly derivable from the facts proved * * *." *Hilary v. Union Ice Co.*, 45 Cal.2d 30, 38, 286 P.2d 21, 25. If the evidence will support

conflicting inferences, which inference shall be drawn is for the jury to decide. *Mah See v. North American Accident Ins. Co.*, 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; *Hamilton v. Pacific Electric Ry. Co.*, 12 Cal. 2d 598, 602-603, 86 P.2d 829. A plaintiff is not required in a malpractice case "to demonstrate conclusively and beyond the possibility of a doubt" that the negligence resulted in the injury. If so "it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science." *Dimock v. Miller*, 202 Cal. 668, 671, 262 P. 311, 312.

We find the evidence sufficient to support an inference by the jury that the death resulted from the failure to hospitalize decedent.

Judgment reversed.

KAUFMAN, P. J., and DRAPER, J.,
concur.

Hearing denied; **SHENK, SCHAUER**
and **SPENCE, JJ.**, dissenting.



162 Cal.App.2d 643

Edith K. FUSS and Jake Fuss, Plaintiffs
and **Appellants,**
v.

CITY OF LOS ANGELES, etc., et al.,
Defendants.

J. A. Thompson & Son, Inc., a Corporation,
Respondent.
Civ. 22562.

District Court of Appeal, Second District,
Division 3, California.
Aug. 7, 1958.

Rehearing Denied Sept. 2, 1958.

Hearing Denied Oct. 1, 1958.

Action to recover damages arising out of personal injuries sustained by one of the plaintiffs. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., entered an order quashing service of summons and

plaintiffs appealed. The District Court of Appeal, Patrosso, J. pro tempore, held that where service of an alias summons and an amended complaint was made upon a corporation by serving its general manager, but copy of summons so served did not contain indorsement that corporation was served as a defendant sued under a designated fictitious name as required by Code of Civil Procedure, and neither the summons nor complaint designated such corporation as a party to the action, service was properly quashed.

Order quashing service of summons affirmed.

1. Municipal Corporations ⇨816(1)

Where in complaint to recover damages arising out of personal injuries sustained by one of the plaintiffs, only defendants alleged to have been negligent in creating hazardous condition which caused injury were two named individuals, their agents, and employees, and there was no allegation that a contractor, alleged to be a partnership, did anything in connection with construction of an allegedly defective sidewalk, no cause of action was stated against defendant partnership as such.

2. Corporations ⇨507(15)

Where service of an alias summons and an amended complaint was made upon a corporation by serving its general manager, but copy of summons so served did not contain indorsement that corporation was served as a defendant sued under a designated fictitious name as required by Code of Civil Procedure, and neither the summons nor complaint designated such corporation as a party to the action, service was properly quashed. *West's Ann.Code Civ. Proc. § 474.*

3. Process ⇨157

One who is not named either by his true or fictitious name or as an unknown defendant is not a proper party to an action, and service of summons upon such person, upon proper motion, should be quashed.

4. Appeal and Error $\S$ 103, 870(5)

An order of a trial court denying plaintiffs' motion to amend a first amended complaint and summons issued thereon by substituting a corporation for a copartnership named as a defendant, was not appealable, and propriety of such order was reviewable only upon appeal from a final judgment rendered in the action.

Buchalter, Nemer, Coyle & Cooper, Los Angeles, Richard B. Coyle, Leon Savitch and Joseph Weissman, Los Angeles, of counsel, for appellants.

Chase, Rotchford, Downen & Druker, Henry A. Schultz, Los Angeles, for respondents.

PATROSSO, Justice pro tem.

Appeal by plaintiffs from an order quashing service of summons upon J. A. Thompson & Son, Inc., a corporation.

Plaintiffs instituted this action to recover damages for personal injuries sustained by the plaintiff Edith K. Fuss on August 4, 1954. The original complaint was filed on August 3, 1955, and named as defendants therein the City of Los Angeles, a municipal corporation, J. A. Thompson & Son, Contractors, a copartnership, J. A. Thompson, J. H. Thompson and a number of fictitiously named corporations, copartnerships and individuals. A first amended complaint was filed on August 15, 1955, naming the same defendants and insofar as material here, containing substantially identical allegations as the original complaint.

Both the original and first amended complaint allege "That J. A. Thompson & Son, Contractors, is a copartnership consisting of J. A. Thompson and J. H. Thompson;" that J. A. Thompson and J. H. Thompson were engaged in the construction business as contractors and constructed and laid a concrete sidewalk on the northerly side of Victory Boulevard immediately adjacent to premises owned and occupied by the

plaintiffs; that "J. A. Thompson, J. H. Thompson, and their agents, and employees, Doe V and Doe VI," in the course of constructing said sidewalk placed spacer-boards therein and after the completion of the work negligently left some of said spacer-boards imbedded in the sidewalk in such manner as to protrude and extend above the level thereof; that "J. A. Thompson, J. H. Thompson, Doe V and Doe VI knew, or should have known, that the said sidewalk with one or more of the said 'spacer-boards' so placed and protruding therefrom * * * was a dangerous and defective condition which would constitute a continuing hazard to the public and particularly" the occupants of plaintiffs' premises; "That the careless and negligent conduct of the said Defendants, J. A. Thompson and J. H. Thompson and Doe V and Doe VI created the dangerous and defective condition aforesaid which, as a continuing hazard, directly and proximately caused Plaintiff, Edith K. Fuss, to be injured" as therein set forth.

[1] It will be noted from the foregoing recital of the allegations in plaintiffs' complaint that the only defendants¹ who are alleged to have been negligent in creating the hazardous condition which caused injury to Mrs. Fuss are J. A. Thompson and J. H. Thompson and their agents and employees Doe V and Doe VI. There is no allegation that the defendant J. A. Thompson & Son, Contractors, alleged to be a partnership, did anything in connection with the construction of the sidewalk or in any other respect. Hence, no cause of action was stated against the defendant partnership as such. *Billings v. Finn*, 1921, 55 Cal.App. 134, 202 P. 938; *Potts v. Whitson*, 1942, 52 Cal.App.2d 199, 205, 125 P.2d 947.

On December 14, 1955, defendants J. A. Thompson & Son, a partnership, J. A. Thompson and J. H. Thompson, filed an answer to the first amended complaint wherein they denied substantially all of the

1. Other than the city of Los Angeles and its agents and representatives with whom we are not here concerned.

material allegations thereof. On September 13, 1956, an alias summons was issued upon the first amended complaint in which the defendants were named as they appeared in the first amended complaint, and although J. A. Thompson & Son, Inc., a corporation, was not named as a defendant, service of said alias summons together with a copy of the first amended complaint was made upon that corporation, the affidavit of service reciting that such service was, on September 15, 1956, made upon "J. A. Thompson & Son, Inc., a corporation, sued herein as J. A. Thompson & Son, Contractors, by serving C. H. F. Durkee in his capacity as General Manager of said corporation at 773 Stradella Road, Bel Air, California." The copy of the summons so served did not contain thereon the endorsement required by Code of Civil Procedure, section 474, namely: that the corporation was served as a defendant sued under a designated fictitious name.

[2, 3] Following the purported service upon it the corporation J. A. Thompson & Son, Inc., appeared specially and moved to quash the service upon the grounds that neither the summons nor complaint designated said corporation as a party to the action and that the summons bore no endorsement to the effect that the corporation was served as a fictitious defendant. As previously indicated, the motion was granted and the trial court could not have done otherwise. Not only because of the failure of the summons to bear the endorsement required by Code of Civil Procedure, section 474 (*Armstrong v. Superior Court*, 1956, 144 Cal.App.2d 420, 424, 301 P.2d 51), but also because one "who is not named either by his true or a fictitious name or as an unknown defendant is not a proper party to an action, and service of summons upon such person upon proper motion should be quashed." *Kline v. Beauchamp*, 1938, 29 Cal.App.2d 340, 342, 84 P.2d 194, 195.

[4] We are also asked by the appellants to review the order of the trial court in denying their motion, made at the same time as the order quashing service of summons,

whereby they sought to amend the first amended complaint and summons issued thereon by deleting the name "J. A. Thompson & Son, Contractors, a copartnership" as a party defendant and substituting therefor the name "J. A. Thompson & Son, Inc., a corporation," and so as to state a cause of action against said corporation. While defendants devote a considerable portion of their brief to a discussion of the propriety of the trial court's action in this regard, we may not consider the question they undertake to present as the order is not appealable (*Kline v. Beauchamp*, supra), and is reviewable only upon an appeal from the final judgment rendered in the action. *Randall v. Beher* (1950) 101 Cal.App.2d 179, 181, 225 P.2d 291.

City of Oakland v. Darbee, 1951, 102 Cal. App.2d 493, 227 P.2d 909, cited by appellants in support of their contention that the order refusing leave to amend is reviewable upon this appeal from the order quashing service of summons is not in point. That was an action in eminent domain instituted in Alameda County against a number of individual defendants between whom there was no community of interest or ownership in any single parcel. Some of the defendants who were residents of the city and county of San Francisco moved for a separation of the proceedings as against them and also moved for an order transferring the proceedings as to them to a neutral county pursuant to section 394 of the Code of Civil Procedure. The trial court granted both motions. The order of transfer was appealable but the order of severance was not. Upon appeal from the former order it was held that both orders are reviewable for the reason that the correction of the order transferring the case to another county necessarily involved and was dependent upon the propriety of the order of severance. Here, however, the correctness of the order quashing summons is in no event dependent upon the correctness of the order denying appellants' motion for leave to amend. If the latter order had been granted it would not have had the effect of validating the purported service upon respondent of the

alias summons issued on the first amended complaint.

The order quashing service of summons is affirmed.

SHINN, P. J., and PARKER WOOD, J.,
concur.



163 Cal.App.2d 22

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Doyle BEASLEY, Defendant and Appellant.
Cr. 3337.

District Court of Appeal, First District,
Division 1, California.

Aug. 19, 1958.

Hearing Denied Oct. 15, 1958.

Prosecution for murder wherein subject of sex deviation was brought out for first time by defense while cross-examining a state witness, who testified on redirect examination that defendant had performed acts of sodomy, without showing that acts of sodomy were committed between defendant and deceased. From adverse judgment of the Superior Court, City and County of San Francisco, C. Harold Caulfield, J., the defendant appealed. The District Court of Appeal, Bray, J., held that all testimony concerning homosexuality should have been stricken from the record, since it did not have any bearing on question of whether defendant killed deceased and only tended to degrade defendant.

Judgment and order denying new trial reversed.

1. Criminal Law ☞1144(13)

Reviewing court must assume in favor of the verdict the existence of every fact which jury could have reasonably deduced from the evidence.

2. Homicide ☞253(1)

Evidence was sufficient to sustain verdict of murder in the first degree. West's Ann.Pen.Code, § 189.

3. Homicide ☞233

Motive, while oftentimes valuable, is not an indispensable element of proof in prosecution for murder.

4. Homicide ☞233

In prosecution for murder, testimony by state witness that defendant had told him that he had to kill victim to keep victim from telling police something for which defendant would have to serve time established a motive.

5. Homicide ☞232

In prosecution for murder, testimony as to statements made by defendant on evening of shooting that he might get in serious trouble and subsequent admissions of killing allegedly made to keep victim from telling police something which would cause defendant to serve time established premeditation. West's Ann.Pen.Code, § 189.

6. Criminal Law ☞703

In prosecution for murder, statements by prosecuting attorney in his opening statement that prosecution intended to prove defendant and deceased were homosexuals and that breaking up of that relationship was motive for murder was not error, since prosecution was entitled to prove that motive if it could and trial court at that point had right to assume statement was made in good faith.

7. Witnesses ☞247

In a criminal prosecution, when a witness is asked "why?" he may give his reasons, whether they be founded upon fact, fiction, or mere suspicion.

8. Witnesses ☞287(1)

Where on cross-examination matters are brought out tending to discredit a witness' testimony, he may make explanations.

9. Witnesses ☞287(1)

In prosecution for murder, wherein defendant's cross-examination of inspector appeared to be an attempt to show that police settled upon defendant as killer with-

out making thorough investigation of other theories, especially that of robbery, and inspector testified they never pursued theory of robbery because of type of case it was, and explained that to mean that during their investigations they questioned homosexuals friendly with victim and defendant, without objections, testimony by inspector on redirect examination that they were able to ascertain that victim and defendant were homosexuals was admissible in explanation of officer's selection of defendant as perpetrator of crime, although not for purpose of proving its truth.

10. Criminal Law ⇨696(3)

In prosecution for murder, wherein subject of sex deviation was brought out for first time by defense while cross-examining a state witness, who testified on redirect examination that defendant had performed acts of sodomy, without showing that acts of sodomy were committed between defendant and deceased, all testimony concerning homosexuality should have been stricken from the record, since it did not have any bearing on question of whether defendant killed deceased and only tended to degrade defendant.

11. Criminal Law ⇨719(1)

In prosecution for murder, wherein prosecuting attorney stated that he intended to prove that defendant and deceased were homosexuals, statements by prosecutor in argument to jury that police had found out they were homosexuals and statements concerning passions and jealousies between homosexuals were highly improper when no homosexual relationship between the two men had been proved.

12. Criminal Law ⇨1165(1)

A course of conduct can deprive a defendant of a fair trial even though each individual error is unimportant.

13. Criminal Law ⇨824(4)

While trial court has duty to instruct jury on law applicable to case, it has no duty to instruct on any specific subject developed by evidence unless there is a request from one of the parties to do so.

14. Criminal Law ⇨824(4)

In prosecution for murder, court was not required on its own motion to instruct on motive.

Markuse & Murray, James Murray, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerney, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from a judgment entered upon a jury verdict of murder in the first degree with recommendation of life imprisonment.

Questions Presented.

1. Sufficiency of evidence.
2. Alleged error in admitting evidence of homosexuality.
3. Alleged misconduct of prosecuting attorney.
4. Failure to instruct on motive.

1. Sufficiency of Evidence.

[1,2] Assuming “* * * in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence * * *” as we are required to do (People v. Newland, 1940, 15 Cal.2d 678, 681, 104 P.2d 778, 780) the evidence is amply sufficient to support the verdict.

Sometime between 11 p. m. July 27th and 4 a. m. July 28th deceased was killed near the entrance to his apartment by being shot four times with a .38-caliber revolver. No one saw the shooting. Although when the body was discovered deceased's wallet was missing, the police almost immediately concluded that it was actually a revenge murder or something of that nature. Without detailing all of the facts, the evidence shows that about six months prior to the homicide defendant had a falling out with the victim with whom he had been rooming. He pretended to want to rent an apartment close to where the killing occurred and did occupy it the night of the killing. On the date of the killing

defendant was seeking to contact the victim and was using assumed names in doing so, and was in the area of the killing both before and during the time when the killing took place. Defendant showed a consciousness of guilt by admittedly lying to the investigating officers concerning incidents connected with the case and his own activities on the fatal day. The afternoon of the shooting defendant, patting himself at the waist line where there was a bulge which appeared to be a pistol, told his friend Washington that defendant might get in "serious trouble." After the killing defendant evidenced an almost macabre interest in it. Also he told Washington that the only gun police could tie him in with was in Louisiana and that he had taken the other gun he had and its cartridges and thrown them into the ocean near Fleishacker pool. (The police dragged that area of the ocean with mine detectors, but were unable to find a gun.) He also said that he had to do what he had done because "this fellow" was going to get him into a lot of trouble and was going to "squeak" to the police and defendant would "get a lot of time." Defendant admitted lying to the police and stating to Washington that he had had to do the killing and had thrown the gun and shells away, but claimed that he said it merely to calm Washington down. Defendant practically admitted to the officers that he had stated to a Miss Winslow that he had been with deceased the night he was killed. Defendant, without any suggestion of the matter having been made by the prosecution, asked a police inspector what one Lopez, who was a fellow prisoner with defendant at the city jail, had told the inspector defendant had told Lopez. The inspector replied that Lopez had said that defendant stated to him that he was in jail on a murder charge and "I did it, but nobody saw me." He then asked Lopez what was the best way to get out of the country. Defendant's denial of the killing and all circumstances therewith merely created a conflict with the other evidence, which conflict the jury resolved against him.

[3-5] Defendant's statement to Washington as well as other evidence in the case shows premeditation. The firing of three of the four shots at close range and the evidence that the killer was probably waiting in the doorway supports a verdict of first degree murder on the theory of lying in wait which section 189, Penal Code, so classifies it. See *People v. Tuthill*, 31 Cal.2d 92, 187 P.2d 16, 21, on the subject of what constitutes "lying in wait." Defendant claims that no motive was shown. Motive, while oftentimes a valuable, is not an indispensable element of proof. See *People v. Durrant*, 1897, 116 Cal. 179, 208, 48 P. 75; *People v. Dessauer*, 1952, 38 Cal.2d 547, 551, 241 P.2d 238. But Washington's testimony that defendant had to do what he had done to keep his victim from telling the police something for which defendant would have to serve time, established a motive. On the question of premeditation our case differs from *People v. Morton*, 1947, 79 Cal.App.2d 828, 843, 181 P.2d 32, where veiled threats against his wife were uttered by the defendant many months before the shooting, in that in the instant case defendant on the evening of the shooting disclosed that he was going to get into serious trouble and subsequently admitted the killing and gave as the reason for committing it one which, together with the circumstances of the killing, proved that it was deliberately and premeditatedly committed.

2. Homosexuality.

[6] In his opening statement, the prosecuting attorney stated that the prosecution intended to prove that defendant and deceased were homosexuals. Defendant objected that this was not "proper" and was "unfair." The court then admonished the jury that any statement of the attorney was not evidence, was not to be considered by the jury as such, and that if evidence were attempted to be introduced on that subject the court would then pass upon the matter. The attorney then stated that the prosecution intended to prove that the breaking up of that relationship was the motive for the murder, and that it would not be offered

to degrade or take advantage of defendant, but that it merely would go to the motive. Again the court admonished the jury that the statement was not evidence and that the court would rule upon the subject at the proper time. There was no error here, as the prosecution was entitled to prove that motive if it could, and at this point in the trial the court had the right to assume that the statement was made in good faith. See *People v. Berryman*, 6 Cal.2d 331, 57 P.2d 136; *People v. Granados*, 49 Cal.2d 490, 319 P.2d 346. See also *People v. Northcott*, 209 Cal. 639, 652, 289 P. 634, 70 A.L.R. 806; *People v. Mullen*, 115 Cal. App.2d 340, 252 P.2d 19; and *People v. Hall*, 27 Cal.App.2d 440, 81 P.2d 248, on admissibility of evidence of sex desires as motive for murder.

Defendant's cross-examination of Inspector O'Haire appears to be an attempt to show that the police settled upon defendant as the killer without making a thorough investigation of other possibilities and theories, especially that of robbery. A part of the cross-examination follows: "Mr. Wainwright [defendant's attorney]: Q. Now, Inspector, after having determined that Mr. Martland's bill fold was missing, did you ever pursue the theory that Mr. Martland was the victim of a robbery? A. No, we never pursued that theory, due to the type of gunshot wounds, the type of case it was.

"Q. * * * When you say 'due to the type of case it was' what do you mean? A. Well, during our investigation we questioned homosexuals that were friendly with Martland and also knew Beasley. In fact, Mr. Martland had made a statement to one such person that he was afraid of Beasley." No objection to, nor motion to strike this statement was made.

On redirect examination plaintiff called O'Haire's attention to the fact that answering a question by defendant as to whether it was the fact that defendant had lied to him that was the main reason for assuming defendant to be guilty. O'Haire had replied "That, plus other evidence." When asked that he explain that answer,

O'Haire stated, "Yes, there was many factors which indicated that Doyle Beasley was the perpetrator of the crime. We were able to ascertain that Martland was a homosexual and that Doyle Beasley was a homosexual. We were able to determine—" Defendant moved that the answer be stricken as a conclusion of the witness. Considerable colloquy of court and counsel followed and the court ruled, "I find nothing in the question, the cross-examination questions that would permit the subject to be pursued any further on re-direct." Apparently this was a ruling in defendant's favor. Then plaintiff called O'Haire's attention to his answer hereinbefore set forth to the effect that the police had not pursued a theory of robbery "due to the type of gunshot wounds, the type of case it was," and then asked him to explain that answer. O'Haire replied that in investigating the case, they determined that deceased and defendant were homosexuals. Defendant objected that this was the conclusion of the witness. The court overruled the objection on the ground that the matter was brought out in answer to the question asked by defendant. However, the court ruled, "due to the type of information that might be elicited, I am going to sustain the defendant's objection to further examination on this subject."

[7-9] As stated before, it was the endeavor of defendant to show that the police and particularly Inspector O'Haire selected defendant as the killer and made no effort to pursue other possibilities. Defendant even asked O'Haire if they had considered that the killer might have been a woman. Defendant pursuing this line of questioning and allied lines opened the door for O'Haire to give his reasons for not following other possibilities. "When a witness is asked 'why?' he may give his reasons whether they be founded upon fact, fiction, or mere suspicion." *People v. Page*, 1938, 28 Cal.App.2d 642, 649, 83 P.2d 77, 80. Where on cross-examination as here with O'Haire matters were brought out tending to discredit a witness' testimony, he may make explanations. See *People v. Darr*, 3

Cal.App. 50, 53, 84 P. 457. In *People v. Quock Wong*, 1954, 128 Cal.App.2d 552, 554, 275 P.2d 778, 779, the court said: "Upon cross-examination of one of the officers who testified concerning such reputation, defendant developed the fact that upon one occasion he was arrested as a keeper of a house of prostitution at this hotel. That, if error, was invited error of which defendant cannot complain. [Citation.] The police officer next called was asked by the state to relate the circumstances of that arrest. * * * The state, relying upon section 1854 of the Code of Civil Procedure and *People v. McCarthy*, 25 Cal.App.2d 667, 78 P.2d 252, claims it was proper for the state to inquire into the whole subject after part of it had been given in evidence by the defendant. That position seems sound." See also *People v. Howes*, 1950, 99 Cal.App.2d 808, 222 P.2d 969, where the defendant on cross-examination of the employer in a prosecution of the defendant-employee for grand theft tried to show that the books were kept in a slipshod manner. On redirect the witness was allowed to explain why the shortage was not discovered. It was said: "It is quite clear that, even if the objection were timely and should have been sustained to this line of questioning, which is doubtful, the error could not have been prejudicial inasmuch as appellant's counsel had opened the subject on cross-examination and examined the witness at some length." 99 Cal.App.2d at page 822, 222 P.2d at page 978.

The evidence was admissible, not for the purpose of proving its truth, but in explanation of the police officer's selection of defendant as the perpetrator of the crime, an explanation of which defendant himself requested.

[10] The first time the subject of sex deviation was mentioned, it was done by defense counsel, who asked Washington whether he ever knew defendant "to be perverted or anything of that nature." Washington replied, "Well, no, I can't exactly say that I have never seen anything out of him that—" He then stated that when up to defendant's house they would

eat and drink and witness would go about his business and defendant about his. On redirect examination after asking Washington if in answer to a question by defense counsel he had stated that defendant had never "performed any perverted acts" and receiving an affirmative reply, the following occurred:

"Q. Weren't you present on Stockton Street on one occasion—A. Well, I wouldn't like to talk about that. I didn't—as far as I know, acted as any other man would. As far as being perverted, I wouldn't say he was.

"Q. Did you tell me, Mr. Washington, that you—

"Mr. Wainwright: I am going to object to this man seeking to impeach—

"The Witness: A. I cannot—

"The Court: Overruled.

"Mr. Campbell [for the prosecution]: Q. Didn't you tell me, Mr. Beasley had performed acts of sodomy in the Stockton Street hotel? A. Yes.

"Q. He— A. But, I didn't see him. I wasn't in his room with him at the same time.

"Mr. Wainwright: Well, now, I am going to move that be stricken.

"The Witness: A. He told me that he had.

"Mr. Campbell: Q. He told you he had? A. I was not in the house. He told me he had.

"Mr. Wainwright: I am going to move that be stricken.

"Mr. Campbell: You brought it up.

"Mr. Wainwright: Certainly."

Later, defendant moved to strike from the record all testimony concerning homosexuality, including this statement of the witness Washington. The court denied the motion. This motion should have been granted. While it is true that defendant opened the subject on cross-examination and possibly under the rule set forth in *People v. Howes*, supra, 99 Cal.App.2d 808, 822, 222 P.2d 969, the evidence would have been admissible had it been followed up to

show that the acts of sodomy were committed between defendant and the deceased to prove what the prosecuting attorney stated in his opening statement he intended to prove, namely, that the motive of the killing was the estrangement of two homosexuals,¹ without connecting the acts to the actors in this case the only effect of the testimony could be to degrade the defendant in the eyes of the jury. The fact that he had committed sodomy with a person other than the deceased could not possibly have had any bearing upon the question of whether or not defendant had killed the deceased. The motion to strike was made at the end of the prosecution's case, when it was clear that there was no proof of any homosexual relationship between the two men. The effect of this error will be discussed with the next subject.

3. Misconduct.

[11] In his opening argument the prosecuting attorney stated: "The police found out, as you heard from the evidence, that Richard Martland was a homosexual and so was the defendant Doyle Beasley. They found out from Pat Creegan, as you heard in the evidence, that the two men had lived together; had had a falling out and that Martland had moved out." In his argument, defense counsel pointed out that the prosecution had failed to prove that the homosexual relationship existed between the two men, and that the inspector's assumption that such relationship existed was merely to slander and degrade defendant.

In his closing argument the prosecuting attorney stated: "We, who are in law enforcement work, ladies and gentlemen, we see homosexuals, sex perverts and criminals that sometimes we don't understand why an average, normal citizen, who doesn't come in contact with them the way we do, is at a loss to understand the motives or reasons that cause them to act the way they do. In a homosexual relationship, there is al-

ways, just as in a normal male-female relationship, the loved one and the lover. Passions and jealousies between homosexuals are even more exaggerated than they are in normal people." Here defendant objected and asked that the jury be admonished. The court overruled the objection. The prosecuting attorney continued: "A rebuffed homosexual is in the same position as a woman scorned. Doyle Beasley, ladies and gentlemen, did not hate Richard Martland. On the contrary, he loved him. But, he had been rebuffed. He had been turned down and tossed aside and when he talked to Ralph Washington on July 27, 1956, his course was already set. He had made up his mind what he was going to do and he indicated to his friend, Ralph, just what he intended to do." These statements were highly improper. No homosexual relationship between the two men had been proved. The theory upon which the inspector could properly mention the subject was not to prove the fact, but to answer defendant's probing as to why the police finally concluded that defendant was the perpetrator of the murder. (The inspector testified that the police before coming to that conclusion had investigated every person who they could learn had known the deceased.)

[12] The error in the failure of the court to strike the sodomy testimony and the statements of the prosecution above mentioned, coupled with the fact that the record shows that the prosecution from the very opening statement on, engaged in a course of conduct that must have been deliberately intended to improperly prejudice defendant and to deprive defendant of a fair trial, was prejudicial. Homosexuality is a subject upon which the public generally looks with disfavor. It is a disgusting subject to some and a distasteful subject to others. Although the prosecution stated at the beginning that it intended to prove a homosexual relationship between deceased and defendant, it made no effort to do so.

1. We have in mind that sodomy, under the legal definitions, may be committed by humans of opposite sex as well as of the same sex. See Vol. 39, Words and Phrases, p. 559 et seq. Nevertheless the term as

commonly understood and as we believe it would be understood by the jurors is considered to relate only to acts between members of the male sex.

It must have known that Washington would mention "sodomy" in answer to its question and that unless connected with the deceased such evidence was inadmissible. It must have known that Inspector O'Haire's testimony was inadmissible to prove the fact of homosexuality, and yet it argued to the jury that homosexuality had been proved, and the prosecuting attorney, in effect, testified to the jury the experience of "We, who are in law enforcement work" with homosexuals. Then in both his opening and closing arguments it engaged in a discussion which was clearly erroneous, and could not be anything but prejudicial. The whole course of conduct was designed to prejudice the defendant. This deliberate and continuous conduct should not be condoned. A course of conduct can deprive a defendant of a fair trial even though each individual error is unimportant. 4 Cal.Jur.2d p. 506. The evidence was circumstantial and to a considerable degree depended upon whether the jury believed Washington or defendant. It is very doubtful whether with the prosecution arguing that homosexuality had been proved, the jury could objectively weigh the conflict between the two. Applicable here is the following from *People v. Beal*, 116 Cal.App.2d 475, 478, 254 P.2d 100, 102: "It has been said many times that a District Attorney may strike hard blows, but he is not at liberty to strike foul ones. Here he struck foul ones." Also applicable is our statement in *People v. Talle*, 111 Cal.App.2d 650, 676, 677, 245 P.2d 633, 648: "It hardly needs citation of authority that an argument by the prosecution that appeals to the passion or prejudice of the jury, * * * that uses evidence admitted for a limited purpose as substantive evidence of the facts there recited * * * is erroneous and prejudicial." See also *People v. Hidalgo*, 78 Cal.App.2d 926, 938-949, 179 P.2d 102.

4. Instructions.

[13, 14] Defendant offered no instruction on motive, and contends that the court should have given one on its own motion. While the trial court has the duty to instruct the jury on the law applicable to the case,

it has no duty to instruct on any specific subject developed by the evidence unless there is a request from one of the parties to do so. *People v. Klor*, 32 Cal.2d 658, 661-662, 197 P.2d 705; *People v. Rein-schreiber*, 141 Cal.App.2d 688, 699, 297 P.2d 658. In *People v. Landry*, 106 Cal.App.2d 8, 15, 234 P.2d 736, it was held that the trial court is not required on its own motion to instruct on motive. One of the reasons there given is that proof of motive is never indispensable to a conviction. Moreover, how an instruction on motive would have helped defendant is difficult to perceive. Washington's testimony that defendant said he had to do what he did to keep deceased from "squeaking" on him about a matter for which defendant felt he would get "a lot of time" supplied motive.

The judgment and order denying new trial are reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



163 Cal.App.2d 181

M. Elizabeth BARTLETT, Coexecutor of the Will of George Maurice Bartlett, Deceased, Petitioner,
v.

SUPERIOR COURT of the State of California IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Sonja Bartlett, Real Party in Interest.
No. 23240.

District Court of Appeal, Second District,
Division 3, California.
Aug. 26, 1958.

Hearing Denied Oct. 22, 1958.

Proceeding on an executor's petition for writ of mandate to compel Superior Court to hear and determine executors' petition for order authorizing them to continue to operate testator's business. The

District Court of Appeal, Nourse, J. pro tem., held that although widow claimed that she was owner of business and of machinery and equipment used in operating business, the Superior Court had jurisdiction to determine executors' petition.

Peremptory writ of mandate granted.

1. Courts $\approx$ 200½

Probate court does not have jurisdiction to determine adverse claims to property of estate which are asserted by stranger to estate.

2. Courts $\approx$ 200½

Although executors' petition for authority to continue to operate testator's business was opposed by testator's widow, who claimed ownership of business and machinery and equipment used in operating business, probate court had jurisdiction to and it was its duty to determine petition, as court was not called upon to determine whether testator or his widow was owner of property but only to determine whether it was for best interest of estate that executors conduct business pending adjudication of question of title. West's Ann.Prob.Code, § 572.

3. Executors and Administrators $\approx$ 82

Where executors petitioned court for order authorizing continuance of operation of testator's business, probate court might ratify acts of executors in conducting business and authorize them to continue to conduct business, or refuse to authorize continued operation of business, but court could not refuse to exercise its discretion and deny its jurisdiction. West's Ann. Prob.Code, § 572.

Tscharner & Tscharner, Azusa, and Marion P. Betty, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

Guerin & Guerin, Los Angeles, for real party in interest.

NOURSE, Justice pro tem.

Petitioner is coexecutor under the will of George Maurice Bartlett, hereinafter called Bartlett. Upon the appointment of petitioner and her coexecutor they came into possession of and still have possession of a business conducted by Bartlett during his lifetime and since coming into possession have continued to operate that business. The business was inventoried by them as one of the assets of the estate.

After taking possession of the business and while operating it petitioner and her coexecutor petitioned the respondent court pursuant to section 572 of the Probate Code for an order authorizing them to continue the operation of the business. To this petition the real party in interest herein, the widow of Bartlett, filed objections supported by her affidavit that she was the owner of the business and of the machinery and equipment used in operating it and affirming that she had filed an action in the Superior Court of Los Angeles County for declaratory relief and for an accounting and for an injunction.

When the matter came on for hearing the real party in interest objected to the introduction of any evidence in support of the petition upon the grounds that the issues presented by the petition involved a dispute between the executors and a stranger to the estate as to title to property and that therefore the court was without jurisdiction to act upon the petition. This objection was sustained and the court refused to hear any evidence or to either grant or deny the petition.

Petitioner here seeks a writ of mandate to compel the respondent court to hear and determine the petition.

[1] The probate court does not have jurisdiction to determine adverse claims to property of an estate which are asserted by a stranger to the estate. In re Estate of King, 199 Cal. 113, 248 P. 519; In re Estate and Guardianship of Vucinich, 3 Cal.2d 235, 44 P.2d 567.

[2] The respondent court, however, was not called upon to determine whether dece-

dent, at the time of his death, or his wife, was the owner of the property in question, but only called upon to determine whether or not it was for the best interest of the estate of the decedent that the executors of that estate conduct the business which was in their possession pending such time as the title to that business was adjudicated. The executors had the right under section 572 of the Probate Code to petition the court for an order authorizing them to operate the business at the risk of the estate rather than at their own risk and the court had jurisdiction to and it was its duty to determine that question.

[3] The court might upon such petition ratify the acts of the executors in conducting the business up to the time of the hearing of the petition and authorize them to continue to conduct the business, placing such conditions on the use of the proceeds of the business as it deemed reasonable, or it might in its discretion refuse to authorize the continued operation of the business and leave it to the executors to determine whether or not they would continue to operate it at their own risk. The court could not, however, refuse to exercise its discretion and deny its jurisdiction. *Gering v. Superior Court*, 37 Cal.2d 29, 31-32, 230 P.2d 356; *Robinson v. Superior Court*, 35 Cal.2d 379, 383, 218 P.2d 10; *Van Kirk v. Superior Court*, 144 Cal.App.2d 66, 78, 300 P.2d 706.

Neither *Wilson v. Superior Court*, 101 Cal.App.2d 592, 225 P.2d 1002, nor *In re Estate of Abdallah*, 80 Cal.App.2d 634, 182 P.2d 596, cited by respondents are in point. Each of those cases involved an order made by the probate court requiring a third party in the possession of property claimed by the executor to deliver that property to the executor. Such order necessarily involved decision by the probate court of title and the right of possession and in each case it was held that such questions were beyond the jurisdiction of the probate court.

The present case does not involve any such questions for here the executors are in possession and the court is not called

upon to decide their right to possession or the validity of the executors' claim of title but only to decide whether it is to the best interest of the estate that they be authorized to operate a business as to which there is a dispute as to title at the risk of the estate.

Let a peremptory writ of mandate issue.

SHINN, P. J., and VALLÉE, J., concur.



The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Frank CARSWELL, Defendant and
Appellant.*

Cr. 3442.

District Court of Appeal, First District,
Division 1, California.

Aug. 13, 1958.

As Modified on Denial of Rehearing

Sept. 12, 1958.

Hearing Granted Oct. 10, 1958.

Defendant was convicted of second degree burglary. The Superior Court, County of Alameda, Marvin Sherwin, J., rendered judgment, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence failed to sustain prosecution's contention that officers who were admitted to defendant's room by a man who was painting premises and who used his key to open the door after the officers asked him whether he had such a key, had a reasonable belief that defendant was in the room, when he was, in fact, not there.

Reversed.

1. Criminal Law ⇐1180

Doctrine of the law of the case applies to criminal as well as civil causes.

*Opinion vacated 335 P.2d 99.

2. Criminal Law Ⓒ1180

Basis of doctrine of law of case is that facts presented on a second appeal are the same as those presented on the first, and consequently questions must be reconsidered on a second appeal insofar as additional factors which may influence the result have been brought out.

3. Criminal Law Ⓒ394

Though fact that seizure was pursuant to search warrant would otherwise have placed burden on defendant to establish illegality of search, fact that warrant was obtained only after first illegal entry made burden shift back to prosecution to establish legality of entry. West's Ann. Pen.Code, § 844.

4. Criminal Law Ⓒ394

Evidence failed to sustain prosecution's contention that officers who were admitted to defendant's room by a man who was painting premises and who used his key to open the door after the officers asked him whether he had such a key, had a reasonable belief that defendant was in the room, when he was, in fact, not there. West's Ann. Pen.Code, § 844.

5. Searches and Seizures Ⓒ7(27)

Even if painter who unlocked defendant's room for police officers had been owner or manager of building, his consent would have been insufficient to justify officers' entry without warrant. West's Ann. Pen.Code, § 844.

6. Searches and Seizures Ⓒ7(28)

The fact that painter at work in building unlocked defendant's room after officers asked him whether he had a key did not make the painter's act a voluntary one which would authorize the officers to enter the room and conduct a search and seizure without a warrant.

7. Criminal Law Ⓒ543(2)

Record failed to sustain prosecution's contention that defense counsel had conceded at trial that a witness whose testimony from a former trial was read in evidence was actually out of the state. West's Ann. Pen.Code, § 686, subd. 3.

8. Criminal Law Ⓒ543(1)

The statute permitting the introduction of testimony from a former trial of a witness who, with due diligence, could not be found within the jurisdiction could not be invoked to allow reception of such testimony of a witness where, less than two weeks before trial, such witness had been allowed to leave state, under conditions of probation requiring him to return to another state, to the knowledge of an employee of the same district attorney's office as that which conducted prosecution. West's Ann. Pen.Code, § 686, subd. 3.

9. Criminal Law Ⓒ780(4)

In second degree burglary prosecution, under the facts of the case, instruction stating that to determine whether accomplice's testimony had been corroborated, jury should remove it from consideration and see whether other evidence connected defendant with commission of offense was not proper.

10. Criminal Law Ⓒ781(6)

Instruction stating that jury must view with caution testimony of any witness which purports to relate to an oral statement of defendant was proper under statute stating that evidence of oral admissions must be viewed with caution. West's Ann. Code Civ. Proc. § 2061, subd. 4.

Goth & Dennis, O. A. Goth, James M. Dennis, Redwood City, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of second degree burglary of a hardware store from which shotguns and rifles had been taken, defendant has appealed. He claims errors in the admission of certain evidence and in the giving of certain instructions.

This is the second appeal. Upon the first appeal judgment was reversed for failure of the prosecution to meet its burden of proving the legality of a search of de-

defendant's room where rifles and shotguns were found and seized. *People v. Carswell*, 149 Cal.App.2d 395, 397-401, 308 P.2d 852. The court also found erroneous, but not of itself prejudicially so, an instruction on corroboration of an accomplice. At pages 403-404 of 149 Cal.App.2d, at pages 856-857 of 308 P.2d.

Between 6:20 Saturday evening and 7:45 Monday morning, twenty-seven rifles and shotguns were taken from the Markus Hardware store in Oakland. A panel in the skylight had been removed.

The Magnolia Hotel was next door to the hardware store. Charles Holmes, who pleaded guilty, testified at the former trial that he and three other men, including the defendant, entered the hardware store through the skylight, took the guns, went over the roof and into the Magnolia Hotel. There the guns were divided, and defendant, Hunter and White, the two other men, carried their share of the guns wrapped in sheets down the stairs and out of the hotel on Sunday evening. This testimony was read into the record over objection by the defendant. Melinda Ornduff testified that she saw the defendant and the two other men carrying long packages wrapped in sheets out of the hotel at 7:30 on Sunday.

Over objection by the defendant that it was the product of an illegal search and seizure, an officer testified that nine rifles and shotguns were found in defendant's room at 800-11th Street.

I. Were the Guns Admissible in Evidence?

At the first trial, the testimony was that on November 21, when they had no search warrant, the police officers went to the premises at 800-11th Street, were admitted by a man who was painting the premises and who opened the door to defendant's room with a key. There they observed guns, one on the bed and some in the closet. They returned the next day with a search warrant and seized them. The court held that the prosecution had not sustained its burden of proving the en-

try lawful. *People v. Carswell*, supra, 149 Cal.App.2d 395, 397-401, 308 P.2d 852.

On this trial, the same testimony was given, with these additional facts: Inspector Richardson went to the Markus Hardware store, and checked its position relative to the Magnolia Hotel. After making inquiry at the hotel, he interviewed Mrs. Ornduff, who told him that she had seen defendant, White and Hunter leaving the hotel carrying packages wrapped in sheets that could have been the stolen guns. Mrs. Ornduff had previously given information which had proved reliable to Inspector Burns. White, who roomed at the hotel, was placed under arrest shortly thereafter. The police had found a peculiar type of blue mud near the skylight of the hardware store, on the base of the fire escape leading to the hallway by White's room and on White's shoes. The police then ascertained defendant's address from his parole officer and a few minutes later went to 800-11th Street.

Lieutenant Hawkinson testified that he rang the bell at 800-11th Street. A gentleman answered. After identifying himself, Hawkinson showed the man a picture of Carswell, asking if he lived there. Receiving an affirmative response, Hawkinson asked to be shown the room. He knocked hard on the door three or four times, announced "Oakland Police Department" and received no response. He then turned to the man who had opened the outside door and asked him if he had a key. The man produced a key and unlocked the door. One gun was lying at the foot of the bed, with its serial number exposed. Inspector Richardson checked with the list of missing guns furnished by the hardware store, and found the number to be identical to one purportedly missing.

The man who opened the door was not the owner but a painter. Inspector Richardson testified that he thought he was the owner because as a general rule in West Oakland, when a house is being cleaned and painted, the owner is doing it, and the man had keys.

Inspector Reed testified that the painter said he did not know whether the defendant was in his room. No noise was heard from inside the room and the officers did not remember whether the lights were on or not.

[1-2] Defendant's first argument is that the law of the case governs, and the search must be declared illegal here as in the first case, relying upon *Davis v. Edmonds*, 218 Cal. 355, 23 P.2d 289. The doctrine applies to criminal as well as civil cases (*People v. Marshall*, 209 Cal. 540, 289 P. 629), but the basis of the rule is that the facts presented on the second appeal are the same as the first. 4 Cal.Jur.2d 594, 608; see *Erlin v. National Union Fire Ins. Co.*, 7 Cal.2d 547, 548, 61 P.2d 756; *Estate of Baird*, 193 Cal. 225, 244, 223 P. 974; 3 *Witkin on California Procedure* 2424. Therefore, the question must be reconsidered in this appeal insofar as the additional factors brought out in the testimony may influence the result. *Davis v. Edmonds*, supra, 218 Cal. 355, 23 P.2d 289, applying the law of the case when the appellant changed only his theory of exclusion of certain evidence on two successive appeals, is not applicable here.

[3] The respondent argues that the seizure of the guns was pursuant to a search warrant, and the burden is on the appellant to establish the illegality of the search pursuant to the warrant. It is undisputed that the warrant was obtained after the first entry and as a direct result of that entry. This having been shown to have taken place without a warrant, the burden then shifts back to the prosecution to establish the legality of the entry. *People v. Carswell*, supra, 149 Cal.App.2d 395, 398, 308 P.2d 852, relying upon *People v. Roberts*, 47 Cal.2d 374, 377, 303 P.2d 721.

[4] The respondent urges two grounds for legality of the entry: (a) Penal Code, section 844 and (b) consent by the painter.

Penal Code section 844 provides: "*To make an arrest*, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or

window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." (Emphasis added.) It will be assumed that the police had grounds for arrest in that they had reasonable grounds for believing that defendant committed a felony through Mrs. Ornduff's information. However, there is nothing in the record to establish the basis for a reasonable belief that defendant was in the room. (a) The painter said he did not know whether defendant was in the room; (b) they received no reply to a loud knocking; and (c) heard no sound in the room. It was between 4:30 and 6 o'clock in the evening and respondent argues that the officers reasonably concluded defendant would be home from work. Since they did not know where, or what hours, he worked, this conclusion must have been based upon common experience which would indicate that he might or might not have been home from work, or might be out to supper. Respondent also relies upon the lack of reply, arguing that the police could infer from this that defendant was evading them or asleep, and therefore was inside. This reasoning is circular since the inferences attempted to be drawn depend upon a reasonable basis for believing defendant was inside. Unless the qualification that breaking into a place to arrest is justified only when the person is there or the officers "have reasonable grounds for believing" him to be there is meaningless, the entry here would not be justified under Penal Code, section 844.

[5] The second ground for justifying the entry relied upon by respondent is consent by the painter. It is argued that the police could have reasonably believed him to be the owner since he was working on the place, and had keys. Even if the painter had been the owner or manager of the building, his consent would not be sufficient. In *People v. Roberts*, 47 Cal.2d 374, 377, 303 P.2d 721, 722, holding the purported consent ineffective to authorize the search,

the court stated: "The situation here is entirely unlike that in *People v. Gorg*, 45 Cal.2d 776, 291 P.2d 469, and *People v. Caritativo*, 46 Cal.2d 68, 292 P.2d 513. In both of those cases the premises searched were part of a private home, it was unclear whether the defendant was a guest, tenant or servant, and the officers had the consent of the owner who purported to have authority to authorize the search. In the present case Mrs. Higgins was a tenant of an apartment, and there is no evidence that the officers had reason to believe that the manager had authority to consent to their entry." The same would apply here.

[6] Respondent's final argument is that the door was opened voluntarily by the painter and the "officers should not be penalized for the voluntary act of the painter in opening the door." There is no dispute that the painter was asked whether he had a key. It is hardly reasonable that the question was an academic one to satisfy the curiosity of the police, and the opening of the door was clearly in response to the question.

The prosecution has not shown any legal justification for the entry and therefore the guns were inadmissible.

II. Was It Error To Permit the Prosecution To Read Into Evidence Testimony Given At a Former Trial?

Upon the ground that he was out of the state at the time of this trial, the testimony of one Charles E. Holmes, given at a former trial was read into evidence over the objection of the defendant.

Penal Code, section 686, subdivision 3, provides that a defendant is entitled to "produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that * * * the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who can not, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who

has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted."

Fred Davis, a deputy probation officer in Alameda County, testified that Charles E. Holmes had been assigned to him for supervision, and that he had a letter postmarked July 22 from Holmes indicating he was in Philadelphia, Pennsylvania. The trial of this case began July 24. On July 11, the superior court had made an order restoring Holmes to probation on condition that he return to Philadelphia. The probation officer was aware that he (Holmes) was a witness in the Carswell case, but the court was not so advised on July 11. A representative of the District Attorney's office, Mr. Sutton, was in court at the time of the hearing. The probation officer stated on that day, a Thursday, that he (the probation officer) had not yet received the money; his testimony at the trial was that he "gave him [Holmes] the money on Tuesday; he said he was leaving that night." The District Attorney's office discussed the matter with the probation officer on the same day, or the day following the July 11 proceedings, when Holmes was still in California.

The court below refused to impute the knowledge of the various officers involved to each other, stated that the word "inadvertent" described the situation, and ruled that he would allow the testimony to be read unless the defendant made a showing of special prejudice.

The defendant argues that there must be a showing of diligence under the statute, that the evidence was insufficient to show Holmes was outside the jurisdiction, that the District Attorney must be charged with knowledge of the hearing on July 11 and take responsibility for failure to oppose the motion.

The evidence of Holmes' being outside the jurisdiction is not too satisfactory. There was no testimony as to what postmark was on the letter, and even if there had been a Philadelphia postmark on it, it could have been mailed by Holmes as an

enclosure to Philadelphia, and then mailed back to California between July 11 and July 22. An inference that Holmes was in Philadelphia on the 22nd when the letter was mailed is a permissible inference, but not the only one possible. However, there is nothing to support the further inference that Holmes was out of the jurisdiction at the time of the trial. He could easily have returned to California by the time the trial began, two days after the letter was postmarked, or at the time the testimony was read on July 29, seven days after the letter was postmarked.

The respondent relies on *People v. Bryant*, 124 Cal.App. 241, 243, 12 P.2d 168, 169, where the testimony of a Mrs. Luna at the preliminary examination was allowed to be read into evidence. A letter dated six days before trial began was admitted into evidence without objection. The letter stated that the witness would not be able to be present at the trial and her physician advised her that her physical condition would not admit of the trip. The court also stated that "it was shown by competent evidence that Mrs. Luna had gone from the state of California to the state of Texas about six weeks before the time of this trial, and that she had not returned to this state." In the instant case, there was no such independent showing; the contents of the letter from Holmes were not introduced into evidence; and even if they had been and supported the conclusion that Holmes was not planning to return, there was no suggestion of physical impossibility of returning. The only barrier to Holmes' presence was the court's order concerning the conditions of probation, which might well have been different had the court been apprised of the true situation.

[7] The respondent also argues that the defendant conceded in the trial court that the evidence was sufficient to show that Holmes was out of the jurisdiction. After a discussion of the search and seizure question, the following took place: "The Court: You wanted to argue the point as to whether or not the Court would admit the testimony of the witness in Pennsylvania? Mr.

Spear [defense counsel]: Right. Now, we can start with the supposition that counsel has shown, that the witness is beyond the jurisdiction, which comes within 686, Subdivision 3, of the Penal Code * * *." The purported concession appears to be only a concession for the purpose of the argument to follow, which was to the effect that the testimony should not be read even if it were conclusively established that the witness was in Pennsylvania.

[8] Respondent attempts to meet the appellant's argument that lack of due diligence was shown, by stating that this is immaterial because inability to find the witness within the jurisdiction with due diligence is a separate ground for admission of prior testimony, and immaterial in this case. The respondent's argument would seem to be completely correct but based upon a misunderstanding of the defendant's argument. If it is shown that the witness is out of the state, it would be superfluous to make an intensive search within the jurisdiction to establish that he was not within the state. However, the defendant seems to argue that the respondent, under the peculiar circumstances of this case had an obligation to use due diligence to insure the witness' presence at the trial.

That the state has more than an obligation to ascertain the whereabouts of witnesses on the eve of trial is implied by *People v. McDonald*, 66 Cal.App.2d 504, 152 P.2d 448. There the plea was entered on October 11. The process server received the subpoena in the latter part of October. The process server went to the place the witness was supposed to work on November 3; returned the next day and found he had been transferred; went to a second working place on November 5th; returned there on the 6th; checked the Veterans Hospital on the 15th after being told the witness was a veteran with an injury to his side; rechecked the places of work on the 29th; checked one work place and the hospital on December 8; checked the jails and the police station on December 7 and 8; checked again at the

place of work on January 14 and also checked a purported residence, finding that no such place existed. The court held that this was an insufficient showing of diligence in attempting to find the witness within the jurisdiction. The court stated, 66 Cal.App.2d at page 508, 152 P.2d at page 449: "The process server did not receive the subpoena until the latter part of October. Such leisurely activity is not 'due diligence', in the light of the record of the witness's testimony at the preliminary hearing. * * * The testimony given by the complainant at the preliminary hearing revealed him to be an apparently illiterate man, and probably a transient. In any event, the record of the preliminary hearing was in the nature of a warning, for the testimony of the complainant itself was notice of the uncertainty of such witness's whereabouts at any time." The opinion is based upon not only an obligation to search for the witness at the time of trial, but also to do those things which are reasonable in light of the circumstances of the case, to insure that the witness will appear, such as timely procuring and serving a subpoena.

The principle would be equally applicable here. It seems grossly unfair to sit idly by while the witness left the jurisdiction less than two weeks before the trial and thereby gain the right to have the prior testimony read into the record. This would be the case even if the District Attorney had no knowledge of the proceedings to change the conditions of probation. However, a representative of the District Attorney's office, Mr. Sutton, did have actual knowledge of those proceedings. Mr. Vukota, the attorney who actually prosecuted the case, stated that he had no knowledge of those proceedings, but both he and Mr. Sutton act on behalf of the same District Attorney. The prosecution here clearly had an opportunity and the means, under the peculiar circumstances of this case, to produce Holmes at the trial.

III. Were Erroneous Instructions Given?

[9] (a) *In respect to corroboration*, the court instructed as follows:

"In determining whether or not the testimony of an accomplice had been corroborated as required by law, you must, for the purpose only of your consideration of that question, assume to be removed from the case such testimony, if any, of the accomplice which tends to connect the defendant with the commission of the crime charged and shown by the evidence to have been committed by someone; and you then must examine all the other evidence with the view of determining if there be any evidence tending to connect the defendant with the commission of the offenses."

The reviewing court upon the prior appeal cogently and correctly criticized this instruction. (See at pages 403-404 of 149 Cal.App.2d, at pages 856-857 of 308 P.2d.) We concur in the views therein expressed and find the instruction erroneous.

[10] (b) *In respect to admissions*, defendant complains of the following instruction: "You must view with caution the testimony of any witness which purports to relate an oral statement of the defendant." Code of Civil Procedure, section 2061, subdivision 4, provides that the jury is to be instructed on all proper occasions "That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution."

In this case, there was testimony by police officers of statements made by the defendant to them after he was taken into custody. Defendant testified to a different version of this conversation. Defendant's argument seems to be that, under the instruction given, relating to any "oral statement" and not admissions alone, both the prosecution witness' and defendant's testimony concerning these conversations could be viewed with caution. This is not the result contemplated by the proper instruction.

We conclude that the errors discussed operated prejudicially. In view of this

conclusion, it is unnecessary to discuss other errors assigned.

The judgment and the order denying a new trial are reversed.

PETERS, P. J., and BRAY, J., concur.



162 Cal.App.2d 679

Harry L. PAYNE, Plaintiff and Appellant,
v.

STATE PERSONNEL BOARD of the State of California; Ford A. Chatters, President and member thereof; Benjamin E. Mallary, Robert D. Gray, Emery E. Olson and Ralph H. Cowing, members thereof; Department of Employment of the State of California and James G. Bryant, Director thereof; Thomas H. Kuchel, State Controller of the State of California; and Charles G. Johnson, State Treasurer of the State of California, Defendants and Respondents.

Civ. 9294.

District Court of Appeal, Third District,
California.

Aug. 11, 1958.

Hearing Denied Oct. 10, 1958.

Proceeding on an application for a writ of mandate wherein relief was sought by a former employee, from a decision of the State Personnel Board sustaining dismissal of former employee. The Superior Court, Sacramento County, Malcolm C. Glenn, J., entered judgment denying the writ and former employee appealed. The District Court of Appeal, Schottky, J., held that mere fact that at hearing before personnel board, former state employee was required by the hearing officer to proceed with his case before the state presented its case, because of statutory provision, did not mean that former employee was deprived of his property without due process of law, since presumption in favor of state action as set forth in section of Government Code

in question does not constitute an unconstitutional deprivation of property without due process of law.

Judgment affirmed.

1. Constitutional Law Ⓒ277(2)

Constitutional provisions for due process of law do not apply to the field of public employment.

2. States Ⓒ53

Terms and conditions of government employment are fixed by statute and administrative regulations, and state employment is accepted subject to statutory provisions regulating such matters as salary, working conditions and tenure.

3. Constitutional Law Ⓒ55

The legislature may endow an official act or finding with a presumption of regularity or of verity.

4. Constitutional Law Ⓒ277(2)

Officers Ⓒ61

Presumption contained in Government Code to the effect that at a hearing before the personnel board, in regard to a state employee, the parties may submit all proper evidence against or in support of a cause, but it shall be a presumption that the statement of causes is true, was within the power of the Legislature, and its purpose was to facilitate the hearing of disciplinary matters and simplify the procedure, and such code provisions would not be deemed to amount to an unconstitutional deprivation of property without due process of law. West's Ann.Gov.Code, § 19578.

5. Constitutional Law Ⓒ277(2)

Mere fact that at a hearing before personnel board a former state employee was required by the hearing officer to proceed with his case before the state presented its case, because of a statutory provision, did not mean that former employee was deprived of his property without due process of law, since presumption in favor of state action as set forth in section of Government Code in question does not constitute an unconstitutional deprivation of property without due process of law. West's Ann.Gov.Code, § 19578.

6. Officers 61

Statutes permitting appointing power to take punitive action against state employees and providing for finality of the action of the appointing power without any action on the part of the personnel board unless employee answers, and thus, in effect, appeals to the state personnel board were not in conflict with section of constitution pertaining to the State Personnel Board, and providing that punitive action in the civil service shall be the duty of the board. West's Ann.Gov.Code, §§ 19574, 19575, 19578, 19579, 19582; West's Ann.Const. art. 24, § 2.

James H. Phillips, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Willard A. Shank, Deputy Atty. Gen., for respondents.

SCHOTTKY, Justice.

This is an appeal from a judgment of the superior court denying a writ of mandate after review of a decision of the State Personnel Board sustaining the dismissal of Harry L. Payne.

Harry L. Payne was dismissed from his civil service position on December 28, 1949, by James G. Bryant, Director of the Department of Employment. Payne was served with the required notice of punitive action and within the statutory period he filed a written answer with the personnel board. Hearings were held and on November 3, 1951, the personnel board made its findings of fact and entered its decision sustaining the action of the director. A writ of mandate was sought in the superior court which, after a hearing, upheld the decision of the personnel board.

Appellant does not attack the sufficiency of the evidence to sustain the findings and decision of respondent board, but bases his argument for a reversal upon what he terms error in procedure and denial of due process of law.

Appellant's first contention is: "The entire hearing and the decision of the Per-

sonnel Board is null and void and of no effect whatsoever because it was conducted under the provisions of Section 19578 of the Government Code making it a presumption that the statement of causes are true, which is violative of the United States Constitution and the Constitution of the State of California, thereby depriving appellant of property without due process of law."

Appellant points out that at the hearing appellant was required by the hearing officer to proceed with his case before the state presented its case because of a provision in section 19578 of the Government Code which states that at the hearing the parties may submit all proper evidence against or in support of the causes but "*it shall be a presumption that the statement of causes is true.*" (Italics ours.) The italicized portion of section 19578 was added by the Legislature in 1949 and deleted in 1955.

[1] Appellant contends that the presumption in section 19578 of the Government Code is an unconstitutional deprivation of property without due process of law. It is a well recognized principle that the constitutional provisions for due process do not apply to the field of public employment. The case of *Butterworth v. Boyd*, 12 Cal.2d 140, at page 150, 82 P.2d 434, at page 439, 126 A.L.R. 838, holds:

"It is next argued that the charter denies due process of law in providing for a compulsory deduction in an uncertain amount from the salaries of municipal employees. A conclusive answer is that no one has a vested right in his public employment except in so far as the right is conferred by statute or other valid regulation; * * * It is well settled that public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority."

As stated in the case of *Risley v. Board of Civil Service Commissioners*, 60 Cal.

App.2d 32, at page 37, 140 P.2d 167, at page 170:

"Plaintiffs' first two contentions may be considered together, as they involve the same fallacious concept, which is that plaintiffs have a vested, contractual, right to have the terms of their employment continue unaffected by charter amendments. That they have rights, by virtue of the provisions of the charter, which the courts will protect against unauthorized infringement by the city or any of its legislative or executive officers or boards, is undoubtedly true, and is recognized in the large number of cases cited by the plaintiffs. But that these rights are vested, contractual, rights, protected by the state and federal constitutional provisions forbidding the impairment of contracts and the taking of 'property' without due process, so that they cannot be changed, is not true * * *."

Appellant contends also that because the hearing before the Board was conducted under section 19578 as it read in 1949, he has been deprived of a fair hearing and of his property without due process of law. We are unable to agree with this contention.

[2] It has been consistently held that the terms and conditions of government employment are fixed by statute and administrative regulation. *State of California v. Brotherhood of Railroad Trainmen*, 37 Cal.2d 412, 417, 232 P.2d 857. In the case of *Boren v. State Personnel Board*, 37 Cal. 2d 634, at page 639, 234 P.2d 981, at page 984, the court states: "Moreover, state employment is accepted subject to statutory provisions regulating such matters as salary, working conditions, and tenure * * *."

[3] It is also well established that the Legislature may endow an official act or finding with a presumption of regularity or of verity. In the case of *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 35 S.Ct. 328, 59 L.Ed. 644, the Supreme Court of the United States was faced with the conten-

tion that section 16 of the Act to Regulate Commerce, 49 U.S.C.A. § 16, which provided that a finding and order of the Interstate Commerce Commission should be "prima facie" evidence of the facts stated therein in a civil suit to recover damages, infringed the right of trial by jury and violated due process of law. The court states at page 430 of 236 U.S., at page 335 of 35 S.Ct.:

"This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in anywise work a denial of due process of law. In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained. * * * An instructive case upon the subject is *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381, where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor prima facie evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence and in nowise inconsistent with the constitutional right of trial by jury."

The above cases concern fields in which constitutional rights were directly involved. In the case of section 19578 of the Government Code we are in a field where constitutional questions are not involved. It would appear there is ample authority to support the validity of the presumption that the "statement of causes is true" since it deprives the employee of no defense nor does it impose an obstacle to a full contestation of all the issues.

In discussing the effect of the presumption it is stated in 21 Op.Atty.Gen.Cal. 132, at page 140:

"As we have said, the appointing power having the burden of proof (except where the issue is an affirmative defense) is the one, in the absence of any statutory provisions to the contrary, having the right or duty to commence the production of the evidence. The presumption set forth in section 19578 does not in our opinion change the usual rule. We have seen that the presumption is as to evidence and at best would merely shift the burden of going forward with the evidence to the employee. However, when it is contended that the presumption shifts the burden of going forward with the proof to the employee, it is implied that the appointing power has produced evidence or has in its favor the equivalent of evidence in the presumption. Here the rules having to do with the order of proof of facts come into play. With reference to court procedure, section 2042 of the Code of Civil Procedure gives the general rule in the following language:

"The order of proof must be regulated by the sound discretion of the court. Ordinarily the party beginning the case must exhaust his evidence before the other party begins."

"Such discretion of the court will not be interfered with on appeal unless it has been abused in a substantial manner to the detriment of the appellant (*Silver v. Shemanski*, 89 Cal.App. 2d 520, 529, 201 P.2d 418).

* * * * *

"If the statement of causes in the punitive action is in some detail, the appointing power may wish to rely upon the presumption and introduce no further evidence at the outset for the hearing or it may be that the appointing power wishes to supplement the statement of causes by evidence in more or less detail. It is our opinion that the appointing power has this election. Assuming a proper and sufficient statement of causes in the notice of punitive action, the appointing power

may rely on the presumption and need produce no further evidence at the outset of the hearing, but he is not required to rely upon the presumption."

It must be borne in mind that under the provisions of the Government Code relating to civil service notice of punitive action is served upon the employee in which notice must be stated the charges against him. He may file a written answer within 15 days which answer shall be deemed to be a request for a hearing. At the hearing the parties may submit all proper evidence against or in support of the charges, "but it shall be a presumption that the statement of causes is true." Section 19582 provides that "The board shall consider carefully the evidence submitted in the hearing and render a decision which in its judgment is just and proper."

[4-6] We are convinced that the enactment of the presumption contained in section 19578, properly construed, was within the power of the Legislature, and that its purpose was to facilitate the hearing of disciplinary matters and simplify the procedure. As applied to the instant case, the record shows that appellant had a full and fair hearing and called a great many witnesses in addition to testifying himself. It is significant that appellant makes no attack whatever upon the sufficiency of the evidence.

There is no merit in the further contention of appellant that sections 19574, 19575 and 19579 of the Government Code are in conflict with section 2 of Article XXIV of the Constitution of the State of California because they permit the appointing power to take punitive action against employees and provide for finality of the action of the appointing power without any action on the part of the personnel board. These sections permit punitive action and make the action final unless the employee answers, and, in effect, appeals to the state personnel board. By Article XXIV, section 2, action by the state personnel board is required to make any action with respect to dismissals effective. Section 5 of Article XXIV provides that the Legislature may

enact legislation not in conflict with the article to facilitate its operation. Certainly, the statutes facilitate the operation of the article. Why should the personnel board be required to pass on each case if the employee does not request a hearing or contest the charges against him? If the employee does request a hearing then it is only the personnel board that can act.

No other points raised require discussion. The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.



162 Cal.App.2d 768

Jo Ann LEATHERS, Plaintiff and Respondent,

v.

Jack O. LEATHERS, Defendant and Appellant.
Civ. 23052.

District Court of Appeal, Second District,
Division 1, California.

Aug. 14, 1958.

Rehearing Denied Sept. 8, 1958.

Child custody case. From an order of the Superior Court of Los Angeles County, J. F. Moroney, J., awarding temporary custody of children to their mother, their father appealed. The District Court of Appeal, Lillie, J., held that since there had been no showing of change of circumstances, and since it affirmatively appeared that children's mother had surreptitiously, without knowledge or consent of their father and under an order fraudulently obtained, brought the children to California from state of marital domicile and bona fide domicile of children, it had been an abuse of discretion to fail to give recognition to sister state decree, entered only two months earlier, awarding custody of children to their father.

Order reversed.

Cal.Rep. 327-328 P.2d-53

1. Infants $\S$ 19

Paramount concern of court in child custody proceeding is welfare of child.

2. Infants $\S$ 18

Courts of state where children presently resided had jurisdiction of proceeding affecting their custody.

3. Judgment $\S$ 815

A child custody decree of sister state is enforceable in California; but it may be re-examined for circumstances occurring after it was rendered. West's Ann. Civ.Code, $\S$ 138.

4. Equity $\S$ 65(2)

Where it appeared that mother of children had brought them to California surreptitiously, without knowledge or consent of father and under an order fraudulently obtained, California court would not decide whether child custody case presented such an "unusual" situation as would permit a change of custody from previous decree of sister state even in absence of showing of change of circumstances.

5. Equity $\S$ 65(1)

Under the "clean hands" doctrine, California courts will recognize and enforce child custody decrees of sister state without re-examination of their merits and regardless of change of conditions if there was misconduct or malfeasance on part of parents seeking such re-examination.

6. Equity $\S$ 65(1)

Whether party seeking re-examination has "clean hands" is a most important consideration in exercise of judicial discretion in determining whether foreign decree should be re-examined on its merits.

7. Equity $\S$ 65(1)

Infants $\S$ 19

In interest of welfare of child, custody decrees of sister states are subject to independent re-examination by California courts, but such discretion will not usually be exercised where parent seeking relief in California court has "unclean hands".

8. Judgment $\S$ 822(1)

Where there was no showing of change of circumstances, and where it affirma-

tively appeared that children's mother had surreptitiously, without knowledge or consent of their father and under an order fraudulently obtained, brought the children to California from state of marital domicile and bona fide domicile of children, it was an abuse of discretion to fail to give recognition to sister state decree, entered only two months earlier, awarding custody of children to their father.

Walter C. Harbert, John J. Hall, Los Angeles, for appellant.

Charles C. Montgomery, Jr., Burbank, M. S. Bernard, Santa Ana, for respondent.

LILLIE, Justice.

Defendant father appeals from a pendent lite order awarding custody of two minor children to plaintiff mother.

The parties were married in 1946 and lived together in Paris, Illinois, until January 12, 1956, when plaintiff commenced an action for divorce in the Illinois court. Defendant filed his answer thereto and cross-complained for a divorce on grounds of desertion and adultery, asking for custody of their two minor children, a son born in 1947, and a daughter born in 1952. From marital separation in January until June 8, 1956, the children resided with defendant father in the family home in Illinois.

On June 8, 1956, plaintiff "by fraud and deceit, obtained the children from the custody of the Defendant, representing that she would return them the next day, but * * * secreted them" from him and since "has kept said minor children away from Defendant." Exhibit A—Decree of Divorce, *Leathers v. Leathers*, No. 56S11476, Superior Court of Cook County, Illinois, entered June 10, 1957. Shortly after taking them, plaintiff obtained from the Illinois court "by practicing a fraud upon the Court" an ex parte injunction enjoining and restraining defendant from taking the children from her custody, which injunction was later dissolved by the same court as "improvidently entered."

The trial of the Illinois divorce action on its merits was set for June 10, 1957. Plaintiff, by "extreme tactics" and by making "materially false statements" to the court, sought in various ways to prevent the cause from coming to trial. Her request for a further continuance was denied, and finally being unable to avoid trial, she "surreptitiously fled" to California in early June, 1957, bringing the two children with her. Immediately upon arrival, and on June 5, 1957, she filed an action for custody of the children in the Los Angeles County Superior Court in which an order to show cause was issued, asking for their custody pending the hearing on the merits.

Plaintiff also immediately filed another affidavit in the Illinois case, alleging illness and asking for a further continuance. The court denied the same and on June 10, 1957, the Illinois divorce action was heard on its merits in her absence, plaintiff having defaulted by leaving the state. The Illinois court, by decree of divorce (Exhibit A), granted to defendant on his cross-complaint a divorce on grounds of plaintiff's desertion and adultery, and awarded custody of the two minor children to defendant denying all rights of visitation to plaintiff until further order of the court. After reciting plaintiff's false representations to the court, her immoral, adulterous and fraudulent conduct and that she is a woman of "adulterous disposition, bad moral character, irresponsible and reckless in her conduct without proper regard for decency, Courts, law and lacking in self-respect," the court found "She is totally unfit to be permitted the care, custody or control of the minor children, or to even be permitted visitation with them, except upon such terms and conditions as will insure their being protected"; and that defendant is a fit person to have their custody.

Defendant, having been served with plaintiff's California complaint for custody, filed an answer thereto and a cross-complaint setting up the Illinois decree and, for the first time learning the whereabouts of the children, filed in the Superior Court

of Los Angeles County a petition for writ of habeas corpus seeking their physical custody and return under the Illinois order. The writ was issued August 2, 1957.

Plaintiff then filed an appeal from the Illinois decree which was affirmed by the Illinois Supreme Court on March 20, 1958, 13 Ill.2d 348, 148 N.E.2d 773.

The defendant's writ of habeas corpus and plaintiff's order to show cause were consolidated for hearing and heard on August 9, 1957. The trial judge discharged defendant's writ of habeas corpus, and on the plaintiff's order to show cause ordered that physical custody of the children remain in plaintiff pending trial of the main action. From the latter order defendant appeals.

At the hearing before the trial court an authenticated copy of the Illinois divorce decree entered June 10, 1957, was received in evidence as defendant's Exhibit A. (Under Illinois law, this decree became final upon its entry. *Jackson v. Jackson*, 294 Ill.App. 508, 14 N.E.2d 276.) The only witness was defendant, an engineer, who testified to his occupancy of the former marital home in Illinois in which the children resided prior to their removal by plaintiff, its accommodations, school and transportation facilities and his arrangements for a qualified housekeeper to care for the children. Plaintiff did not take the stand except when called by the trial judge to determine the whereabouts of the children. Nothing was offered by her in support of her order to show cause, although she had ample opportunity to testify and present whatever evidence she desired. She made no showing whatever of a change of circumstances or conditions; she offered no evidence that she is now a fit and proper person to have custody of the minors; and made no proper or legally authorized attack directly or indirectly upon the Illinois decree for either fraud or want of jurisdiction.

This case very simply involves a woman who, seeking to avoid the jurisdiction of the

court in Illinois, the marital and bona fide domicile of the minors, surreptitiously, without the knowledge and consent of the father and under an order fraudulently obtained, brought two minor children to California where she now hopes the court will look more favorably upon her request for legal custody.

The question before us is whether the trial court abused its discretion in refusing to give legal effect to the decree of the Illinois court and in permitting plaintiff under these circumstances to retain the custody of the minors without a showing of a change of circumstances or that she is now a fit person to care for them.

[1,2] Without any question, the paramount concern of the court in custody proceedings is the welfare of the child. *Puckett v. Puckett*, 21 Cal.2d 833, 136 P.2d 1; *Lerner v. Superior Court*, 38 Cal.2d 676, 242 P.2d 321. However, in the case at bar the issue is complicated by the existence of an Illinois decree entered only two months prior to the order of the California court and awarding custody of the children to the defendant. That the California courts have jurisdiction in the instant case is clear, particularly in view of *Sampsell v. Superior Court*, 32 Cal.2d 763, 197 P.2d 739. This case held that in the interest of a minor's welfare, the California court, as the court of the child's present domicile, has subject matter jurisdiction over his custody, care and control, even though the court of another state had "concurrent jurisdiction." Our question here, however, is whether the California court should give effect to the foreign custody decree based upon "concurrent jurisdiction."

[3] For some time our courts have been faced with the problem whether to give "full faith and credit" or "comity" to a sister state's decree and refuse to re-examine its merits, or to exercise their own discretion and protect the welfare of the child within their jurisdiction. The solutions have been as varied as human needs. Hesitant to base their decision to re-exam

ine the merits of a foreign custody decree on lack of jurisdiction, they often chose to justify their rulings on the ground that a *change of circumstances* occurred since the making of the foreign decree. Such a finding appears in virtually all decisions refusing to give effect to a foreign decree. This has resulted in the general rule now followed in California that while a custody decree of a sister state is enforceable, it may be re-examined for circumstances occurring after it was rendered. It is based on the theory that a custody award is never final but subject to being changed at any time (section 138, Civ.Code; *Anthony v. Tarpley*, 45 Cal.App. 72, 187 P. 779, 780), and that consideration for a child's welfare precludes the settlement of a dispute between parents from becoming binding on their child. The case of *Foster v. Foster*, 8 Cal.2d 719, at page 727, 68 P.2d 719, at page 723, well states the rule: " * * * a decree of a court of one state, having jurisdiction, relating to the custody of minor children is under the doctrine of comity prevailing among sister states and, subject of course to the right of the parties to show a change in the circumstances or conditions, entitled to recognition in another state."

In the instant case, however, the record is silent as to any evidence—that plaintiff mother is a fit and proper person to have custody of the minors, the Illinois court not two months before having found her unfit by virtue of her bad moral character and neglect of her children; that between June 10, 1957, and August 9, 1957, conditions or circumstances have changed justifying a change of custody; or that defendant father is not still fit to take their custody under the order of the Illinois court. Nor does the record show that either directly or indirectly plaintiff has sought to attack the Illinois decree on grounds of fraud or lack of jurisdiction, or on any other ground. Her several questions of defendant on cross-examination concerning what he failed to tell the Illinois court concerning the house in which he re-

sides amount to no proper attack on the court's order. It also appears that plaintiff recognized the validity of the Illinois decree by appealing from it, on the merits, to the Supreme Court of Illinois. In addition, the record before us discloses no findings of the trial court particularly with regard to change of circumstances, or fitness of plaintiff. Indeed there appears to be no evidence to support the trial court's order.

[4] However, the Supreme Court in the *Foster* case, *supra* (in which it refused to modify a South Dakota decree) in discussing the necessity of change of circumstances, did indicate that "It is perhaps possible to conceive of a case" in which, even in the absence of a change of circumstances "the welfare of the child might require that the previous order of custody be changed." 8 Cal.2d at page 728, 68 P.2d at page 723. "However, such a case would be a most unusual one." 8 Cal.2d at page 729, 68 P.2d at page 723. But because of the conduct of the plaintiff in bringing the children to California, we do not feel called upon to decide whether this case presents such an "unusual" situation as would permit a change of custody from the previous Illinois decree in the absence of a showing of change of circumstances.

[5] It is well settled that our courts will recognize and enforce custody decrees of a sister state without re-examination of their merits regardless of change of conditions when there is misconduct or malfeasance on the part of the parent seeking such re-examination, by invoking the doctrine of "clean hands." This misconduct generally consists of defiantly leaving a sister state, usually the marital domicile, with the minor to avoid its jurisdiction and for the purpose of seeking redetermination of the issue in a more favorable forum. It appears from an analysis of the California authorities that in most cases in which the courts have refused to re-examine the custody decrees of a sister state the parent seeking re-examination was a fugitive from the state issuing such decree, or abducted the minor from an-

other state to avoid the court's jurisdiction, or brought the child into the forum state in defiance of another state's order (In re Livingston, 108 Cal.App. 716, 292 P. 285), or obtained or retained custody of the child by misrepresentation on occasion of a casual visit and brought him to the forum state. Foster v. Foster, supra, 8 Cal.2d 719, 68 P.2d 719. In the following cases a foreign custody decree was recognized and enforced against a parent who was in some way defying the decree or the jurisdiction of the court that issued it. Bowman v. Bowman, 125 Cal.App. 602, 13 P.2d 1049, 14 P.2d 558; In re Guardianship of Cameron, 66 Cal.App.2d 884, 153 P.2d 385; In re Kyle, 77 Cal.App.2d 634, 176 P.2d 96; In re Dehning, 135 Cal.App. 2d 635, 287 P.2d 782; In re Bauman, 82 Cal.App.2d 359, 186 P.2d 154; In re Memmi, 80 Cal.App.2d 295, 181 P.2d 885; In re Guardianship of Simpson, 87 Cal.App.2d 848, 197 P.2d 820. Although the holding in the following cases was not based on the parents' conduct, the problem was discussed in Lerner v. Superior Court, 38 Cal. 2d 676, 242 P.2d 321; In re Brown, 90 Cal. App.2d 651, 203 P.2d 799; In re Swindall, 90 Cal.App.2d 177, 202 P.2d 845; In re Kosh, 105 Cal.App.2d 418, 233 P.2d 598; Brown v. Brown, 104 Cal.App.2d 88, 230 P.2d 651; In re Lee's Guardianship, 123 Cal.App.2d 882, 267 P.2d 847. On the other hand, the element of malfeasance was usually absent in cases where the courts consented to use their independent discretion. Interestingly enough, the bulk of cases in which recognition of a decree of a sister state was refused, although there was no showing of changed circumstances, involved foreign decrees which attempted to affect custody *lawfully* held by a resident of the forum or a bona fide resident child. In re Inman, 32 Cal.App.2d 130, 89 P.2d 421; Stout v. Pate, 120 Cal.App.2d 699, 261 P.2d 788. See also, Chapter Twenty, Recognition of Out-of-State Custody Decrees in California, by Albert A. Ehrenzweig, Family Law for California Lawyers.

[6,7] Our analysis of the cases supports the conclusion that the petitioner's "clean hands" is a most important con-

sideration in the exercise of judicial discretion in determining whether a foreign decree should be re-examined on its merits. Foster v. Foster, supra. The Foster case establishes the principle that in the interest of the welfare of the child, custody decrees of a sister state are subject to an independent re-examination by the California courts although this discretion will not usually be exercised where the parent seeking relief in the California courts has "unclean hands."

The record before us discloses that plaintiff herself chose the Illinois forum by commencing the action which resulted in the decree she now seeks to avoid; that upon separation from defendant she left the children with him in the marital home and six months later took them from him upon the representation she would return them the next day; that three weeks thereafter, through fraudulent representations to the Illinois court she obtained an order of custody and secreted the children from defendant; that on the evening of the hearing on the merits of her Illinois action, after failing by questionable means to obtain a continuance to further delay the trial and to avoid the court's order and jurisdiction, she fled the family domicile and surreptitiously brought the children to California where she immediately brought this custody proceeding.

Respondent consumes considerable time discussing a stipulation. Since it was at no time received in evidence or properly brought to the attention of the trial court and is not in the record before this court, we are compelled to ignore all reference thereto.

[8] Besides finding no evidentiary support for the court's order under the doctrine of "clean hands" we conclude that the trial court abused its discretion in failing to give recognition to the decree of the Illinois court.

For the foregoing reasons, the order granting custody pendente lite is reversed.

WHITE, P. J., and FOURT, J., concur.

163 Cal.App.2d 136

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Hannah WARREN and General Bell,
Defendants,

General Bell, Defendant and Appellant.
Cr. 6265.

District Court of Appeal, Second District,
 Division 1, California.

Aug. 25, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, LeRoy Dawson, J., for narcotic offenses, and he appealed. The District Court of Appeal, White, P. J., held that any objection defendant had to information count, in that he had allegedly not been legally committed by magistrate or had been committed without probable cause, had been waived when he failed to move in trial court to set aside information.

Affirmed.

1. Criminal Law ⚖️1044

Any objection defendant had to information count, in that he had allegedly not been legally committed by magistrate or had been committed without probable cause, was waived when he failed to move in trial court to set aside information. West's Ann.Pen.Code, § 995.

2. Indictment and Information ⚖️41(1)

Under Penal Code section making it duty of district attorney to file information charging defendant with offenses named in commitment order or any offenses shown by evidence taken before magistrate to have been committed, only requirement is that additional charge filed by district attorney arise out of same transaction as one for which accused was held to answer; and even though committing magistrate had dismissed complaint count charging defendant with selling heroin, district attorney was authorized to file information count charging sale of heroin where charge of transportation of narcotics, contained

in municipal court complaint which defendant was held to answer, related to and arose out of same transaction as charged sale. West's Ann.Pen.Code, § 739.

General Bell, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

The District Attorney of Los Angeles County filed an information wherein appellant was charged in two counts with a violation of Section 11500 of the Health and Safety Code. Count I alleged that on or about November 18, 1957, appellant unlawfully sold a preparation of heroin. In Count IV it was alleged that on the same day, appellant transported and offered to sell a preparation of heroin. (Counts II and III of the information contained charges against Hannah Warren, the co-defendant of appellant at the trial.) Reference might here be made to the preliminary examination where the committing magistrate dismissed Count I of the complaint charging that appellant sold, furnished, and gave away a preparation of heroin but added and held appellant to answer to Count IV of the complaint charging appellant did unlawfully transport and offer to sell and furnish and give away a preparation of heroin.

The information also alleged that before the commission of the offenses charged against him, appellant had been convicted of two prior felonies and served terms of imprisonment in the state prison. The first prior felony alleged was the crime of burglary and possession of marijuana with judgment rendered in the District Court of the State of Texas, on or about March 30, 1950; the other for the crime of possession of marijuana with judgment rendered by the District Court of the State of Texas on or about June 19, 1952.

To the offenses charged against him in Counts I and IV, appellant pleaded not guilty. Trial by jury was duly waived and

by stipulation the cause was submitted on the transcript of the testimony adduced at the preliminary examination, each side reserving the right to offer additional evidence.

Following a reading of the aforesaid transcript and consideration of additional testimony offered at the trial, the court adjudged appellant guilty as charged in Count I and not guilty on Count IV. No finding was made on the prior felony convictions as alleged. Probation was denied and appellant was sentenced to state prison. From the judgment of conviction he prosecutes this appeal.

The following will serve as a fair epitome of the factual background surrounding this prosecution. There was evidence that at about five o'clock on the evening of November 18, 1957, Justin B. Burley, an undercover investigator for the sheriff's office assigned to the narcotics detail, went to defendant Hannah Warren's residence. He was accompanied by a confidential informant known as Maggie.

Approximately one hour later Burley and the confidential informant returned to Warren's residence and for the first time met appellant as he was leaving. Appellant asked them if they had the "stuff" (meaning heroin). They told him "No" that they had been trying to "pick up" (meaning to purchase or obtain narcotics). Appellant stated he had a "connection" (meaning a person from whom one gets his heroin) that lived near 94th and San Pedro and would be willing to take them to that location.

They entered defendant Warren's residence and told the latter that her "connection" was going to be too long and they would try to "score" (meaning to purchase) with appellant Bell. Defendant Warren asked if she could hold the money and in the meantime if her "connection" should call she would be able to "score". Burley let defendant Warren hold \$15.

Burley, the informant, and appellant entered the latter's car and drove to the vicinity of 94th and Broadway. Appellant

took \$20 and left the automobile saying he had to make a phone call. He returned and said his "connection" was not home. Appellant gave back the \$20 and no sale took place. They then returned to defendant Warren's residence. Some person called Mrs. Warren from next door and when she returned Mrs. Warren stated she had made contact with her "connection" and they were to meet her "connection" at 56th and McKinley. Appellant asked defendant Warren if he could accompany them to the location because he wanted to "score" himself. Appellant stated he would drive them over in his automobile.

Defendant Warren and her little girl, the confidential informant, Burley and appellant entered appellant's vehicle and drove to the vicinity of 56th and McKinley. Defendant Warren then left the car and Burley observed a brown Studebaker driven by a male Negro. Appellant stated that this was Mrs. Warren's "connection" and he had seen him on several occasions. Defendant Warren returned and appellant asked her "did she pick up". Defendant Warren said "Yes" that everything was "straight".

The parties in appellant's car returned to 2043 East 115th Street, which is defendant Warren's residence. They entered the location and Mrs. Warren produced a small paper bindle and proceeded to put white powder into capsules. Appellant purchased one of the capsules from defendant Warren, went into the bathroom and took a "fix" meaning an injection of a solution of white powder and water into his veins. Defendant Warren then gave Burley five capsules. The powder in the capsules upon analysis contained the narcotic drug heroin. After Burley received the five capsules appellant approached him and asked Burley to sell him one but Burley told appellant he needed the capsules for himself.

Appellant and his co-defendant Hannah Warren testified for the defense. Their testimony may be summarized as follows: On the evening here in question, appellant was at defendant Warren's residence. As the former was leaving the house, Officer

Burley and the confidential informant, Maggie Magee, approached. The latter asked appellant if he would "drive her down 94th and Broadway". Appellant responded in the affirmative but that they would have to put gas in his automobile. When they were approaching Broadway, Maggie Magee told Officer Burley it "didn't look like anyone was home". Appellant said he would have to make a phone call before he took them back. He called a friend who wanted appellant to get him a job where appellant was working. The phone call was not in connection with the purchase of narcotics. At no time during this trip was there any discussion of narcotics. Maggie Magee gave appellant a dollar for taking her over to 94th Street.

Later on the same evening Mrs. Warren, Officer Burley, Maggie Magee and appellant went on a second trip in appellant's car with the latter driving. Defendant Warren had asked appellant if he would take her to some market that was open. Appellant didn't know why Officer Burley and Maggie Magee happened to go along; he thought maybe they were friends. Appellant got no money for this trip as he was doing Mrs. Warren a favor. There was no discussion of narcotics before this trip started nor anytime during the trip. Appellant did not at any time ask Maggie Magee or defendant Hannah Warren if "she had picked up"; nor at any time did appellant offer to sell narcotics to Officer Burley and Maggie Magee. Appellant did not see Mrs. Warren get out of the car and go to a Studebaker nor did he say "that is her connection". Appellant did not know at any time that he was transporting narcotics. After the trip they went back to defendant Warren's house. Appellant went into the house, but he did not take a "fix". There was never any mention of narcotics. Appellant has been convicted of the crimes of burglary and possession of marijuana and served terms of imprisonment in the state prison.

[1] As his first ground for reversal of the judgment appellant urges that since Count I of the information involved the same facts and allegations as contained in

Count I of the complaint filed in the municipal court, and which was dismissed by the committing magistrate, the trial court was without jurisdiction and therefore erred in finding him guilty on Count I of the information. In this contention appellant cannot be sustained. While appellant appears in propria persona on this appeal, he was represented by counsel at both the preliminary examination and his trial in the court below. Any objection appellant had to Count I of the information in that he was not legally committed by a magistrate or had been committed without probable cause has been waived because of his failure in the trial court, to move to set aside the information pursuant to the provisions of section 995 of the Penal Code, which, insofar as here pertinent, provides that the court must set aside an information in either of the following cases:

"1. That before the filing thereof the defendant had not been legally committed by a magistrate.

"2. That the defendant had been committed without reasonable or probable cause."

This is followed by Section 996 which provides that:

"If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in the last section." (Emphasis added.)

Manifestly, such motion under Section 995 is a condition precedent to later raising the point (*People v. Workman*, 121 Cal. App.2d 533, 535, 263 P.2d 458; *People v. Linton*, 102 Cal.App. 608, 612, 283 P. 389; *People v. Branch*, 119 Cal.App.2d 490, 495, 260 P.2d 27; *People v. Ahern*, 113 Cal.App. 2d 746, 750, 249 P.2d 63).

[2] There is, however, a further reason why appellant's contention that he was illegally convicted under Count I of the information cannot be sustained. At the conclusion of the preliminary examination, the committing magistrate dismissed Count I of the complaint filed in the municipal court,

which charged appellant with selling, furnishing and giving away a preparation of heroin. But, the committing magistrate added Count IV to the complaint, wherein it was charged that appellant transported and offered to sell, furnish and give away a preparation of heroin. Upon this added count, (IV), appellant was held to answer. However, Section 739 of the Penal Code provides that "When a defendant has been examined and committed, as provided in Section 872, it shall be the duty of the district attorney of the county in which the offense is triable to file in the superior court of that county * * * an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment *or any offense or offenses shown by the evidence taken before the magistrate to have been committed* * * *." (Emphasis added.) In the instant case, the question then arises, was the offense charged in Count I of the information in the superior court within the scope of "any offense or offenses shown by the evidence taken before the magistrate"? *Parks v. Superior Court*, 38 Cal.2d 609, 612, 241 P.2d 521, 522. It would appear that the only requirement is that the additional charge filed by the district attorney arises out of the same transaction as the one for which the accused is held to answer. Although the magistrate concluded impliedly or otherwise, that the evidence did not show probable cause that the offense charged in Count I of the complaint in the municipal court had been committed by the accused, the district attorney was authorized under Section 739 of the Penal Code to file Count I of the information if such count was related to or arose out of the transaction which formed the basis of the commitment under Count IV of the complaint in the municipal court, upon which appellant was held to answer and, depending on the evidence, could result in conviction on one charge or the other, even though the magistrate refused to hold the accused to answer to the charge contained in Count I of the complaint (*People v. Sturman*, 56 Cal.App.

2d 173, 177, 132 P.2d 504; *People v. Griffin*, 106 Cal.App.2d 531, 535, 235 P.2d 424; *Parks v. Superior Court*, supra, 38 Cal.2d at page 612, 241 P.2d at page 523). The only requirement would seem to be that the additional charge filed by the district attorney arise out of the same transaction as the one for which the accused is held to answer (*Parks v. Superior Court*, supra, 38 Cal.2d at pages 613, 614, 241 P.2d at pages 523-524). To us it seems quite clear that in the case at bar, the charge of transportation of narcotics on November 18, 1957, in Count IV of the municipal court complaint upon which appellant was held to answer is related to and arose out of the same transaction as the charged sale on November 18, 1957, as set forth in Count I of the information. The record reflects that appellant drove his automobile to where the contraband was obtained, and then drove back to the residence of the co-defendant Hannah Warren, at which place the heroin was delivered to Officer Burley. We are therefore persuaded that even though appellant had presented a timely motion under Section 995 of the Penal Code, nevertheless, the district attorney was authorized by Penal Code Section 739 to include Count I in the information filed herein, and the court was invested with jurisdiction to proceed to trial thereon.

For the foregoing reasons, the judgment is affirmed.

LILLIE, J., concurs.

FOURT, Justice.

I concur in the Judgment.

The record in this case indicates that it is but another of the long number of cases arising in Los Angeles county where there has been a miscarriage of justice in the administration of the statutes and laws pertaining to narcotics.

The appellant in this instance was charged with two prior convictions, the first of which had to do with burglary and narcotics, and the second of which had to do with narcotics. It was charged in the information that each of these prior offenses

occurred in the state of Texas, and that appellant served a separate term in the state prison in the state of Texas for each of said offenses.

The district attorney offered, and there was received into evidence, documents which, without question, and without objection, clearly showed that the appellant had been so convicted and had served such terms in prison. It was stipulated that the person named in the documents was the appellant. It was then stipulated by the prosecution and the appellant, in effect, that the judge could determine the truth or falsity of the charges with reference to the prior convictions. The question was put, "Do you want this judge to determine these priors?", and the appellant answered, "Yes."

The appellant took the witness stand and testified in his own behalf and admitted, with no hesitancy, that he had been so convicted of such felonies and that he had served terms in prison therefor. Even the attorney for the appellant, in pleading his cause to the court, said, "He has never, so far as I can see, had the opportunity to be placed on probation. Recognizing the problem, where *he has these two priors*, it would appear in his case he was just—when this thing happened * * *." (Emphasis added.)

The judge then proceeded to ignore the fact of the priors and the terms served therefor, made no findings thereon, and sentenced the appellant as a first offender.

There is, so far as I can find, no excuse whatsoever for such a course other than to thwart the legislative intention, and the clear wording of the statutes made and provided in such instances, and to give an ex-convict who has twice been convicted of narcotic offenses the advantage of being sentenced as a first offender. Such a course brings the administration of criminal justice into disrepute, unnecessarily breeds serious problems and is grossly unfair to the defendants who are properly sentenced and are serving terms in the state prison as recidivists. See Penal Code, Sec.

1158; Health & Safety Code, Secs. 11715.6, 11712; *People v. Barbara*, Cal.App., 323 P.2d 815; *People v. Rixner*, 157 Cal.App. 2d 387, 321 P.2d 91.

It is not readily ascertainable from the record just why the district attorney did not, at least, ask the judge to make a finding with reference to the priors, even if he, the district attorney, assumed that the judge might, notwithstanding the uncontradicted evidence, find that it was not true that the appellant was previously convicted as alleged. At least there might have been a determination.



163 Cal.App.2d 106

Mary Ann BUTLER, a minor, by A. O. Butler, her guardian ad litem, Plaintiff and Respondent,

v.

John B. HOPEWELL, Defendant and Appellant.
Civ. 5818.

District Court of Appeal, Fourth District,
California.
Aug. 22, 1958.

Hearing Denied Oct. 15, 1958.

Automobile accident case. The Superior Court, San Diego County, Gerald C. Thomas, J., granted plaintiff's motion for a new trial, and defendant appealed. The District Court of Appeal, Mussell, J., held that where there was evidence that nine-year old plaintiff-girl suffered a back injury when thrown from automobile, in addition to a brain concussion and other minor injuries, trial court's determination on motion for new trial that award of \$242.50 as general damages was inadequate was not abuse of discretion.

Order affirmed.

1. New Trial ☞70

In passing upon a new trial upon ground of insufficiency of evidence, it is exclusive province of trial court to judge credibility of witnesses and weigh evidence, and court may draw inferences opposed to those drawn at trial and where the only conflicts consist of inferences deduced from uncontradicted probative facts, court may resolve such conflicts in determining whether case should be retried.

2. Appeal and Error ☞1015(1)

On appeal from grant of a motion for new trial based upon insufficiency of evidence, it is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that a reviewing court will reverse the order of the trial court.

3. Damages ☞130(4)

In automobile accident case, wherein there was evidence that nine year old plaintiff-girl suffered a back injury when thrown from automobile, in addition to a brain concussion and other minor injuries, trial court's determination on motion for new trial that award of \$242.50 as general damages was inadequate was not abuse of discretion.

Oakes & Horton, San Diego, for appellant.

Clinton F. Jones, Escondido, for respondent.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained by plaintiff in an intersection automobile collision. A jury returned a verdict in favor of plaintiff for the sum of \$475, following which the trial court granted a new trial "on all the issues upon the ground of insufficiency of the evidence to justify the verdict in that the amount awarded is not in conformity with the evidence adduced at the trial and is inadequate." Defendant John B. Hopewell appeals from this order, claiming that the

trial court abused its discretion in granting a new trial.

On January 15, 1953, plaintiff, Mary Ann Butler, then approximately nine years of age, and Marjorie Ann Church, another minor, were seated in the rear of a 1930 Ford pickup which was involved in an intersection accident with an automobile being driven by the defendant John B. Hopewell. As a result of this collision plaintiff's head struck the side of the pickup and she was thrown through the air about twenty feet and "landed on her buttocks." She was unconscious for several minutes and was taken to the Palomar Memorial Hospital in Escondido.

Dr. Flaiz, who examined plaintiff on her admission to the hospital, testified that she complained of pain in her head and back; that she exhibited some abrasions on her right thigh, and there was also a small puncture wound on her right side; that she was admitted to the hospital on January 15, 1953, and was discharged on January 24th; that the final diagnosis was concussion. The discharge sheet of the hospital record also indicated that there was a fracture of the lamina of the left fifth lumbar vertebra. However, the evidence shows that there was no fracture as stated in this record. On March 23, 1953, plaintiff was again examined at the hospital and was complaining that she had headaches and some low back ache. Again on September 29, 1953, she complained of headache when tired and on shaking or motion of her head. On March 21, 1955, she complained of pain in her left back and sacroiliac region during the previous four to six weeks. On July 9, 1956, plaintiff complained that while doing housework her back started hurting; that her left leg ached and kept her awake during the previous night. Plaintiff was then sent to the Children's Hospital where she remained for ten days.

Dr. Werden, who was called as a witness by the defendant, testified that he examined plaintiff in March, 1954, and that at that time he concluded that she had sus-

tained a mild to slight degree of concussion of the brain, but that this had cleared up and left her without any residual symptoms and no disability. In 1956 Dr. Werden again examined plaintiff and at that time thought she had a backward dislocation of the cartilage in the lower part of her back. Dr. Werden and Dr. Woods, who was called as a witness for the plaintiff, agreed that plaintiff was suffering from spondylolisthesis, a forward slipping of the vertebrae, but there was a sharp conflict in the evidence as to whether this condition was congenital or caused by the automobile accident. Dr. Woods testified that in his opinion this spondylolisthetic condition was attributable to and caused by the initial trauma which plaintiff sustained in the accident. Dr. Woods further testified that plaintiff will require surgery to correct her condition, requiring further hospitalization and expense.

The record shows that at the time of the trial plaintiff's hospital bill was \$114.50 and her doctor's bill was \$118.00. These items were not disputed. It is apparent, therefore, that the jury awarded plaintiff the sum of \$242.50 as general damages.

In *Phillips v. Lyon*, 109 Cal.App. 264, 268, 292 P. 711, it is said that it is difficult to determine just what state of facts will warrant a trial court in setting aside the verdict of the jury on the ground that the award is inadequate or what record will justify an appellate court in reversing a judgment on that ground.

[1,2] In passing upon a motion for a new trial based upon the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence. In considering the sufficiency of the evidence upon such motion the court may draw inferences opposed to those drawn at the trial, and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve such conflicts in determining whether

the case should be retried. It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court. *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 307, 163 P.2d 689.

In *Amavisca v. City of Merced*, 149 Cal. App.2d 481, 308 P.2d 380, it was held that a motion for a new trial, on the ground that the verdict is inadequate, appeals peculiarly to the discretion of the trial court, and its order should not be disturbed on appeal in the absence of a showing of abuse of discretion, and that upon a motion for a new trial based upon the contention that the damages are inadequate, the trial court should review the evidence, not only with respect to the issue of damages but also with respect to the issue of liability.

In *Parks v. Dexter*, 100 Cal.App.2d 521, 527, 224 P.2d 121, it was held that it was within the province of the trial court to pass upon the sufficiency of the evidence to sustain the verdict for the damages allowed and that the appellate court may not reverse the order unless it clearly appears that the trial court abused its discretion. In *Clifford v. Ruocco*, 39 Cal.2d 327, 332, 246 P.2d 651, in the concurring opinion written by Mr. Justice Carter, it is stated that if there is evidence which supports the conclusion of the trial court as to the inadequacy of the damages awarded, its conclusion in such a case should likewise not be disturbed by the appellate court.

[3] In the instant case it clearly appears that there is substantial evidence which would support a verdict and judgment contrary to that entered. It follows that the trial court did not abuse its discretion in determining that the sum of \$242.50 as general damages was an inadequate award for the injuries suffered by the plaintiff herein.

The order granting a new trial is affirmed.

GRIFFIN, P. J., concurs.

163 Cal.App.2d 53

**Edward M. SCHAFER, Plaintiff and
Respondent,**

v.

**Lewis MASCOLA, Mrs. Lewis Mascola,
Defendants and Appellants.**

Civ. 17946.

**District Court of Appeal, First District,
Division 2, California.**

Aug. 19, 1958.

Action against landlord for injuries sustained by person making deliveries to tenant. The Superior Court, Alameda County, Charles Wade Snook, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that where evidence was insufficient to take to jury question whether landlord had reserved control over the stairway, on which plaintiff had fallen, instruction concerning landlord's duty to exercise care over portions of premises over which he retains control was prejudicially erroneous.

Judgment reversed.

1. Landlord and Tenant ⇨167(8)

Person delivering groceries to tenant was a business invitee of tenant.

2. Landlord and Tenant ⇨169(11)

In action by delivery man against landlord for injuries sustained when he fell on stairs while making delivery to tenant, evidence was insufficient to take to jury question whether landlord had reserved control over stairway.

3. Landlord and Tenant ⇨167(8)

With respect to portions of premises as to which landlord has not reserved control, landlord is liable to tenant's invitees only on proof of a known hidden defect.

4. Appeal and Error ⇨1064(1)

Landlord and Tenant ⇨169(10)

In action against landlord for injuries sustained by tenant's invitee, who fell on stairway, wherein evidence was insufficient to take to jury question whether landlord had reserved control over the stairway,

instruction concerning landlord's duty to exercise care over portions of premises over which he retains control was prejudicially erroneous.

5. Landlord and Tenant ⇨167(8)

A landlord may be held liable for an injury to a tenant's invitee on the premises, although the premises were under control of the tenant, if the defect causing the injury was a dangerous one which existed at the time the lease was made, or should have been observed by landlord, in exercise of ordinary care, or if the landlord has undertaken to make repairs.

Cornish & Cornish, Berkeley, for appellants.

H. A. Dannenbrink, Joseph H. Stephens, Oakland, for respondent.

KAUFMAN, Presiding Justice.

This is an appeal by the defendants from a judgment in favor of the plaintiff, rendered on a jury verdict. The complaint sought damages for personal injuries alleged to have been caused by the defendants' negligence.

The defendants, husband and wife, are the owners of a two-flat apartment house in Berkeley. Both flats are rented to tenants. At the back of the property there is an outside wooden stairway from the ground to the upstairs flat. There is also a front stairway. On April 30, 1956, the plaintiff, a grocer, used the back stairway to deliver some groceries to the tenants of the upper flat, the Freemans. On the way down, plaintiff's right foot went through the fourth step from the bottom, which "just dropped down out of sight". The plaintiff, a 60 year old man who weighed about 160 pounds, fell and sustained the injuries complained of in this action.

Plaintiff testified that he had been using the back stairway to deliver groceries to the Freemans every day for about six months. Every day he noticed that the step in question was "springy" but forgot about it. He mentioned it in the store

several times and had mentioned it to Mrs. Freeman two or three weeks before the accident. He did not mention the step to anyone else as it was not his place to do so. Several photographs of the steps, taken by the plaintiff's son, were introduced in evidence as well as a portion of the step (removed by the plaintiff's son when he took the photographs) which showed dry rot. Louis B. Ripp, the contractor hired by the defendant to repair the stairway after the accident, testified that in his opinion the stairway was not dangerous or unsafe, but was not fit for repair and needed replacing.

The defendant, Lewis Mascola, testified that he had bought the building about two years before the accident. At that time the building was about 35-40 years old. Defendants made no inspection at the time of the purchase but relied on the realtor. Defendants' subsequent inspections of the property, made about once or twice a month, were confined to the area around the house to see that it was kept clear of refuse, etc. Defendants had made an oral agreement with each of the tenants. Each tenant agreed to take care of the lawn and the premises in return for a reduction of \$10 in the monthly rental of his flat. Defendants stated that the tenants agreed "to take care of everything around the house" and that this included repairs of the premises.

Defendant also testified that as a matter of fact he took care of all repairs on the premises. Both defendants used the back stairway extensively in remodeling the premises. Mrs. Mascola had not been on the premises in a year and a half. Mr. Mascola had used the back stairway the month of the accident. Defendant stated that in going up and down the stairs he always faced the part that was close to the house because he felt, "if I was going to get hurt or anything I could fall safer against the house." Neither one of the defendants knew of a defective stair and had never been advised of any defect. The Freemans were not called as witnesses by either party.

On appeal, defendants urge that in the absence of testimony as to the condition of the stairway at the time the Freemans took possession, the court erred in denying defendants' motion for a non-suit and in refusing to direct a verdict in favor of the defendants; that the court erred in not submitting the issue of the control of the stairway to the jury as well as other prejudicial errors in the court's instructions to the jury, and finally that the plaintiff is barred from recovering from the defendants because the plaintiff had notice of the defect.

[1] It is not disputed that the plaintiff is a business invitee of the tenant. Defendants argue that their duty to the plaintiff should be measured in accordance with the general rule as set forth in *Goodmaker v. Kelley*, 154 Cal.App.2d 457, 316 P.2d 746, that in the absence of fraud, concealment or covenant in the lease, a landlord is not liable for injuries due to a defective condition or faulty construction of the leased premises. Plaintiff argues that this case falls within the exceptions to the general rule set forth in *Kalis v. Shattuck*, 69 Cal. 593, 598, 11 P. 346, and *Gerard v. Wilson Holding Co.*, 79 Cal.App.2d 553, 180 P.2d 380, as the stairway was under the control of the landlord, and even if under the control of the tenant, the defect existed at the time the premises were demised, and that the defendant should have discovered the defect in the exercise of ordinary care. The key issue is whether the stairway was a common areaway under the control of the defendant landlord, or a portion of the premises leased to the tenant.

[2,3] In the instant case, the stairway is an independent exterior stairway leading to the upstairs flat. It is apparently the only means of ingress to and egress from the back door of the Freeman flat. The complaint alleged that the stairway served both flats, but the only evidence adduced at the trial indicated that the stairway led only to the kitchen of the upstairs flat and that it was frequently used by the defendants. There was no evidence to

indicate that the defendants reserved control of the stairway for the use of other tenants in common with the plaintiff. In the absence of such conflicting evidence, the issue of control was not an issue of fact for the jury. As pointed out in *Goodmaker v. Kelley*, 154 Cal.App.2d 457, 316 P.2d 746, in the absence of such reservation, a landlord can be held liable only on proof of a known hidden defect. In this case the court gave only the following instruction on the issue of control:

"It is the duty of the landlord, such as the Defendants in this case, to exercise reasonable care in making safe, and in the maintenance and repair of, any part of a building or other property *over which he retains* control and which is reserved from the exclusive use of any one tenant so that it may be used in common by all tenants and all others who may lawfully enter the premises."

[4] This was an erroneous instruction because there was no evidence that the landlord retained control over the stairway. The trial court should have instructed the jury that the landlord could not be held liable on the theory that he retained control over part of the premises.

[5] As stated, we think the quoted instruction finds no support in the evidence and was prejudicial to the defendants and

misleading. *Elm v. McKee*, 139 Cal.App. 2d 353, 293 P.2d 827. In giving the quoted instruction, the court apparently relied on *Gerard v. Wilson Holding Co.*, 79 Cal.App. 2d 553, 180 P.2d 380. In that case, an invitee of a tenant fell in the dark on a side stairway leading only to the apartment of the tenant. The landlord was held liable as by neglecting to provide a handrail on a portion of the steps, he had failed to provide a safe means of exit or entrance for the use of his tenants and their invitees. As the question of control was not involved in that case, it is not applicable here. On retrial the jury should be instructed that although the staircase was under the control of the tenant, the defendants may be liable if the defect was a dangerous one which existed at the time the lease was made, or should have been observed by the defendants, in the exercise of ordinary care, or if the defendants have undertaken to make repairs. *Gerard v. Wilson Holding Co.*, 79 Cal.App.2d 553, at page 556, 180 P.2d 380.

In view of the above, it is not necessary to discuss defendants' remaining contentions.

We conclude that the judgment does not find support in the record before us.

Judgment reversed.

DOOLING and DRAPER, JJ., concur.

50 Cal.2d 594

Henrietta M. PEISER, Sidney L. Ancker, and Lydia Ancker Stern, as Trustees, of the Trust Created by the Last Will and Testament of Abraham Ancker, Deceased, Plaintiffs and Appellants,

v.

Willie H. METTLER, Opal W. Fry, Jack Fry, Opal W. Fry & Son, a co-partnership consisting of Jack Fry and Opal Fry; J. E. Garner, Gordon Moore, J. E. Garner and Gordon Moore, a co-partnership, Defendants and Respondents.

L. A. 24894.

**Supreme Court of California,
In Bank.**

July 11, 1958.

Landlords' action against tenant and subtenants to recover damages from breach of farm lease by removal of irrigation pumps and other equipment and buildings from leased premises and for conversion, waste and return of such property. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., entered order granting tenant and subtenants' motion to change place of trial and landlords appealed. The Supreme Court, Carter, J., held, *inter alia*, that where lease provided that tenant would remain liable to landlords on lease even though he assigned it unless written consent of landlords was obtained, and no such written consent was obtained, complaint stated cause of action against tenant, a Los Angeles County resident, and it could not be said that only purpose of joining tenant was in order to secure venue in Los Angeles County.

Order reversed.

McComb, J., dissented.

Opinion, 318 P.2d 775, vacated.

1. Landlord and Tenant ☞161(3)

In landlords' action against tenant and subtenants to recover damages for breach of farm lease by removal of certain equipment and buildings from leased premises and for conversion, waste and return of such property, and by terms of lease tenant

was to remain liable thereunder unless assignment of same was through written consent of landlords, and no written consent had been obtained to assignments, complaint was sufficient to state a cause of action against tenant, a Los Angeles County resident, and joinder of him as party defendant could not be held improper.

2. Venue ☞4

Nature of cause of action so far as it affects or determines place of trial will be ascertained from complaint alone and court will inspect complaint for purpose of determining character of action and judgment which may be rendered.

3. Venue ☞7

Action for damages for breach of contract is a transitory cause of action.

4. Landlord and Tenant ☞79(2)

Where lease provided that tenant, in event of assignment, would remain liable to landlords on lease unless written consent of landlords was obtained, tenant's assignees took with notice of terms and provisions of lease and subject thereto.

5. Landlord and Tenant ☞79(3)

Ordinarily an assignment of lease does not release tenant from obligations even though landlord consents to assignment, nor does express assumption by assignee of obligations under lease affect liability of tenant to landlord.

6. Venue ☞22(1)

Where landlord brought action to recover damages for breach of farm lease by removal of irrigation pumps, pipelines, and buildings from leased premises, and under terms of lease tenant, in event of assignment, remained liable thereon, and joined as parties defendant the tenant, a Los Angeles county resident, and subtenants who were residents of Kern county, since complaints stated cause of action against tenant, defendants were not entitled to change of venue on grounds of defendants' residence.

7. Venue ☞4

Question of transitory or local character of causes of action must be determined

from allegations of complaint on file at time motion for change of venue is made and from nature of judgment which might be rendered thereon, assuming truth of allegations.

8. Venue ⚡4

Where landlord brought action against tenant and subtenants for breach of contract, conversion of certain structures and improvements, restoration and reinstallation of same structures and improvements, and for waste if such property could not be restored, main relief sought in all four causes of action was personal and title to or possession of real property was only incidentally involved, so that nature of action was essentially transitory and not local which had to be tried in county where land was situated. West's Ann.Code Civ.Proc. § 392.

9. Fixtures ⚡29

Severance of fixtures and improvements from land changes character of property from real to personal irrespective of means by which it is accomplished.

10. Venue ⚡22(1)

Where landlords brought action to recover damages for breach of farm lease against tenant and subtenants, fact that tenant and subtenants all joined in moving for change of venue was immaterial since cause would be retained if complaint stated, in apparent good faith, a cause of action against defendant who resided in county in which action was commenced.

11. Venue ⚡52(4)

Before convenience of witnesses may be considered as ground for order granting a change of venue, it must be shown that their proposed testimony is admissible, relevant and material to some issue in case as shown by record before court. West's Ann. Code Civ.Proc. § 397, subd. 3.

12. Venue ⚡66

Affidavits in support of motion for change of venue on ground of convenience of witnesses must set forth names of witnesses, nature of testimony expected from each, and reasons why attendance of each

would be inconvenient. West's Ann.Code Civ.Proc. § 397, subd. 3.

13. Customs and Usages ⚡12(1)

Person is not bound by custom or usage unless he had actual knowledge thereof or it is so general or well-known in community as to give rise to presumption of such knowledge.

14. Venue ⚡70

Where action for breach of lease was brought by landlords against tenant and subtenants because of removal of certain improvements from leased land, and defendants moved for change of venue on ground of convenience of witnesses through affidavits showing that witnesses would testify as to local custom that improvements were to be removed from leased premises at termination of lease, but written lease provided that such improvements were to remain thereon, affidavits were insufficient since evidence was inadmissible and failed to show that landlords knew or should have known of purported custom and usage.

15. Venue ⚡52(3)

Expert witnesses with a personal knowledge of facts of particular case come within rule that permits their convenience to be considered on motion for change of venue.

16. Venue ⚡52(3)

Where action was brought for breach of farm lease which recited that certain improvements of a substantial or permanent character became absolute property of landlords, and defendants claimed there still remained a question as to what property was substantial, and on motion for change of venue for convenience of witnesses it appeared that some of the prospective witnesses were to testify to value of improvements but it did not appear from affidavits that any other appraiser could not make the same inspection of property or that witnesses would testify that improvements were not substantial within meaning of lease agreement, convenience of expert witnesses could not be considered on motion for change of venue. West's Ann.Code Civ.Proc. § 397, subd. 3.

17. Venue $\S$ 52(1)

Convenience of parties is not considered on motion for change of venue.

18. Venue $\S$ 52(5)

Where defendants moved for change of venue, arguments that defendants' books and records were located in county to which defendants sought action to be transferred and that court calendar in such county was less congested than in county wherein action was commenced, were immaterial as neither reason fell within statutory provision regarding change of venue for convenience of witnesses. West's Ann. Code Civ.Proc. $\S$ 397, subd. 3.

Livingston & Borregard, Lawrence Livingston, Leo E. Borregard and Isabella H. Grant, San Francisco, for appellants.

Vizzard, Baker & Sullivan, Maas & Nairn and Donahue & Goldberg, Bakersfield, for respondents.

CARTER, Justice.

Plaintiffs appeal from an order granting defendants' motions for a change of venue from Los Angeles County to Kern County. The motions were made and granted on the grounds of (1) residence of defendants; (2) that the action involved damage or injury to real property situated in Kern County; and (3) because of convenience of witnesses.

The complaint alleges that the controversy here involved grew out of a written lease agreement involving land situated in Kern County. Plaintiffs are the original lessors, or their successors; defendant Mettler was the original lessee. Defendant Mettler assigned the lease to defendants Fry who sublet the easterly one-half of the premises to defendant Garner who subsequently sublet part of his interest to defendant Moore. The lease was executed and recorded in 1945. Under the terms of the lease the lessee was given the option to extend the term thereof for a five-year period. The option was exercised by defendants Fry as will hereinafter appear.

The lease which is made part of the complaint provides: "4. That Lessee shall drill and complete two (2) wells to irrigate said land in the proper cultivation and farming thereof; that Lessee shall construct and lay at least two (2) miles of fourteen (14) inch concrete irrigation pipeline and install pumps for such irrigation purposes; that the aforesaid construction and installation of pumps, pipeline and any and all other improvements that may be made by Lessee shall be at the sole cost and expense of Lessee.

"5. That upon the expiration or sooner or other termination of this lease all of said pipeline and pumps so built and installed as aforesaid, and all other improvements of a substantial or permanent character, or that may be attached to the land, shall revert to and become the absolute property of Lessor, free and clear of any and all claims against the same."

The lease then continued as follows:

"11. That in the event Lessee desires to extend the term of this lease for an additional five (5) years from date of expiration hereof the option herein granted for such extension must be exercised by said Lessee by written notice to Lessor of Lessee's intention so to do not less than three (3) months before the date of expiration."

"13. In the event Lessee assigns or subleases any of the leased land in whole or in part, Lessee shall remain responsible and liable for the performance of all obligations herein contained, unless consent of Lessor is obtained in writing, to assign or sublease."

"17. That this lease and all the terms, covenants and conditions herein contained, subject to the provision as to assignments, shall apply to and bind the heirs, executors, administrators and assigns of the parties hereto."

In 1947, Mettler, the original lessee, assigned the lease to defendants Fry who agreed that they would "well and truly keep and perform each and every covenant and condition in said lease [the original lease agreement] provided to be performed by

the lessee and will hold the assignor herein free and blameless from payment of said rentals and performance of said covenants and conditions."

In 1949, defendants Fry sublet, subject to the "Assignment of Lease," to defendant Garner the easterly one-half of the property. In 1950, defendants Fry gave written notice to plaintiffs that they intended to exercise the option to extend the lease for a five-year period. Defendant Mettler did not obtain written consent from the original lessors for the assignment to defendants Fry.

At various times subsequent to the execution of the original lease defendants installed in or built upon the leased premises: "1. A pipe line more than two (2) miles in length and approximately 14" in diameter was built and installed in the land. 2. Three (3) deep wells were drilled and constructed to connect with said pipe line as integral part of the irrigation system of said property. 3. As appurtenances to said wells there were attached thereto shafts, bores, pumps, motors and pipelines, all of which were integral parts of the irrigation system of said property. 4. There were also installed and attached to pipelines three (3) sumps, together with their appurtenances, including three (3) tail-water pumps, motors and pipe lines, all of which were also integral parts of said irrigation system. 5. There were built upon said property two (2) one-story dwelling houses, one (1) duplex dwelling house, one (1) general utility building, one (1) two-car garage, one (1) shed and additional structures, the exact nature and character of which are unknown to plaintiffs and are well known to defendants."

Plaintiffs allege that defendants, or some of them, breached the terms of the lease by removing from the premises one deep well shaft, bore, pipeline, motor and pump; two tail-water pumps and motors and pipelines attached; two dwelling houses; one duplex dwelling; one general utility building; one shed; and the other buildings heretofore described to their damage in the sum of \$31,275.20. The complaint sets

forth four "causes of action": (1) breach of contract; (2) damages for conversion of the structures and improvements; (3) restoration and redelivery of the removed property together with damages resulting from the cost of reinstallation and for loss of use; and (4) one for waste to the real property arising from the removal of the heretofore described property.

Defendant Mettler, defendants Fry and defendants Garner and Moore filed three separate answers. At the same time all defendants filed separate motions for change of venue (the grounds of which have been heretofore set forth) from Los Angeles to Kern County. The affidavits in support thereof, which plaintiffs unsuccessfully moved to strike, will be considered subsequently.

Plaintiffs concede that if any of the three grounds upon which the trial court granted defendants' motions for change of venue can be supported the order should be affirmed.

Residence of Defendants:

[1-3] Defendant Mettler by affidavit admits that he is a resident of Los Angeles County. The other defendants are residents of Kern County. It is defendants' argument that defendant Mettler was joined only for the purpose of securing venue in Los Angeles County. Plaintiffs, on the other hand, maintain that Mettler is a proper and necessary party. Therefore, the first question that presents itself is whether the complaint states a cause of action against defendant Mettler. "The nature of the *cause of action* so far as it affects or determines the place of trial will be ascertained from the complaint alone, and the court will inspect the complaint for the purpose of determining the character of the action and the judgment which may be rendered." *Sam Finman, Inc., v. Rokuz Holding Corp.*, 130 Cal.App.2d 758, 759-760, 279 P.2d 982, 984. We held in *Kaluzok v. Brisson*, 27 Cal.2d 760, 762, 167 P.2d 481, 482, 163 A.L.R. 1308, that "To decide the question [as to whether a defendant was entitled to a change of venue] it is

necessary to determine the nature of the action as disclosed by the complaint, and the scope of the judgment which might be entered on default. *Neet v. Holmes*, 19 Cal.2d 605, 122 P.2d 557; *Eckstrand v. Wilshusen*, 217 Cal. 380, 18 P.2d 931; *Grocers' Fruit Growing Union v. Kern County Land Co.*, 150 Cal. 466, 89 P. 120; *McFarland v. Martin*, 144 Cal. 771, 78 P. 239." Plaintiffs' first cause of action is for damages for breach of contract which is clearly a transitory cause of action. In the *Kaluzok* case, *supra*, the action was one for damages for fraudulent representations made by the sellers of real property in order to induce the plaintiffs to buy land. In holding that the action was a transitory one, we said that the "gravamen of the present action is damages for deceit" and that the "title to the real property would not be affected. That title remains in the plaintiffs as before, encumbered by the same deed of trust given to secure whatever sum the plaintiffs are in law obligated to pay the defendants. No interest in the real property is determined or affected." *Kaluzok v. Brisson*, 27 Cal.2d 760, 763, 764, 167 P.2d 481, 482, 163 A.L.R. 1308.

[4-6] It will be recalled that under the terms of the lease agreement defendant Mettler remained liable to the lessors on the lease even though he assigned it unless he obtained the written consent of the lessors. No such written consent was obtained. Mettler's assignees took with notice of the terms and provisions of the lease and subject thereto. The complaint alleged a breach of the terms of the lease by defendant Mettler and/or the defendant assignees. However, as we held in *De Hart v. Allen*, 26 Cal.2d 829, 832, 161 P.2d 453, 455, "Ordinarily an assignment of a lease does not release the lessee from his obligations even though the lessor consents to the assignment. *Samuels v. Ottinger*, 169 Cal. 209, 211, 146 P. 638, Ann.Cas. 1916E, 830. Nor does the express assumption by the assignee of obligations under the lease affect the liability of the lessee to the lessor. *Lopizich v. Salter*, 45 Cal.App. 446, 449, 187 P. 1075; 32 Am.Jur. 315. It

has sometimes been said that the effect of an assignment is to make the lessee a surety for the assignee. *Samuels v. Ottinger*, 169 Cal. 209, 212, 146 P. 638, Ann.Cas. 1916E, 830; *Brosnan v. Kramer*, 135 Cal. 36, 39, 66 P. 979; *Schehr v. Berkey*, 166 Cal. 157, 160, 135 P. 41. This may be true in a limited sense as between the assignee and his assignor, the lessee, but as between the lessor and the lessee the latter remains a primary obligor under his express contract to pay rent. *T. A. D. Jones Co. v. Winchester Repeating Arms Co.*, D.C., 55 F.2d 944; *Id.*, 2 Cir., 61 F.2d 774, certiorari denied 288 U.S. 609, 53 S.Ct. 401, 77 L.Ed. 983; *Tiffany on Landlord and Tenant*, vol. 1, p. 994; 32 Am.Jur. 310-311, 321." It is obvious from the above cited rule that defendant Mettler remained liable under the lease and was, therefore, a proper and necessary party to the action and that the complaint states a cause of action as to him. *Russello v. Mori*, 153 Cal.App.2d 828, 315 P.2d 343; *Taff v. Goodman*, 41 Cal. App.2d 771, 776, 107 P.2d 431. In *California Collection Agency v. Fontana*, 61 Cal. App.2d 648, 653, 143 P.2d 507, 510, an order granting a motion for a change of venue was reversed. The court there said: "It also appears clear from the language of the decisions that upon the hearing of such motion, the court should not try, upon conflicting affidavits, the issues of fact going to the merits of the cause of action stated against the resident defendant. *Pacific Coast Auto. Ass'n v. Ahlf*, 115 Cal. App. 21, 24, 300 P. 841; *Sourbis v. Rhoads*, 50 Cal.App. 98, 101, 194 P. 521; *Mitchell v. Kim*, 42 Cal.App. 111, 114, 183 P. 368; *Lakeshore Cattle Co. v. Modoc Land & Livestock Co.*, 108 Cal. 261, 262, 41 P. 472; *McKenzie v. Barling*, 101 Cal. 459, 462, 36 P. 8. In our opinion the rule, supported by reason and by authority, is that upon the hearing of the motion for change of venue under the circumstances presented here, the real issue for determination by the trial court was whether plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that plaintiff had a cause of ac-

tion against the resident defendant. If he did, then we do not believe that it may be said that the resident defendant was *improperly* joined as a defendant or was made a defendant *solely* for the purpose of having the action tried in the county of the residence of the resident defendant within the meaning of section 395 of the Code of Civil Procedure." *McClung v. Watt*, 190 Cal. 155, 211 P. 17; *Freeman v. Dowling*, 219 Cal. 213, 25 P.2d 980; *Gottesfeld v. Richmaid Ice Cream Co.*, 115 Cal.App.2d 854, 252 P.2d 973. It follows, from the foregoing, that the trial court erred in granting defendants' motion for a change of venue on the ground of defendants' residence.

Local or Transitory Nature of the Case:

[7] The question of the transitory or local character of the causes of action must be determined from the allegations of the complaint on file at the time the motion was made and from the nature of the judgment which might be rendered thereon, assuming the truth of the allegations. *Neet v. Holmes*, 19 Cal.2d 605, 607, 122 P.2d 557; *Sheeley v. Jones*, 192 Cal. 256, 219 P. 744; *Eckstrand v. Wilshusen*, 217 Cal. 380, 18 P.2d 931; *Sausen v. Anderton*, 129 Cal. App.2d 324, 276 P.2d 814; *Bybee v. Fairchild*, 75 Cal.App.2d 35, 170 P.2d 54.

[8] In the case under consideration, plaintiffs' complaint contained four so-called causes of action: breach of contract; conversion of certain structures and improvements; restoration and reinstallation of the same structures and improvements; and a cause of action for waste "if such property cannot be restored." Plaintiffs prayed for damages for breach of contract, together with attorneys' fees, for the first two causes of action; for the return of the described improvements together with damages for reinstallation and loss of use on the third cause of action; or, in the alternative, damages for loss of use and the value of the improvements in the event the improvements could not be restored; for damages in the amount of the value of the improvements and for

trebled damages in the cause of action for waste.

It would appear from the allegations and prayer of the complaint that the main relief sought in all four causes of action was personal and that title to, or possession of, real property was only incidentally involved. As we held in *Neet v. Holmes*, 19 Cal.2d 605, 611-612, 122 P.2d 557, 560, "The nature of the action here is essentially transitory, that is, the defendants would be entitled to have it tried in the county of their residence, if the determination of an estate or interest in land is merely incidental to the determination of a cause for equitable relief in trust, fraud, or contract. The nature of the action is local, and must be tried in the county where the land is situated, where it turns on the title to property as distinct from the personal obligation, and the decree operates *ex proprio vigore* on the title. *State v. Royal Consolidated Mining Co.*, 187 Cal. 343, 351, 202 P. 133. In *Booker v. Aitken*, 140 Cal. 471, 74 P. 11, an action to recover real property on the ground that a deed of said property was invalid for fraud, was deemed to be local and an order denying a motion for a change of venue to the county of the defendant's residence was affirmed. The principles hereinabove stated were recognized and it was expressly pointed out that in that case neither a personal accounting nor a money judgment was sought, and that the substantial and only specific appropriate relief related to the title of the land deeded to the defendant. Similar cases are *Eckstrand v. Wilshusen*, 217 Cal. 380, 18 P.2d 931 and *State v. Royal Consolidated Mining Co.*, *supra*.

"In the present case it is obvious that the action turns principally on the personal obligation, as distinct from the title, and that judgment for any mining properties not now owned by the plaintiffs would follow if at all, merely as an incident of the judgment establishing the personal obligation."

In *Rosen v. Kessler*, 145 Cal.App.2d 676, 683, 303 P.2d 110, 114, the court held: "Under the general rule, when an action is

partly local and partly transitory and stated in separate causes of action, it is to be regarded as transitory in determining the place of trial." See, also, *Henderson v. Henderson*, 85 Cal.App.2d 476, 193 P.2d 135.

In *Hardy v. White*, 130 Cal.App.2d 550, 552, 279 P.2d 126, 128, the court said: "The well settled rule is that if there is a personal, or *in personam*, cause of action joined with one that is local in nature, the defendant is entitled to have the proceeding transferred to the county of his residence. *The action must be wholly local in nature to require it to be brought in the county of the situs as designated in section 392(a), Code of Civil Procedure.* *Turlock Theatre Co. v. Laws*, 12 Cal.2d 573, 576, 86 P.2d 345, 120 A.L.R. 786; see California cases collected in 120 A.L.R. 791-992." (Emphasis added.)

While the case at bar could be considered to come within the rules just set forth, it appears to us that the complaint sets forth only one cause of action stated on four different legal theories even though the theories are called separate "causes of action." The entire transaction arose out of the alleged breach of the lease agreement by defendant Mettler, the original lessee, and his assignees and the sub-lessees. The so-called fourth cause of action for waste is also predicated on the lease agreement in that the lease provides, and plaintiffs so allege, that "lessee shall not commit any waste or damage, or suffer any to be done. * * *" It was held in *California Trust Co. v. Cohn*, 214 Cal. 619, 629, 7 P.2d 297, 301, that "The seeking of different kinds of relief does not establish different causes of action." *Security Loan & Trust Co. v. Mattern*, 131 Cal. 326, 63 P. 482. The cause of action is based upon the injury to the plaintiff and not the particular legal theory of the defendant's wrongful act (*Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 134 P.2d 242; *Steiner v. Thomas*, 94 Cal.App.2d 655, 211 P.2d 321). In the case under consideration, plaintiffs have alleged but one wrong—the removal of the improvements heretofore described

in violation of the terms of the lease. In an analogous situation in a change of venue case the court, in *Maselli v. E. H. Appleby & Co., Inc.*, 117 Cal.App.2d 634, 636, 637, 256 P.2d 618, 620, said: "It is obvious from the allegations of all three counts contained in the complaint that the common counts are not based on separate contracts and that there was in fact only one transaction out of which this suit arose. Although our case law permits the use of common counts, nevertheless the courts recognize that where the common counts follow a count wherein all of the facts on which plaintiff's demand is based are specifically pleaded and the common counts upon their face make it clear that they are based upon the same set of facts, the common counts are to be considered not as different causes of action, but as alternative methods of pleading the plaintiff's right to recover the money judgment he seeks."

[9] There is no merit to defendants' argument that the "causes of action" for conversion and replevin involve "real property." The severance of the fixtures and improvements from the land "changed the character of the property from real to personal, irrespective of the means by which it was accomplished." *Buckout v. Swift*, 27 Cal. 433, 436. In *Teater v. Good Hope Development Corp.*, 14 Cal.2d 196, 208, 93 P.2d 112, 119, we held that " * * * Where a fixture annexed to a freehold is tortiously severed, the owner of the realty, at his option, may treat the fixture as personalty and recover the same by the action of replevin. * * *" (22 Cal.Jur.2d § 38, pp. 324, 325.)

[10] Whether we consider that there has been a joinder of transitory causes of action with a local action and that the transitory actions control so far as venue is concerned, or whether we consider that plaintiffs have stated only one transitory cause of action, the result is the same under the rules and authorities heretofore set forth and the trial court was in error in granting the defendants' motions for change of venue on the ground that the

action was a local one which must be tried at the situs of the real property pursuant to the provisions of section 392 of the Code of Civil Procedure. The fact that defendant Mettler joined with the other defendants in moving for a change of venue is immaterial. As we said in *Mono-gram Co. of California v. Kingsley*, 38 Cal.2d 28, 30, 237 P.2d 265, 266, "Even when all of the defendants join in a demand for or consent to a change of venue the cause will be retained if the complaint attempts in apparent good faith to state a cause of action against a defendant who resides in the county where the action was commenced. * * * [A] plaintiff who has brought his action in the proper county will not be compelled to go elsewhere merely because all of the defendants prefer it." *Independent Iron Works v. American President Lines, Ltd.*, 35 Cal.2d 858, 221 P.2d 939.

Convenience of Witnesses:

[11] Before the convenience of witnesses may be considered as a ground for an order granting a change of venue it must be shown that their proposed testimony is admissible, relevant and material to some issue in the case as shown by the record before the court (*Miller & Lux v. Kern County Land Co.*, 140 Cal. 132, 138, 73 P. 836; *Wong Fung Hing v. San Francisco Relief & Red Cross Funds*, 15 Cal. App. 537, 115 P. 331; *Mize v. Old Taylor Fruit Co.*, 114 Cal.App. 588, 300 P. 128; *Harden v. Skinner & Hammond*, 130 Cal. App.2d 750, 279 P.2d 978).

Plaintiffs concede that the witnesses whose convenience is to be considered are residents of Kern County.

Section 397(3) of the Code of Civil Procedure provides that the court may, on motion change the place of trial "When the convenience of witnesses and the ends of justice would be promoted by the change." In *Willingham v. Pecora*, 44 Cal.App.2d 289, 295, 112 P.2d 328, it was held that both of the conditions—convenience of witnesses and the ends of justice—must occur and that the moving party has

the burden of proving that both conditions will be met.

[12] The affidavits in support of the motion for change of venue on this ground must set forth the names of the witnesses, the nature of the testimony expected from each, and the reasons why the attendance of each would be inconvenient. *Juneau v. Juneau*, 45 Cal.App.2d 14, 113 P.2d 463; *San Jose Hospital v. Etherton*, 84 Cal.App. 516, 258 P. 611; *Harden v. Skinner & Hammond*, 130 Cal.App.2d 750, 755, 279 P.2d 978.

Some twenty affidavits were filed in support of the motions for change of venue. The witnesses' (as distinguished from the parties' and attorneys') affidavits were devoted, primarily, to averments that there was a custom and usage in Kern County that buildings such as those here involved, pumps, motors, tail water pumps, etc., were considered personalty which were removable by the lessee during, or at the end of the term. Other affidavits were concerned with the value of the improvements and the manner of their attachment to the real property.

Plaintiffs contend that their motion to strike the affidavits should have been granted; that the evidence as to custom and usage was inadmissible, immaterial and irrelevant because (1) it was not pleaded by the defendants; (2) it was not shown that plaintiffs knew or should have known of the purported custom and usage; (3) that the purported custom and usage would vary and contradict the terms of the lease—not interpret it; and (4) that the testimony relating to the purported custom and usage was to be given by expert witnesses whose convenience is not to be considered.

[13, 14] Defendants concede that custom and usage was not pleaded by them. In *Tharp v. San Joaquin Cotton Oil Co.*, 27 Cal.App.2d 554, 561, 81 P.2d 443, 82 P. 2d 21, it was held that "it is the invariable rule that evidence of a custom which is not so general in its character that it will be presumed to have been known to the

parties or of which a court will take judicial knowledge must be pleaded to warrant the acceptance of evidence of such custom. * * * The appellant failed to plead the custom, the proof of which he sought to introduce." *Pray v. Trower Lumber Co.*, 101 Cal.App. 482, 281 P. 1036. There is nothing in the record to show that plaintiffs knew, or should have known, of the purported custom and usage and defendants' only argument on this point is that plaintiffs were lessors of farm land located in Kern County. As the court said in *Mize v. Old Taylor Fruit Co.*, 114 Cal. App. 588, 590, 300 P. 128, 129, "the affidavit in support of the motion fails to supply this necessary link connecting the testimony of the inconvenienced witnesses with the issues in the case." And, as was held in *Roberts Distributing Co. v. Kaye-Halbert Corp.*, 126 Cal.App.2d 664, 676, 272 P.2d 886, 894, "A person is not bound by a custom or usage unless he had actual knowledge thereof, or it is so general or well-known in the community as to give rise to the presumption of such knowledge." In *Miller v. Stults*, 143 Cal.App. 2d 592, 602, 300 P.2d 312, 319, it was said: " * * * Customs of special trades and local usages which are limited to certain communities are not presumed to be known to all persons. *Jones on Evidence*, 3d Ed., p. 714, § 464. To bind one who is not engaged in the trade or occupation which employs the usage relied upon, proof of his actual knowledge of the usage is necessary, unless it is so commonly accepted that the public is presumed to recognize its existence. * * * "

" * * * So in the case at bar it does not appear that either party manifested an intention to be governed by the asserted custom. * * * There was no evidence that defendant was a farmer. [Citation.] So far as the record shows, defendant was a stranger to farming customs." In the case at bar there is nothing to show that plaintiffs, or any of them, were farmers or that they knew anything of farming customs.

Defendants argue that the purported custom and usage is admissible to interpret the terms of the lease agreement rather than to vary or contradict them. It will be recalled that the lease provided that "upon the expiration or sooner or other termination of this lease all of said pipe line and pumps so built and installed as aforesaid, *and all other improvements of a substantial or permanent character or that may be attached to the land*, shall revert to and become the absolute property of Lessor, free and clear of any and all claims against the same." (Emphasis added.) It will be noted that the provision refers to improvements of a substantial *or* permanent character *or* those attached to the land. In *Realty Dock & Improvement Corp. v. Anderson*, 174 Cal. 672, 676-677, 164 P. 4, 7, we held that "It is, of course, quite apparent that the term 'improvement' is comprehensive enough to embrace all additions or alterations which may be made by a tenant for the convenience of his business upon the premises. It is much more comprehensive than the word 'fixture,' and while including these, includes also many things that may not be classed as fixtures. In fact, if force is to be given to a provision in a lease which provides that all 'improvements' made in premises shall inure to the lessor, it is difficult to conceive of any subsequent addition, alteration, or repair to the premises during the tenancy which would not be embraced within the term 'improvement.'" We also held, in answer to the argument made by the lessee that the property was movable, that "It is not a matter of controlling importance whether the vault as constructed was a permanent or a movable fixture. We are not here considering the rights arising by operation of law only between landlord and tenant as to the articles placed upon the leased premises by the latter. On the contrary, these rights are to be determined from the terms of the lease under which the parties undertook to fix them." Defendants' contention that the custom and usage in Kern County

was that the tenant could remove improvements placed upon the land is directly opposed to the terms of the lease which provides that all such improvements shall remain on the land and become the absolute property of the lessor. The parties' intention, as expressed by their written agreement, is controlling and, under their agreement "reasonable minds cannot but agree" that the improvements here involved were covered by the provisions of the lease heretofore quoted (*Wilmerton v. Morton*, 74 Cal.App.2d 891, 896, 169 P.2d 992). The lease here specifically separated substantial or permanent improvements from those that might be attached to the land so the movable character of any of the improvements under consideration is not a matter of "controlling importance." In *Allen v. Alberts*, 82 Cal.App.2d 13, 16, 185 P.2d 372, 373, where the lease provided that all furniture, furnishings, equipment or fixtures installed on the premises, or to be installed, should become the property of the lessor upon termination of the lease, the court said in answer to an attempt by the lessee to introduce evidence of custom and usage to the contrary: "This proposition is likewise without merit. The lease herein involved specifically provided that all personal property and furnishings installed in the premises should be a part of the lease property and belong to the lessors. Hence there was no necessity for introducing any evidence as to custom and usage since the agreement involved was specific and unambiguous." *Sharpe v. Arabian American Oil Co.*, 111 Cal.App.2d 99, 244 P.2d 83; *Dea v. Davy*, 150 Cal.App.2d 435, 309 P.2d 894; *Miller v. Stults*, 143 Cal.App.2d 592, 300 P.2d 312. It clearly appears that evidence relative to the purported custom and usage would tend to vary or contradict the terms of the lease agreement and is therefore inadmissible and the witnesses' testimony concerning it is therefore not material.

[15, 16] Defendants' next argument is that "there still remains a serious question of interpretation as to just what property is substantial." Some of the prospective

witnesses whose convenience is being considered were to testify to the value of the improvements. While the parties disagree, as is seen from the complaint and answers thereto, as to the value of the improvements, it would appear that in either event the value is substantial as distinguished from inconsequential. In *In re Scroggin*, 103 Cal.App.2d 281, 283, 229 P.2d 489, 491, the court was considering the word "substantial" as it related to the word "amount." It was there held that the word "substantial" "imports a considerable amount of value in opposition to that which is inconsequential or small." Defendants do not deny that the value of the improvements is substantial. Plaintiffs and defendants agree that expert witnesses with a personal knowledge of the facts of the particular case come within the rule that permits their convenience to be considered (*Figley v. California Arrow Airlines*, 111 Cal.App.2d 285, 244 P.2d 472) but they disagree as to the materiality of the testimony so far as this particular case is concerned. In other words, plaintiffs argue that any appraiser can give the same testimony without examining the property and that the convenience of these witnesses should not be considered under the general rule. We agree with plaintiffs. The pleadings allege the value of the improvements to be substantial within the meaning of the lease agreement. There is nothing in the record to show that these witnesses are the only witnesses who could testify to the value of the improvements because of their personal knowledge of the facts of the case. In the *Figley* case experts had examined the scene of an airplane accident and were to give testimony as to their opinion of the causes of the crash. The court in affirming an order denying a change of venue said that "Generally, the convenience of experts should not be considered in determining the question of convenience of witnesses on application for change of venue except where the experts have a personal knowledge of the facts upon which their testimony is to be based. *Security Investment Co. v. Gifford*, 179 Cal. 277, 176 P.

444. In this case, as we have commented, the court might well have considered that what one of these men knew it would be reasonable to suppose all knew, and hence the exception to the rule above stated, based upon personal knowledge of the experts, would have no application." 111 Cal. App.2d at pages 287, 288, 244 P.2d at page 473. In the case under consideration, affiants Cassady and Gargan had made appraisals of the improvements moved from the property. It appears from the affidavits that the property can be located and it does not appear that any other appraiser could not make the same inspection or that the witnesses would testify that the improvements were not substantial within the meaning of the lease agreement. It does not appear, therefore, that the convenience of these expert witnesses should be considered on the motion for change of venue. The matter of the value of the improvements is a question for the trier of fact upon a trial of the case after hearing expert testimony or receiving stipulation of the parties and should not be considered upon a motion for a change of venue. In *Security Investment Co. v. Gifford*, 179 Cal. 277, 176 P. 444; *Barnett v. United Oil Co.*, 5 Cal.App.2d 175, 42 P.2d 656; *Wrin v. Ohlandt*, 213 Cal. 158, 1 P.2d 991; and *Pacific Coast Title Ins. Co. v. Land Title Ins. Co.*, 97 Cal.App.2d 829, 218 P. 2d 573, it was held that the convenience of expert witnesses such as we have here could not be considered on a motion for a change of venue.

Inasmuch as the witnesses' affidavits do not purport to state that their testimony would be that the improvements were not substantial within the meaning of the lease agreement their testimony would not be material to the issues of the case as presented on the motions for change of venue and the affidavits were, therefore, improperly considered by the trial court.

[17, 18] With reference to the other affidavits, convenience of the parties is not to be considered upon a motion for a change of venue (*Wrin v. Ohlandt*, 213 Cal. 158, 1 P.2d 991) and the case does not fall within the rule of *Simonian v. Simonian*, 97 Cal.App.2d 68, 69, 217 P.2d 157, where it was held that a party's physical condition made it impossible for him to travel to a distant county to give "material evidence." The affidavit concerning the physical disability of the senior defendant Fry did not aver that he would be called as a witness to give "material evidence" or state what his evidence would be. On the contrary, it appears that the younger defendant Fry had, for some time, been in charge of the Fry affairs. There is no merit to defendants' argument that defendant Mettler's books and records were located in Kern County (*Neet v. Holmes*, 19 Cal.2d 605, 613, 614, 122 P.2d 557) and that the court calendar in Kern County is less congested than that in Los Angeles County inasmuch as neither of these reasons falls within the statutory provision regarding change of venue for convenience of witnesses.

Because the record does not show that the prospective witnesses whose convenience was under consideration would testify to facts within their knowledge material to the issues of the case as distinguished from expert opinion evidence of value, the trial court erroneously granted the motions for a change of venue on this ground.

There being no support in the record for the order granting defendants' motions for a change of venue, the order must be and is reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER and SPENCE, JJ., concur.

McCOMB, J., dissents.

50 Cal.2d 674

**CITY OF LONG BEACH, Plaintiff and
Respondent,**
v.

**BOARD OF SUPERVISORS OF The COUN-
TY OF LOS ANGELES and County of Los
Angeles, Defendants and Appellants.**

L. A. 24559.

Supreme Court of California,
In Bank.

Aug. 12, 1958.

Action by city for declaratory judgment that County Board of Supervisors should have granted claim for cancellation of taxes and for recovery of taxes collected. The Superior Court of Los Angeles County, Joe Raycraft, J., rendered judgment for city, and Board and county appealed. The Supreme Court, Shenk, J., held that where properties were annexed by city they were discharged from existing county tax liens.

Affirmed.

Opinion, 318 P.2d 505, vacated.

1. Taxation ☞217

Municipal property once subject to taxation as being outside the municipal limits becomes exempt when annexed to that municipal corporation. West's Ann. Const. art. 13, § 1.

2. Taxation ☞195

Purpose of constitutional amendment eliminating from exemption from general taxation lands and improvements thereto located outside out of municipal corporation owning same as was subject to taxation at time of acquisition by such body was primarily to safeguard tax revenues of small counties where a large municipal corporation might acquire extensive holdings not located within boundaries of the corporation. West's Ann. Const. art. 13, § 1.

3. Taxation ☞504

While administrative cancellation of taxes may be desirable, failure to do so

cannot make valid a tax lien on property constitutionally exempted from taxation. West's Ann. Const. art. 13, § 1; West's Ann. Rev. & Tax. Code, § 4986.

4. Taxation ☞542

Where taxes are paid under protest on property entitled to exemption, refund is in order upon filing of proper and timely claim. West's Ann. Rev. & Tax. Code, § 5096.

5. Taxation ☞204(3)

Exemption from taxation by county was applicable when parcels of property became qualified upon annexation by city and existing liens on property and city's tax liabilities as of that date disappeared, regardless of date of acquisition of each of parcels by city. West's Ann. Const. art. 13, § 1.

6. Mandamus ☞3(5)

Mandamus would not have been proper remedy for city to pursue to compel cancellation of county tax liens upon lands acquired by city in view of fact that city had adequate remedy in action for refund of taxes alleged to have been erroneously collected. West's Ann. Rev. & Tax. Code, § 4986.

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Walhfred Jacobson, City Atty., Long
Beach, and John R. Nimocks, Deputy City
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SHENK, Justice.

This is an appeal by the defendants, the Board of Supervisors of and the County of Los Angeles, from a judgment declaring that real property of the plaintiff City of Long Beach be tax exempt and requiring the defendants to refund taxes collected from the plaintiff.

The City of Long Beach acquired title to three parcels of land lying outside of its city limits prior to the tax lien date of the first Monday in March, 1954, and title to a

fourth parcel similarly located after that date. The county assessed all four parcels for the tax year 1954-1955. After acquisition and prior to the expiration of the tax year, the city annexed all of the parcels and applied to the board of supervisors for a cancellation of the taxes and liens, pursuant to section 4986, subdivision (e) of the Revenue and Taxation Code in effect at that time. That statutory provision provided in its pertinent parts as follows: "All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged: * * * (e) On property acquired after the lien date by the State or by any county, city, school district or other political subdivision and because of this public ownership not subject to sale for delinquent taxes."

The application for cancellation was denied. The city paid the taxes under protest, filed a verified claim for a refund and, after its denial, commenced this action pursuant to section 5138 of the Revenue and Taxation Code. The complaint sought declaratory relief contending that the supervisors should have allowed the claim, and sought to recover the taxes paid. The defendants demurred, were overruled with leave to answer but declined to do so. The ensuing judgment awarded the relief sought.

[1] Section 1 of article XIII of the Constitution, prior to 1914, exempted from general taxation property belonging to a municipal corporation wherever located. In that year an amendment was adopted which eliminated from the exemption "such lands and the improvements thereon located outside of the county, city and county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation * * *." In construing that section it was said in *County*

of Mariposa v. Merced Irr. Dist., 32 Cal. 2d 467, at page 473, 196 P.2d 920, at page 924: "The constitutional amendment puts two qualifications on lands which are excluded from the exemption. They must be outside the municipal corporation and such 'as were subject to taxation at the time of the acquisition of the same' by the municipal corporation. Manifestly, the phrase 'at the time of acquisition of the same' refers to and modifies only the clause 'as were subject to taxation' and not the clause 'located outside of the * * * corporation owning the same.' That is to say, the amendment does not mean that property located outside the boundaries at the time of acquisition is taxable even though later included within the boundaries of the corporation, while property inside the corporation at the time of acquisition is not taxable." Thus it appears to be settled that municipal property once subject to taxation as being outside the municipal limits becomes exempt when annexed to that municipal corporation. The question is whether, upon qualification for exemption, pre-existing tax liens on the property cease to exist.

Prior to the 1914 amendment the exemption was held to be effective as to existing tax liens upon acquisition of lands by a municipal corporation. Thus in *Smith v. City of Santa Monica*, 162 Cal. 221, 121 P. 920, the city acquired lands against which there were existing tax liens for unpaid assessments for three years prior to the date of acquisition. It was concluded that the liens were eliminated as having been absorbed in the city's title. The court stated that: "The reasoning leading irresistibly to this conclusion is well set forth in *People v. McCreery*, 34 Cal. 432, *People v. Doe*, 36 Cal. 220, *Low v. Lewis*, 46 Cal. [549] 552, and [*People ex rel.*] *Doyle v. Austin*, 47 Cal. [353] 360. That reasoning is that, wherever a municipal corporation or public agency of the state owns real property used for the purposes of such agency, the ultimate title is in the state itself.

The agency holds the title upon the two-fold trusts, the one for the public, the other for the state; and that to countenance taxation of such property would be to countenance the folly of the sovereign taxing its own property 'and taking money out of one pocket to put in another.' In *People v. Doe*, supra [36 Cal. 220], summing up the reasoning, it is said: 'The Constitution and laws upon the subject of taxing property are therefore to be understood as referring to private property and persons, and not including public property and the state, or any subordinate part of the state government, such as counties, towns, and municipal corporations.' * * * The state does not tax the property of a municipality for state and county purposes, because this would be a taxation of its own property."

[2] The concept that a municipality should not be taxed for county purposes was held, in the foregoing case of *Smith v. City of Santa Monica*, to apply to assessments and liens established against the property prior to the acquisition of the property by the municipality and remaining unpaid. The test of exemption at that time was ownership. *Anderson-Cottonwood Irr. Dist. v. Klukkert*, 13 Cal.2d 191, 198, 88 P.2d 685; *Sutter-Yuba Inv. Co. v. Waste*, 52 Cal.App. 2d 785, 790, 127 P.2d 25. The purpose of the amendment in 1914 was primarily to safeguard the tax revenues of small counties wherein a large municipal corporation might acquire extensive holdings not located within the boundaries of the municipal corporation. *City and County of San Francisco v. County of Alameda*, 5 Cal.2d 243, 245-246, 54 P.2d 462. By the amendment certain properties were removed from the exemption during such times as they could not qualify therefor. But upon qualification it appears that the rules governing the application of the exemption should be the same as those existing as to properties upon qualification for the exemption prior to the amendment. There is nothing in the amendment which would indicate otherwise. Accordingly, when the properties were an-

nexed by the plaintiff city as in the present case they were in legal effect discharged from existing tax liens. See *City of Los Angeles v. Ford*, 12 Cal.2d 407, 84 P.2d 1042; *Smith v. City of Santa Monica*, supra, 162 Cal. 221, 121 P. 920; *People v. Board of Supervisors*, 126 Cal.App. 670, 15 P.2d 209.

The defendants claim that there are "vested rights" in a tax lien once established which cannot be extinguished when lands subject to the lien qualify for the exemption. They rely on *Rock Creek Water District v. County of Calaveras*, 133 Cal. App.2d 141, 283 P.2d 740. In that case the Rock Creek Water District, located in Stanislaus County, in December 1948 purported to annex lands lying in Calaveras County. That county continued to tax the lands through 1952. The District paid the taxes and sued for a refund. Recovery was allowed as to the tax years after the 1949-1950 tax year but not allowed as to the 1949-1950 tax payment on the ground that the annexation proceedings on 1948 had not been conducted according to law and were of no effect without the enactment of a validating act, effective on June 30, 1949. It was held, however, that the validating act was ineffective to defeat the "vested right" in the tax lien established prior thereto. The Rock Creek case does not turn upon the effect of annexation as to an existing lien, but upon the effect of the validating act and rests upon the assumption that the tax lien constituted a vested right. In *Oakdale Irrigation District v. County of Calaveras*, 133 Cal.App.2d 127, 283 P.2d 732, decided on the same day as the Rock Creek Water District case, the same court held that lands included within an irrigation district after the tax lien date, were exempt from taxation. Again, the court did not discuss the effect of annexation upon an existing lien, and neither of the cases can be considered as authority upon that subject.

[3] The defendants also rely on *City of Santa Monica v. Los Angeles County*, 15 Cal.App. 710, 115 P. 945, where the city acquired property after the lien date and paid the taxes in that year under protest. It

was held that the city could not recover the taxes because they properly became a lien in the first instance. That decision has been distinguished on grounds that thereafter statutory provisions were enacted which required the cancellation of the tax lien on proper application. *People v. Board of Supervisors*, supra, 126 Cal.App. 670, 15 P. 2d 209. Moreover, it would appear that the qualification of land for the constitutional exemption from taxation, including existing tax liens, in and of itself, would render the collection of such taxes improper aside from the administrative cancellation of taxes once properly levied. If that were not so, it would follow that the collection of taxes on property declared by the Constitution to be tax exempt would be proper. While it may be desirable and more orderly that a cancellation be obtained, the failure to do so cannot make valid a tax lien on property constitutionally exempt from taxation.

It is also contended by the defendants that the plaintiff is not entitled to a recovery of the taxes paid under the statutory procedures pursued by it. The rule of exemption has been implemented by statute. The language of section 4986 of the Revenue and Taxation Code provides that a tax "may" be cancelled if levied on property acquired "after the lien date." It is claimed that the duty of cancellation did not exist at the time of the application as to the three parcels acquired before the lien date, and that the question of cancellation and the propriety of the supervisors' failure to act is now moot. As above pointed out, section 4986 authorizes cancellations only in cases where there is "any uncollected tax * * *." In the present case payment has already been made and the action is one to recover.

[4,5] The foregoing contentions based on the claimed inapplicability of the cancellation provisions need not be determined in view of the effect to be given to the constitutional provision. As stated, the qualification of the parcels herein involved for

the constitutional exemption rendered the collection of existing taxes improper aside from implementing legislation for the cancellation of the tax. Section 5096 of the Revenue and Taxation Code provides in part as follows: "On order of the board of supervisors, any taxes paid before or after delinquency shall be refunded if they were: * * * (b) Erroneously or illegally collected." It is sufficient that the collection, as distinguished from the original assessment, be erroneous or illegal. *Evans v. County of San Joaquin*, 67 Cal.App.2d 452, 454-455, 154 P.2d 468. Where taxes are paid under protest on property entitled to exemption the refund is in order upon the filing of a proper and timely claim. See *S. Siwel Co. v. County of Los Angeles*, 27 Cal.2d 724, 731, 167 P.2d 177. Whether cancellation was available or had been denied would seem to be immaterial. The exemption was applicable when the property became qualified upon annexation, and the existing liens on each of the four parcels of property and the city's tax liabilities as of that date, regardless of the date of acquisition of each of the parcels by the city, disappeared.

[6] Contentions that mandamus is the remedy which the plaintiff city should have pursued to compel cancellation, are without merit. In *Security-First Nat. Bank v. Board of Supervisors*, 35 Cal.2d 323, 217 P.2d 948, it was held that a writ of mandate would not lie to compel, under section 4986 of the Revenue and Taxation Code, the cancellation of taxes improperly levied where the petitioner had an adequate remedy at law by an action for refund of taxes alleged to have been erroneously collected. See also *Vista Irr. Dist. v. Board of Supervisors*, 32 Cal.2d 477, 196 P.2d 926.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

50 Cal.2d 681

Everett M. LEWIS, Plaintiff and Appellant,
v.

MUNTZ CAR COMPANY OF CALIFORNIA
(a Corporation), and Seaboard Finance
Company (a Corporation), Defendants and
Respondents.

L. A. 24964.

Supreme Court of California.
Aug. 12, 1958.

Rehearing Denied Sept. 10, 1958.

Action by automobile buyer against a firm selling the automobile and holder of conditional sales contract for damage based on seller's alleged violation of statute prescribing requirements of conditional sales contract. The Superior Court, Los Angeles County, Arthur K. Marshall, J., entered judgment in favor of the buyer against seller and against the holder of conditional sales contract after deducting certain offsets and the buyer appealed. The Supreme Court, Shenk, J., held that the statute providing that if contract for conditional sale of automobile does not comply with statutory requirements buyer may recover from seller the total amount paid under contract balance, etc., imposes a penalty upon seller which precludes allowance of offset for use of automobile, but no such penalty is imposed upon holder of contract, and hence where it did not appear that finance company violated any undertaking to the buyer under the contract or that finance company participated in original transaction so as to make it liable with seller as a party to transaction finance company could offset against amount recovered by buyer the value of use of automobile by the buyer.

Judgment modified and as modified affirmed.

Opinion, 321 P.2d 81, vacated.

1. Sales ⇨481

Where seller of automobile under conditional sales contract violated statute re-

lating to such contracts, seller was bound to return considerations paid to seller by buyer under such contract. West's Ann. Civ.Code, § 2982(a).

2. Sales ⇨481

The statute providing that if contract for conditional sale of automobile does not comply with statutory requirements buyer may recover from seller the total amount paid under contract balance, etc., imposes a penalty upon seller which precludes allowance of offset for use of automobile, but no such penalty is imposed upon holder of contract, and hence where it did not appear that finance company violated any undertaking to the buyer under the contract or that finance company participated in original transaction finance company could offset against amount recovered by buyer the value of use of automobile by buyer. West's Ann.Civ.Code, § 2982(b).

David J. Lee, Los Angeles, for appellant.

Ellery E. Cuff, Public Defender, Los Angeles County, and Raymond F. Crigger, Deputy Public Defender, Allan L. Leonard, Edwin F. Franke and Donald E. Wheeler, Horrigan & McKnight, and J. Wallace McKnight, Los Angeles, amici curiæ on behalf of appellant.

K. E. Nungesser and Bromley, Ritter & Lindersmith, Los Angeles, for respondent Seaboard Finance Co.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment in favor of himself in an action for restitution, rescission, and cancellation of a contract of conditional sale of an automobile alleged to have been executed in violation of section 2982 of the Civil Code.¹

In April 1953 the plaintiff entered into negotiations for the purchase of an automobile from the defendant Muntz Car Company. After agreeing upon the terms of the sale, an agent of Muntz submitted

1. Section 2982 provides in pertinent part:
"(a) Every conditional sale contract for

the sale of a motor vehicle, with or without accessories, shall be in writing and

several documents to the plaintiff for his signature, including a conditional sale contract form supplied by the defendant Seaboard. It was signed in blank by the plaintiff who then took possession of the car. The terms of the sale were subsequently filled in by Muntz. The document was then assigned by Muntz to the defendant Seaboard Finance Company. After the action was commenced Seaboard forcibly repossessed the car. Plaintiff's motion for a preliminary injunction to restrain Sea-

board from selling or disposing of the automobile was denied.

The trial court found that Muntz violated section 2982 of the Civil Code in several particulars: Subdivision (a): The conditional sale contract signed by the plaintiff did not contain all of the agreements between the buyer and the seller; a copy of the contract was never delivered to the plaintiff; the cash price was stated to be \$5,232, an amount which included a fictitious credit of \$1,000 above

shall contain all of the agreements between the buyer and the seller relating to the personal property described therein. It shall be signed by the buyer or his authorized representative and by the seller or its authorized representative, and when so executed an exact copy thereof shall be delivered by the seller to the buyer at the time of its execution. It shall recite the following separate items as such, in the following order:

1. The cash price of the personal property described in the conditional sale contract. 2. The amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for cash and for such property. * * * 3. The amount unpaid on the cash price, which is the difference between Items 1 and 2. 4. The cost to the buyer of any insurance, the premium for which is included in the contract balance. 5. A description and itemization of amounts, if any, which will actually be paid by the seller or his assignee to any public officer as fees in connection with the transaction, which are included in the contract balance. 6. The amount of the unpaid balance, which is the sum of Items 3, 4, and 5. 7. The amount of the time price differential. 8. The contract balance owed by the buyer to the seller, which is the sum of Items 6 and 7. 9. The number of installments required to pay the contract balance, the amount of each installment, and the date for payment of the installments. * * *

(b) If any charge for insurance is included in the amount paid or to be paid by the buyer under any conditional sale contract for the sale of a motor vehicle, with or without accessories, an insurance policy or policies or a certificate of insurance under a master policy shall be issued and the seller shall within 30 days

after the execution of the conditional sale contract send or cause to be sent to the buyer the original or an exact copy of such policy or policies or certificate. (c) The amount of the time price differential in any conditional sale contract for the sale of a motor vehicle, with or without accessories shall not exceed 1 per cent of the unpaid balance multiplied by the number of months, including any excess fraction thereof as one month, elapsing between the date of such contract and the due date of the last installment, or twenty-five (\$25), whichever is greater, provided that such contract may provide for interest on any delinquent installment from and after the date of delinquency, and for reasonable collection costs and fees in the event of delinquency. (d) Any provision in any conditional sale contract for the sale of a motor vehicle to the contrary notwithstanding, the buyer may satisfy in full the indebtedness evidenced by such contract at any time before the final maturity thereof, and in so satisfying such indebtedness shall receive a refund credit thereon for such anticipation of payments. * * * (e) If the seller, except as the result of an accidental or bona fide error in computation, shall violate any provision of subdivisions (c), or (d) of this section the conditional sale contract shall not be enforceable, except by a bona fide purchaser for value, and the buyer may recover from the seller in a civil action the total amount paid on the contract balance by the buyer to the seller or his assignee pursuant to the terms of such contract. (f) If the holder of such contract, except as the result of an accidental or bona fide error in computation, shall violate any provision of subdivision (d) of this section, the buyer may recover from such holder in a civil action the total amount paid on the contract balance by the buyer to such holder pursuant to the terms of such contract."

the agreed price of the car; the buyer's down payment was incorrectly stated to be \$1,800, an amount \$1,000 in excess of the agreed down payment; the additional \$1,000 was added by Muntz to make it appear that the buyer had paid one third of the purchase price; the amount unpaid on the cash price was incorrectly stated; Muntz obtained insurance for the plaintiff at a premium higher than that agreed upon, but stated the lower premium in the contract; Muntz included a charge of \$126 for life insurance which the plaintiff did not agree to buy; no policy of life insurance was procured by Muntz or delivered to the plaintiff; the registration and title fees were not stated. The amount of the unpaid balance was incorrectly stated, and the time price differential was incorrectly stated. Subdivision (b): No life insurance policy was delivered to the buyer. Subdivision (c): The time price differential was in excess of the limitations prescribed and the misstatement was not due to accident or innocent error in computation.

Muntz went out of business and defaulted but Seaboard appeared. The court found that the plaintiff paid Muntz \$800 as a down payment and \$2,833.30 to Seaboard in installments. The trial court concluded that judgment should be entered against Muntz for \$3,633.30 less an offset of \$2,000 for the value of the use of the car. It further concluded that judgment should be entered against Seaboard for \$2,833.30 less an offset of \$2,000. Accordingly, it entered judgment against Muntz for \$1,633.30 and a judgment against Seaboard for \$833.30, and directed that the automobile be retained by Seaboard. Neither Muntz nor Seaboard has appealed.

[1] It is clear as found and ordered by the trial court that Muntz is bound to return the consideration paid to it by the plaintiff under the conditional sale contract. Civ.Code, § 2982, subd. (e); *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 203 P.2d 758. The first question re-

lates to the right of Muntz to offset the reasonable value of the use of the automobile while in the plaintiff's possession. A like question is presented as to Seaboard. Seaboard contends that no recovery may be had against it, relying on the *Carter* case.

The trial court found that the retail market value of the vehicle at the time it was sold to the plaintiff in April of 1953 was \$4,056; that the retail market value in June 1956, the time of the trial, was \$1,510; that the car at the time of the trial was not in operable condition, could not be driven, but that the body of the vehicle appeared to be in good condition; that the plaintiff had not used the automobile since January 1956; that the depreciation in the value of the car occasioned by use and possession of it by the plaintiff and the sum required to return it to the same condition it was in at the time the plaintiff received it was \$2,000.

Whether the seller or his assignee is entitled to an offset for the reasonable use of a vehicle purchased under a contract rendered unenforceable by section 2982 of the Civil Code has not been definitively stated by this court. However, that question has been before a district court of appeal and the appellate departments of the superior court. The question was involved in *United States Credit Bureau v. Sanders*, 103 Cal.App.2d 806, 230 P.2d 849. In that case, the plaintiff, as assignee of Seaboard, sued to recover deficiencies on promissory notes secured by chattel mortgages. The notes and mortgages had been executed by the defendants Sanders with Seaboard as mortgagee. The Sanders cross-complained to recover sums paid by them on the notes claiming that the transaction was illegal under Civil Code, section 2982. Seaboard was held to have been a "seller" within the meaning of that section. The court held the plaintiff liable on defendants' cross-complaint for money paid by the defendants to the plaintiff under the illegal contract. The court further directed that the amount of the judg-

ment for the defendants on their cross-complaint be reduced by the value of their use of the vehicle.

Williams v. Caruso Enterprises, 140 Cal. App.2d Supp. 973, 295 P.2d 592, was an action to recover money paid under a conditional sale contract rendered invalid by a violation of the provisions of section 2982. The court there held that the defendant was entitled to an offset for the reasonable value of the use of the car and stated at pages 980 and 981 of 140 Cal. App.2d Supp., at page 597 of 295 P.2d: "In our view the most to which a guilty seller is entitled, and which at the same time is equitable to the innocent buyer, is an offset in an amount representing the depreciation in value of the car occasioned by the use made of it by the buyer while in his possession, which necessarily excludes any allowance for depreciation resulting from a general decline in the market value of such automobile during the period in question. Thus the vendee is, in effect, required to return the vehicle in substantially the same condition it was in at the time he received it." The court further determined that the buyer was required to return the vehicle as a condition to maintaining the action and said at page 979 of 140 Cal.App.2d Supp., at page 596 of 295 P.2d: "By instituting an action for the return of the consideration paid by him on account of the purchase of the car, he is, in effect, asserting that the contract as to him is void and as a consequence that he has received no rights in the vehicle which necessarily implies that he claims no right to the possession thereof."

In *Baum v. Aleman*, 139 Cal.App.2d Supp. 929, 293 P.2d 162, the plaintiff vendor repossessed an automobile sold under a conditional sale contract. He then brought an action to recover the balance due on the contract. The defendant cross-complained, claiming that the written contract was invalid because it did not set forth the time price differential as required by section 2982. It was there held that the defendant was entitled to relief on

his cross-complaint subject to an offset for the reasonable value of the use of the car.

Subdivision (c) of section 2982, setting the maximum time price differential, was violated by Muntz. Subdivision (e) of that section states the effect of such violations: "* * * the conditional sale contract shall not be enforceable, except by a bona fide purchaser for value, and the buyer may recover from the seller in a civil action the total amount paid on the contract balance by the buyer to the seller or his assignee pursuant to the terms of such contract." It is the plaintiff's contention that because subdivision (e) does not provide for an offset, none can be allowed. He seeks the return of the consideration paid by him without deduction for the benefits he has received under the contract. He further seeks to recover the vehicle. Plaintiff's contentions in this regard are based upon his construction of section 2982, subdivision (e) as a penalty clause. Section 2982 as enacted in 1945 (Stats.1945, Ch. 1030, § 2) provided in subdivision (c): "* * * If the seller, except as the result of an accidental and bona fide error in computation, shall violate any provision of this subsection (c) [calculation of the time price differential], the conditional sale contract shall not be enforceable except by a purchaser for value, and the buyer may recover from the seller in a civil action three times the total amount paid on the contract balance by the buyer to the seller or his assignee pursuant to the terms of such contract."

The present subdivision (e) of section 2982 provides for recovery from the seller of the "total amount paid on the contract balance." The term "contract balance" is defined in section 2981 as follows: "'Contract balance' shall mean the amount unpaid under the conditional sale contract, which the buyer agrees to pay in installments as provided therein." No express provision is made in subdivision (e) for an offset. Recovery of the "total amount paid on the contract balance," plaintiff contends, precludes the right to an

offset. The Legislature, it is asserted, in repealing the provision for treble damages retained the foregoing penalty as a sanction for violation of subdivision (c). A construction of subdivision (e) as retaining a penalty for violation by the seller of subdivision (c) is consistent with the history of the enactment and the purposes of the legislation and would support the plaintiff's contention that Muntz cannot diminish the plaintiff's recovery of the total amount paid by him on the contract balance by deducting therefrom the amount of the offset. The penalty does not, however, attach to Seaboard in this case as assignee of the contract and furnishes no basis for denying the offset to it as the holder in this action by the buyer for rescission of the contract.

Seaboard contends that under the decision of this court in *Carter v. Seaboard Finance Co.*, supra, 33 Cal.2d 564, 203 P.2d 758, it is not bound to return any consideration to the plaintiff. The *Carter* case was an action for damages for fraud, usury, and violation of section 2982. Two transactions were involved. In the first, Seaboard sold a truck and trailer on which it held a chattel mortgage. The sale was held to be a conditional sale within section 2982 and Seaboard as the seller was held liable for violation of that section. In the second transaction, Seaboard was held to have "merely financed the sale" of a truck and trailer and was not, therefore, liable for the failure of the seller to comply with the provisions of section 2982. No assignment of a conditional sale contract was there involved.

The plaintiff here contends that Seaboard is liable as a party to the original transaction between Muntz and himself under the rule announced in *King v. Curtis*, 133 Cal.App.2d Supp. 806, 284 P.2d 983. In that case, the defendant, Morris Plan Company, was named in the conditional sale contract as the party to which the contract was to be assigned and it was mutually agreed that the contract would be thus assigned. The plaintiff paid the

vendor for insurance as a part of the consideration. The contract provided that the vendor should pay the insurance premiums. The contract was assigned to the defendant Morris Plan Company. The plaintiff was injured, and lost \$500 as a result of the failure of the vendor to obtain the insurance. A judgment of nonsuit in favor of the assignee Morris Plan Company was reversed on the ground that Morris Plan, as a party to the original transaction, was required to obtain the insurance. In the present case the contract was printed on a form supplied to Muntz by Seaboard; it contained Seaboard's name in the assignment clauses. However, it does not appear that Seaboard violated any undertaking to the plaintiff under the contract. The record fails to sustain the plaintiff's contention that Seaboard participated in the original transaction so as to make it liable with Muntz as a party to the transaction.

Seaboard now holds both the vehicle which it forcibly repossessed and the payments made by the plaintiff. The *Carter* case does not otherwise prevent recovery by the plaintiff of the consideration paid by him to Seaboard. Civil Code, section 3408 directs: "On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require." The offset compensated Seaboard for the detriment resulting from the use by the plaintiff of the automobile.

[2] It is concluded that section 2982, subdivision (e) imposes a penalty upon the seller which precludes the allowance of the offset. No such penalty is imposed upon the holder. Judgment should have been entered against Muntz for the amount of the down payment and installments made by the plaintiff to Seaboard without the offset, but Seaboard was entitled to the offset.

Inasmuch as the trial court erroneously allowed the defendant Muntz Car Company of California the offset found to be

\$2,000, the judgment against that company is modified by striking therefrom the sum of \$1,633.30 and inserting in lieu thereof the sum of \$3,633.30. As so modified the judgment is affirmed. Costs on appeal are allowed to the plaintiff as against the defendant Muntz Car Company of California. The plaintiff and the defendant Seaboard Finance Company shall bear their own costs.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



50 Cal.2d 688

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Babe Otto BARBERA, Defendant and
Appellant.

Cr. 6276, 6277.

Supreme Court of California,
In Bank.

Aug. 12, 1958.

Prosecution for sale of heroin and possession of marijuana. The Superior Court, Los Angeles County, LeRoy Dawson, J., rendered judgment on count charging sale of heroin to a minor, revoking probation for prior conviction of possession of marijuana and imposing original sentence for such charge, and defendant appealed. The Supreme Court held that evidence sustained conviction of sale of heroin to a minor, and finding that defendant was not guilty of possession of marijuana as charged on second count, and in absence of argument, judgment revoking probation for prior conviction of possession of marijuana would be affirmed.

Judgment affirmed.

Opinion, Cal.App., 323 P.2d 815, vacated.

1. Criminal Law ⇨1159(2, 4)

A reviewing court is in no position to pass upon credibility of witnesses and is not authorized to review the evidence.

2. Criminal Law ⇨1159(3)

Fact that there may have been some inconsistencies and some contradictions in testimony is not sufficient to reverse judgment.

3. Poisons ⇨9

Evidence sustained conviction of sale of heroin to minor. West's Ann. Health & Safety Code, § 11714.

4. Criminal Law ⇨1178

Where no argument had been presented on appeal from judgment of conviction of narcotic violations with reference to companion case in which probation for prior conviction of possession of marijuana was revoked, judgment would be affirmed. West's Ann. Health & Safety Code, § 11500.

5. Criminal Law ⇨1202(4)

Where information charging defendant with narcotic violations contains count charging that defendant has been previously convicted of violation of narcotics law, failure of judge to find as to truth or falsity of prior conviction amounts to a finding that charge was not true. West's Ann. Health & Safety Code, § 11500.

Harrison M. Dunham and Morris La vine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

Richard E. Erwin, Los Angeles, and William Strong, Beverly Hills, as amici curiae.

PER CURIAM.

A hearing was granted in this case in order to give further consideration to the points raised by appellant, Babe Otto Bar-

bera. After a review of the record and the contentions of the appellant and respondent, we have decided to adopt the opinion of the District Court of Appeal, Second District, Division One, prepared by Justice Fourt, and concurred in by Justice Lillie (Presiding Justice White concurred in the judgment) with certain deletions, as the opinion of this court.

"There are two appeals before the court in this matter. The first case, Superior Court No. 191311, is an appeal from a judgment wherein the defendant was convicted of a violation of the provisions of section 11714, Health and Safety Code (sale of heroin to a sixteen year old child).

"The second case is Superior Court No. 172604, and is an appeal from a judgment wherein the defendant was charged with a violation of the provisions of section 11500, Health and Safety Code (possession of marijuana).

"The defendant, in case No. 191311, was charged in count I of the information with having sold heroin on April 5, 1957, to a minor of the age of sixteen years. In count II of the information the defendant was charged with having possession of certain narcotics (marijuana) on May 2, 1957. It was also charged in the same information that the defendant had formerly, namely on May 10, 1955, been convicted of the crime of violation of section 11500, Health and Safety Code.

"The defendant pleaded not guilty as to both counts and denied the prior conviction. At the time of trial all parties and counsel waived a jury trial and stipulated that the cause be submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, and each side reserved the right to introduce additional evidence. The trial was continued to a day certain, and on that date witnesses were called and testified in behalf of the plaintiff and defendant.

"The court found the defendant guilty of count I and not guilty as to count II of the information, and made no finding as to the charge of a prior conviction. The de-

fendant made an application for probation, and the matter was heard on August 6, 1957. Probation was denied in the heroin selling case and the defendant was sentenced to the state prison and such sentence was ordered to run concurrently with the county jail sentence imposed in case No. 172604.

"In case numbered 172604, filed May 3, 1955, the defendant was charged, in substance, with having marijuana in his possession in violation of the provisions of section 11500, Health and Safety Code. On May 10, 1955, the defendant caused his plea of guilty to be entered and made an application for probation. On May 31, 1955, the defendant was sentenced to one year in the county jail; execution of the sentence was suspended and defendant was granted probation for three years on condition that he serve the first ninety days in jail and that he not associate with users of narcotics, obey all laws and follow all rules of the probation department. * * *

"The defendant was * * * arrested on the offense with which we are here concerned, namely, selling heroin to a sixteen year old high school student on April 5, 1956. Probation was revoked in case numbered 172604 on August 6, 1957, and the original sentence of one year in the county jail (imposed May 31, 1955) was put in force and effect; however, it was ordered that such sentence run concurrently with the prison sentence. The defendant filed his notice of appeal from such judgment.

"The facts of the case having to do with the sale of heroin to the minor child are as follows: A high school girl by the name of Miss Schwartz, of the age of sixteen years, first saw the defendant in March or April of 1957 at the house of a mutual friend, Miss Barbara Burns, in Los Angeles County. Babe Otto Barbera was at the house of Miss Burns when Miss Schwartz arrived at about 8:00 or 9:00 o'clock p. m. Others were there also. Miss Schwartz, testified that she did not pay too much attention to who was there at the time because people were always there and she did not recall their names. She did recall, however, that

she probably asked Miss Burns if she thought Barbera could 'get her anything' and that Miss Burns had answered yes. Miss Schwartz talked with Barbera and she inquired of him as to the possibility of getting her some heroin or a 'cap.' Barbera indicated that he could secure heroin for her and they drove off together in an automobile with Barbera driving. They went a relatively short distance to a house, where Miss Schwartz gave Barbera \$5, and Barbera got out of the automobile and went into the house. After about ten minutes Barbera came back to the automobile and they drove back to Miss Burns' house. Barbera gave to Miss Schwartz a 'cap' which consisted of a one-half inch capsule with a white powder inside. Before this occasion Miss Schwartz had seen heroin in capsules ten or more times and she had used the substance which she believed to be heroin and was familiar with the effects it produced. She knew the manner of shooting it into a vein with a hypodermic needle and eye dropper. After Miss Schwartz received the 'cap' from Barbera she went to the bathroom at Miss Burns' house and 'took a fix.' She described the sensations she experienced and stated that it was similar to the previous instances when she had taken heroin.

"A police officer testified as an expert in the use and effect of narcotics and stated that in his opinion the substance injected into Miss Schwartz was heroin.

"Miss Schwartz later signed a police report wherein she listed Barbera as having furnished her with narcotics. The information was related to other officers and at about 8:30 o'clock, May 1, 1957, two officers went to Barbera's door. Barbera opened the door and he was placed under arrest. The defendant said he wanted to wash his teeth and get his jacket before leaving with the officers. The officers investigated a room which Barbera said was his and in Barbera's jacket pocket they located a spoon, a piece of cotton, an eye dropper and a hypodermic needle. The room was searched and in a top bureau

drawer they found material which later was examined and found to be marijuana.

"The defendant testified in his own behalf and stated that he had not sold any heroin to Miss Schwartz; that some of the marijuana he had possessed in 1955 was kept in the top bureau drawer where the officers had found the material which was identified as marijuana in the instant case.

"The court asked the question: 'Well, at that time, in 1955, the marijuana they found, was any of it in this dresser drawer that we are talking about here? A. *I kept some there, yes.*' (Emphasis added.) * *

"At the oral argument counsel for Barbera stated in effect that it was the defendant's contention at the trial that the marijuana which was found in the bureau drawer in May, 1957, was in fact a part of the marijuana which had been found in May, 1955, and that he had pleaded guilty to possessing that marijuana and had been sentenced therefor, and that he should not be convicted again of having what he contended was a part of the same marijuana. The argument * * * impressed the judge for he found the defendant not guilty of possessing marijuana as charged in the information in count II.

"The appellant contends in the present case that the evidence was legally insufficient to sustain the conviction. He asserts that the testimony of Miss Schwartz was impeached by several witnesses and cites *People v. Draper*, 69 Cal.App.2d 781, 160 P.2d 80, and *People v. Graziano*, 83 Cal. App.2d 701, 189 P.2d 518, to support his contention. There was no direct evidence in either of the cited cases pointing to the accused as being the perpetrator of the offense charged. The situation was entirely different in the case under consideration.

[1] "This court is in no position to pass upon the credit which should be given to the witnesses and we are not authorized to review the evidence under the circumstances existing in the present case. *People v. Silva*, 119 Cal.App.2d 421, 426, 259 P.2d 74.

[2,3] "The fact that there may have been some inconsistencies and some contradictions in the testimony is not sufficient to reverse the judgment. The testimony of Miss Schwartz was not at all improbable. *People v. Thomas*, 103 Cal.App.2d 669, 672, 229 P.2d 836. The circumstances fully support the judgment. *People v. Sykes*, 44 Cal.2d 166, 280 P.2d 769.

[4] "No argument has been presented to us with reference to the case wherein probation was revoked in case number 172604, and in conformity with *People v. Yarter*, 138 Cal.App.2d 803, 805-806, 292 P.2d 649, the judgment therein should be affirmed. * * *" [323 P.2d 815.]

The judgment in case Number 172604 is affirmed.

The judgment in case Number 191311 is affirmed.



50 Cal.2d 640

**Anthony GOMEZ and Ray Cardinal,
Petitioners,**

v.

**The SUPERIOR COURT of the State of
California, IN AND FOR the COUNTY OF
MENDOCINO, and Honorable Hale Mc-
Cowan, Respondents.**

Sac. 6928.

Supreme Court of California,
In Bank.

July 17, 1958.

Proceeding by petitioners seeking writs of prohibition and mandate against Superior Court to restrain such court from proceeding with trial of grand theft charge and writ of mandate to compel Superior Court to transfer cause to appropriate justice court for disposition of petty theft charge. The Supreme Court, Carter, J., held that where information charged petitioners with theft and jury, which had sub-

mitted to it three forms of verdict, that is, guilty of grand theft, guilty of petty theft, and not guilty, found petitioners guilty of petty theft but judgment of conviction was reversed upon appeal, to require petitioners to proceed to trial on charge of grand theft would constitute double jeopardy.

Orders that writs as prayed for be issued.

McComb, J., dissented.

Opinion, 322 P.2d 292, vacated.

1. Burglary ⚡47

If person is accused of first degree burglary and under evidence jury returns verdict of second degree burglary, it is impliedly found that accused did not enter an inhabited dwelling in the nighttime, or was not armed with a deadly weapon during commission of crime, or that he did not assault any person during commission of crime, but in so far as elements of crime of burglary are concerned they remain the same except for differences between the two degrees. West's Ann.Pen.Code, §§ 459, 460.

2. Larceny ⚡23

Elements of crime of theft remain the same except that the distinction between grand and petty theft is in the type of articles stolen, whether articles were taken from person of another and in the value thereof. West's Ann.Pen.Code, §§ 464, 487, 487a, 488.

3. Criminal Law ⚡193½

Where defendants had been charged in information with a felony, and jury had submitted to them three forms of verdict being guilty of grand theft, guilty of petty theft, and not guilty, and verdict of jury was that defendants were guilty of petty theft, but judgment of conviction was reversed on appeal, to require defendants to again face charge of grand theft violated rule against double jeopardy. West's Ann. Pen.Code, §§ 484, 487, 487a, 488; West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 5.

4. Criminal Law Ⓒ162

Guarantee against double jeopardy in California Constitution is almost precisely the same as that found in federal Constitution. U.S.C.A.Const. Amendments. 5, 14; West's Ann.Const. art. 1, § 13.

5. Criminal Law Ⓒ292(1)

Where minute order of court showed that defendants entered pleas of not guilty by reason of once in jeopardy and of prior acquittal, even though minutes did not show that defendants named court, place and time of former trial, statute was substantially followed and defendants did not waive right to urge question of double jeopardy. West's Ann.Pen.Code, §§ 1016, 1017.

6. Criminal Law Ⓒ193

Statute providing that if judgment against defendant is reversed such reversal is deemed an order for new trial unless appellate court otherwise directs, and statute providing that granting of new trial places parties in the same position as if no trial had been had, do not bar a plea of double jeopardy. West's Ann.Pen.Code, §§ 1180, 1262.

7. Criminal Law Ⓒ204

Where judgment of conviction was entered upon jury finding of guilty of petty theft after trial on information charging defendants with having committed a felony, successful appeal from petty theft conviction did not constitute waiver of right to enter plea of double jeopardy in so far as grand theft was concerned. West's Ann. Pen.Code, § 484.

1. "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains

8. Mandamus Ⓒ61**Prohibition** Ⓒ5(4)

Where defendants were threatened with second trial on charges of grand theft after an acquittal in prior trial which resulted in judgment of conviction for petty theft that had been reversed on appeal, defendants were entitled to writ of prohibition to restrain Superior Court from proceeding with trial of theft charge and writ of mandate to compel Superior Court to transfer cause to appropriate justice court for disposition of charge of petty theft.

Kasch & Cook and Leo M. Cook, Ukiah, for petitioners.

Edmund G. Brown, Atty. Gen., Doris H. Maier and J. M. Sanderson, Deputy Attys. Gen., for respondents.

CARTER, Justice.

Petitioners, Anthony Gomez and Ray Cardinal, seek writs of prohibition and mandate against the Superior Court of the County of Mendocino. Petitioners seek the writ of prohibition to restrain the superior court from proceeding with the trial of the grand theft charge and the writ of mandate to compel the superior court to transfer the cause to the appropriate justice court for the disposition of the charge of petty theft.

On March 19, 1957, an information was filed against petitioners charging them with a felony, the violation of section 484 of the Penal Code.¹ Petitioners were accused of

the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, in-

the theft of a P & H Loading Shovel of the value of \$3,000, the personal property of one Casteel, to which charge they pleaded not guilty. The cause was tried to a jury which, after trial and argument, had submitted to it three forms of verdict: (1) Guilty of grand theft; (2) guilty of petty theft; and (3) not guilty. The verdict of the jury was that petitioners were guilty of petty theft. The court pronounced judgment and sentenced each of them to pay a \$500 fine and serve a six months' term in the county jail. Petitioners appealed, and the District Court of Appeal reversed the judgment because of prejudicial misconduct on the part of the district attorney (*People v. Cardinal*, October 31, 1957, 154 Cal.App. 2d 835, 316 P.2d 1001).

From the opinion of the District Court of Appeal (154 Cal.App.2d 835, 316 P.2d 1001), it appears that petitioners admitted that they dismantled and sold as scrap, a loading shovel which they said they had purchased from one Berry who purported to be the owner thereof. A receipt bearing the signature "W. H. Berry" was introduced in evidence but Berry was not produced as a witness.

Petitioners now allege that they have been ordered to proceed to trial on a charge of grand theft; that they have moved the respondent to dismiss the grand theft charge against them on the ground that they have been once in jeopardy and have been acquitted of the grand theft charge; that respondent has no jurisdiction to try them on the sole remaining charge of petty theft and that the matter should be transferred to the Justice Court for the Little Lake Judicial District, Mendocino County, which is the appropriate court for the retrial of the petty theft charge.

Section 687 of the Penal Code provides that "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and con-

victed or acquitted." Section 1023 of the Penal Code provides: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading." Article I, section 13, of the California Constitution provides, in part, that "No person shall be twice put in jeopardy for the same offense * * *."

In California a distinction has been drawn by the courts to the effect that where one is convicted of a lesser offense necessarily included in the charge of a greater offense, he may not be tried again on a charge that he has committed the greater offense. On the other hand, where a crime divided into degrees is concerned, a conviction of a lower degree of the crime has been held not to operate as an acquittal of the higher degree. In other words, it has been held that where one is found guilty of a lesser and necessarily included offense he has been placed in jeopardy and cannot again be tried for the greater offense with which he was originally charged; but where one is found guilty of second degree burglary, for example, the conviction is not considered an acquittal of a charge of first degree burglary or that the defendant has been once in jeopardy. The reasoning appears to be that in the crimes which are divided into degrees but one crime or offense has been charged and that a reversal by an appellate court, or the granting of a new trial operates to set aside the whole verdict leaving the entire matter at large. Petitioners here rely on the cases holding that the conviction of a lesser offense operates as an acquittal of the greater charged offense (*People v. Gilmore*, 4 Cal.

formation or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them

of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud." Pen. Code, § 484.

376; *People v. Gordon*, 99 Cal. 227, 33 P. 901; *In re Hess*, 45 Cal.2d 171, 288 P.2d 5), and the People rely on the cases where "degree" crimes were involved (*People v. Keefer*, 65 Cal. 232, 3 P. 818; *People v. McNeer*, 14 Cal.App.2d 22, 57 P.2d 1018; *In re Moore*, 29 Cal.App.2d 56, 84 P.2d 57).²

In the recent case of *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed. 2d 199, where a prosecution for first degree murder was involved, a divided court held that where a jury had found the defendant guilty of second degree murder, and on appeal the conviction was reversed, the defendant could not be again tried for first degree murder because to do so would place him twice in jeopardy for the same offense in violation of the constitutional guarantee contained in the Fifth Amendment. The People contend that the double jeopardy provisions of the federal Constitution have never been applied to the states and that the rule of the *Green* case is not determinative of the case at bar.

There appears to be no sound reason for the distinction drawn by the California cases, and our constitutional provision and statutes certainly do not require one to be drawn. As Mr. Justice Black pointed out in the *Green* case, "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." 78 S.Ct. 221, 223. In California, burglary is a crime divided into two degrees. It is defined as follows: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, out-house or other building, tent, vessel, railroad car, trailer coach as defined in the Vehicle Code * * * with intent to com-

mit grand or petit larceny or any felony is guilty of burglary." Pen.Code, § 459. Section 460 provides: "1. Every burglary of an inhabited dwelling house or building committed in the night-time, and every burglary, whether in the daytime or night-time, committed by a person armed with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree.

"2. All other kinds of burglary are of the second degree."

[1] If a person is accused of first degree burglary, and under the evidence a jury returns a verdict of second degree burglary, it has impliedly found that the accused did not enter an inhabited dwelling-house in the nighttime, or was not armed with a deadly weapon during the commission of the crime, or that he did not assault any person during the commission of the crime. Insofar as the elements of the crime of burglary are concerned, they remain the same except for the difference between the two degrees, and since the jury had before it all of the evidence pertaining to the crime allegedly committed by the accused, the distinction in the two lines of cases appears unsound. The elements necessary for first degree murder differ from those of second degree murder in much the same way. A jury impliedly decides that the necessary element of the greater crime is lacking under the evidence and returns a verdict finding the defendant guilty of the lesser degree.

In the case under consideration, petitioners were charged with grand theft of an article of the alleged value of \$3,000. The jury found them guilty of petty theft—or, in other words, the jury which heard the evidence found them guilty, but impliedly determined that the value of the article stolen did not exceed \$200.

[2] The distinctions between grand and petty theft according to the Penal Code are

in the type of article stolen, whether the article was taken from the person of another and in the value thereof. Pen.Code, §§ 484, 487, 487a, 488. The elements of the crime remain the same with the exceptions noted. In *People v. Ny Sam Chung*, 1892, 94 Cal. 304, 307, 29 P. 642, 643, a prosecution for grand larceny was held barred after the court had dismissed a charge of petty larceny against the defendants. The court said: "It follows that, if defendants were placed in jeopardy by reason of the proceedings in the police court, their trial in the superior court was a second jeopardy, and they are entitled to their discharge." This case was, of course, decided prior to the 1927 amalgamation of the crimes of larceny, embezzlement, false pretenses and kindred offenses under the cognomen of theft. However, no elements of the former crimes have been changed. In *People v. Myers*, 206 Cal. 480, 483, 275 P. 219, 220, the court was discussing the change made by the 1927 amendment and held: "No elements of the former crimes have been changed by addition or subtraction. This is particularly true of the crime of larceny. All former elements of this offense are perpetuated and contained in section 484 as amended." In the *Ny Sam Chung* case the question presented was whether the defendants had stolen a gold bracelet of the value of \$27 from Jeong Koong. After the evidence was all in, the prosecuting attorney suggested that the property had been taken from the person of Koong and that the offense was grand larceny, rather than petty larceny. The court ordered the action dismissed and the defendants were thereafter placed on trial in the superior court on a charge of grand larceny "upon an information alleging the same facts set out in the complaint in the police court, and the further fact that the property was taken from the person of said Jeong Koong."

3. "When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict,

This court specifically held that defendants had been once in jeopardy and the judgment and order was reversed "with directions to discharge the defendants and dismiss the proceedings." Inasmuch as the elements of the crime remain the same, there appears to be no reason to distinguish the *Ny Sam Chung* case on the ground that it was decided prior to the 1927 legislation heretofore considered. In *People v. Stanhope*, 37 Cal. App.2d 631, 99 P.2d 1075, 1076, defendant was charged with grand theft, "to which accusation he entered a plea of not guilty, was tried before a jury, and convicted of the lesser offense of petty theft. His motion for a new trial having been denied and probation granted, the defendant appeals from the order denying him a new trial." In affirming the judgment, the court said: "In view of the provisions of section 487 and 488 of the Penal Code, it is at once apparent that the jury resolved the doubt concerning the amount of money involved in appellant's favor and found him guilty of petty theft. If this was error, it was certainly error of which appellant cannot complain." 37 Cal.App.2d at page 636, 99 P.2d at page 1078. In other words, the court considered the crime of petty theft necessarily included in a charge of grand theft. In *People v. Simpson*, 26 Cal.App.2d 223, 229, 79 P.2d 119, where the jury improperly fixed the defendants' guilt as grand theft, the appellate court modified the judgment so as to find the degree of the crime to be petty theft. In other words, the appellate decision was a recognition of the fact that petty theft is necessarily included within a charge of grand theft. In *People v. Kelley*, 208 Cal. 387, 391, 281 P. 609, 610, where the defendant was found guilty of first degree murder by a jury, this court modified the judgment so as to find the defendant guilty of manslaughter. It was held that "Section 1181 of the Penal Code,³ as amended in

*finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed * * *.*" Pen.Code, § 1181, subd. 6; italicized words added by 1951 amdt.

1927 (St.1927, p. 1037), which must now be considered for the first time by this court, provides that, if the evidence (in criminal causes) shows the defendant to be not guilty of the degree of the crime of which he was convicted, *but guilty of a lesser degree thereof or of a lesser crime included therein*, the trial court may modify the judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed." (Emphasis added.) See, also, *People v. Castro*, 37 Cal.App.2d 311, 315, 99 P.2d 374; *People v. Cowan*, 38 Cal.App.2d 231, 248, 101 P.2d 125, reduction of conviction of first degree murder to that of second degree; *People v. LaFleur*, 42 Cal.App.2d 50, 57, 108 P.2d 99, reduction of conviction of first degree murder to that of second degree; *People v. Lynch*, 60 Cal.App.2d 133, 145, 140 P.2d 418, 424, conviction of first degree burglary reversed because "as a matter of law he [defendant] was entitled to a finding pursuant to section 1097 of the Penal Code that the offense was of the second degree"; *People v. Slater*, 60 Cal.App.2d 358, 371, 140 P.2d 846, conviction of second degree murder reduced to manslaughter; *People v. Daniel*, 65 Cal.App.2d 622, 636, 151 P.2d 275, conviction of first degree murder reduced to second degree murder. The above cited cases make no distinction between lesser included, although differently defined, crimes and crimes of a lesser degree when the question involved is whether the appellate court should modify the judgment without ordering a new trial. It appears to us that no distinction should be drawn insofar as the question of double jeopardy is concerned.

In *People v. Greer*, 30 Cal.2d 589, 596, 597, 184 P.2d 512, 516, defendant was charged with both statutory rape and lewd and lascivious conduct. In reversing, we said: "The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. *People v. Krupa*, 64 Cal.App.2d 592, 598, 149 P.2d 416. Thus, a prosecution for battery

cannot be followed by a prosecution for assault based upon the same acts. An assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim. The assault, to adopt the statutory language, is 'necessarily included therein.' *People v. McDaniels*, 137 Cal. 192, 194, 69 P. 1006, 59 L.R.A. 578, 92 Am.St.Rep. 81.

"Although section 1023 refers to a situation where the prosecution for the greater offense is first in time, there is no such limitation in the cases. If the defendant is tried first for assault and later for battery, the prosecution for the included offense bars the subsequent prosecution for the greater offense. *People v. McDaniels*, supra, 137 Cal. at page 195, 69 P. 1006; *People v. Defoor*, 100 Cal. 150, 154, 34 P. 642; *People v. Ny Sam Chung*, 94 Cal. 304, 306, 29 P. 642, 28 Am.St.Rep. 129; see, Official Draft on Double Jeopardy, supra, § 17; 1 Bishop's Criminal Law (9th ed.) § 1057; 2 Freeman on Judgments (5th ed.) § 559. 'A conviction of the lesser is held to be a bar to [the] prosecution for the greater on the theory that to convict of the greater would be to convict twice of the lesser.' *People v. Krupa*, supra, 64 Cal.App.2d at page 598, 149 P.2d at page 420. If this were not the rule, section 1023 could be vitiated by the simple device of beginning with a prosecution of the lesser offense and proceeding up the scale." (For an excellent discussion on necessarily included offenses, see *People v. Marshall*, 48 Cal.2d 394, 309 P.2d 456.)

[3] Viewing the matter realistically it appears that defendants here would be tried again on the same set of facts as prevailed when they were found guilty of petty theft. The American Law Institute defines "same offense" as follows: "Prosecutions are for the same offense when they are for violations of the same provisions of the criminal law and when the facts on which they are based are the same." (Emphasis added.) Official Draft on Double Jeopardy, Administration of the Criminal Law, American Law Institute, § 5. See, also, *People v. Defoor*, 100 Cal. 150, 34 P. 642; *People*

People v. McDaniels, 137 Cal. 192, 69 P. 1006, 59 L.R.A. 578.

[4] While it is true as argued by the People that the double jeopardy provisions of the Fifth Amendment to the Constitution of the United States have not definitely been held applicable to the states as encompassed in the due process clause of the Fourteenth Amendment, the language in the Green case (78 S.Ct. 221, *supra*) is certainly persuasive. And, see, Hoag v. State, 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed.2d 913, dissenting opinion of Justices Douglas and Black. The guarantee against double jeopardy in the California Constitution is almost precisely the same as that found in the federal Constitution. Article I, section 13, of our Constitution is entitled "Criminal Prosecutions—Rights of Accused. Due Process of Law. Jeopardy. Comment on Failure of Defendant to Testify. Depositions." It would appear from this that the framers of our Constitution considered the prohibition against twice in jeopardy as part of the concept of due process of law. In the Green case (78 S.Ct. at page 229) the court said: "We believe that if either of the rationales offered to support the Trono result [Trono v. United States, 199 U.S. 521, 26 S.Ct. 121, 50 L.Ed. 292] were adopted here it would unduly impair the constitutional prohibition against double jeopardy. The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance. We do not feel that Trono or any other decision by this Court compels us to forego the conclusion that a second trial of Green for first degree murder was contrary to both the letter and spirit of the Fifth Amendment." It appears to us that if the spurious distinction made by the California cases is perpetuated in the case at bar we would be giving our constitutional prohibition against twice in jeopardy a "narrow, grudging application" unsupported by either logic or reason.

[5] The People argue that defendants have waived their rights to urge the question of double jeopardy. This contention appears to be based first on the ground that the question of double jeopardy was not raised by plea as required by sections 1016 and 1017 of the Penal Code. A copy of the Minute Order, dated March 21, 1958, in the case of People of the State of California, plaintiff, vs. Anthony Gomez and Ray Cardinal, defendants, No. 3124-C, is as follows: "This matter came on at this time to be set, both defendants present; Frank Petersen, Deputy District Attorney appearing for the People and Leo Cook appearing as counsel for defendants. Defendants entered pleas of Not Guilty by reasons once in jeopardy and of prior acquittal. Request by counsel for release upon own recognizance or that bail be reduced denied. Order that bail remain as is. It is ordered that the matter be and is set for trial May, 5, 6, and 7, 1958 and on the calendar April 25, 1958 to draw jury." While the Minute Order does not show that defendants named the court, the place and the time, of the former trial (Pen. Code, § 1017, subs. 3, 4), it appears that the statute was substantially followed since it is provided: "Every plea must be made in open court and may be oral or in writing, and must be entered upon the minutes of the court and must be taken down in shorthand by the official reporter if there is one present. The plea, whether oral or in writing, must be in substantially the following form * * *." Pen.Code, § 1017. In re Burns, 78 Cal.App.2d 294, 177 P.2d 649, relied upon by the People is not in point since there the defendants sought to raise the plea of once in jeopardy by a petition for a writ of habeas corpus *after* a third trial in which all five of them were found guilty. (The first two trials had resulted in disagreements of the jury.) In re Harron, 191 Cal. 457, 469, 217 P. 728, 733, relied upon by the People, was also a proceeding in habeas corpus brought after the defendant was convicted upon a second complaint for battery and after the judgment had become final. The court held that "after final judgment *habeas corpus* cannot be used as a writ

of error; and petitioner has not met the burden of showing he exhausted below the defense upon which he must rely, [and] he is not entitled to relief."

[6] The People next argue that petitioners have waived their plea of double jeopardy in that they appealed their conviction, relying upon section 1262 of the Penal Code which provides: "If a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the appellate court shall otherwise direct. If the appellate court directs a final disposition of the action in the defendant's favor, the court must, if he is in custody, direct him to be discharged therefrom * * *." The People also rely on section 1180 of the Penal Code which provides: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict or finding cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the accusatory pleading." There is obviously no merit to this contention. In that line of cases holding that double jeopardy attaches when a conviction has been had on a necessarily included offense (*In re Hess*, 45 Cal.2d 171, 288 P.2d 5; *People v. Greer*, 30 Cal.2d 589, 184 P.2d 512; *People v. McFarlane*, 138 Cal. 481, 71 P. 568, 72 P. 48, 61 L.R.A. 245; *People v. Smith*, 134 Cal. 453, 66 P. 669; *People v. Gordon*, 99 Cal. 227, 33 P. 901; *People v. Krupa*, 64 Cal.App. 2d 592, 149 P.2d 416) the Penal Code sections relied upon by the People have not been considered as a bar to a plea of double jeopardy.

[7] Insofar as the People's contention reaches the question of waiver, because of defendants' successful appeal from the petty theft conviction, the matter was admirably discussed in the *Green* case where it was held: "Using reasoning which purports to be analogous to that expressed by Mr. Justice Holmes in *Kepner* [*Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49

L.Ed. 114], the Government alternatively argues that *Green*, by appealing, prolonged his original jeopardy so that when his conviction for second degree murder was reversed and the case remanded he could be tried again for first degree murder without placing him in new jeopardy. We believe this argument is also untenable. Whatever may be said for the notion of continuing jeopardy with regard to an offense when a defendant has been convicted of that offense and has secured reversal of the conviction by appeal, here *Green* was not convicted of first degree murder and that offense was not involved in his appeal. If *Green* had only appealed his conviction of arson and that conviction had been set aside surely no one would claim that he could have been tried a second time for first degree murder by reasoning that his initial jeopardy on that charge continued until every offense alleged in the indictment had been finally adjudicated.

"Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. Or stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its first opinion in this case, a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against

double jeopardy." 78 S.Ct. at pages 226-227.

Under the theory presented in the case at bar by the People, these defendants would be forced to choose between appealing an erroneous conviction of petty theft and their constitutional guarantee that they shall not twice be placed in jeopardy for a charge of grand theft. *People v. Green*, 47 Cal.2d 209, 235, 302 P.2d 307, relied upon by the People is not pertinent. In the *Green* case defendant appealed from a conviction of first degree murder with the penalty fixed at death. We affirmed the judgment of first degree murder and reversed only so far as the penalty was concerned. Petitioners here would have no claim that they were twice in jeopardy by being subjected to a second trial, after reversal by an appellate court, on the *petty theft* charge only. Here, as in the case of *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199, defendants were found guilty of the lesser crime and their appeal was from that judgment. Double jeopardy attaches when they are threatened with a second trial on the greater charge of grand theft of which they were impliedly acquitted at the first trial where they were found guilty only of petty theft. *People v. D'A Philippo*, 140 Cal. App. 236, 35 P.2d 134, 135, also relied upon by the People is not in point. In the *D'A Philippo* case, the defendant was pronounced an habitual criminal. This court set aside that particular adjudication on the ground that the trial court had no jurisdiction to sentence him as an habitual criminal and reversed the judgment with " * * * directions to the court below to resentence defendant, as required by law. 220 Cal. 620, 32 P.2d 962." The appellate court held that the resentencing of the defendant did not constitute double jeopardy.

[8] The People contend, finally, that neither prohibition nor mandamus are proper remedies at this time. It is again argued that petitioners did not raise the

plea of double jeopardy as provided for in sections 1016 and 1017 of the Penal Code. As previously shown by the record, the plea was raised in accord with the statutes and the remedies sought are proper. In *Jackson v. Superior Court*, 10 Cal.2d 350, 353, 74 P.2d 243, 245, 113 A.L.R. 1422, the same point was made by the respondents, and quoting from the opinion of the District Court of Appeal in the same case, it was said: "'Respondents urge that the writ [prohibition] should not be issued because petitioners possess a plain, speedy, and adequate remedy at law whereby they may preserve the rights which they hope to protect in this proceeding. They maintain that the plea of former jeopardy is one which the petitioners may or may not enter, their action depending on themselves and their counsel; that if the trial court was in error in refusing their request to enter these pleas, and was in error in concluding that jeopardy had not attached, those questions might be raised on appeal if they should be convicted at their second trial, and would serve as a sure ground for reversal of the judgments which might be pronounced against them, which reversals would result in their discharge after the appeal had been decided. That the right to raise this question on appeal is plain cannot be doubted. That it is either speedy or adequate is open to serious question. * * * In view of the considerable discretion vested in us in issuing these writs, we are constrained to hold that, while the remedy at law is plain, it is neither speedy nor adequate under the facts before us and especially in view of the fact that in its final analysis the question before us is one of the jurisdiction of respondents to again place petitioners on trial for the offenses charged in the indictment found against them. *Menjou v. Superior Court*, 128 Cal.App. 117, 16 P.2d 1007; *Huntington v. Superior Court*, 5 Cal.App. 288, 90 P. 141; *Oliver v. Superior Court*, 92 Cal.App. 94, 267 P. 764.'"

It is our opinion that there is no sound basis for the distinction heretofore drawn by the courts of this state insofar as lesser included offenses and degree crimes are concerned and that petitioners here should be considered as having been once in jeopardy. Inasmuch as the facts here presented bring petitioners squarely within the constitutional prohibition against placing a defendant twice in jeopardy, it is unnecessary for us to determine whether the prohibition against double jeopardy is part of the due process clause.

The writs should issue as prayed for, and it is so ordered.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

SPENCE, J., concurs in the judgment.

McCOMB, Justice.

I dissent, for the reasons stated by Mr. Presiding Justice VAN DYKE in the opinion prepared by him for the District Court of Appeal in *Gomez v. Superior Court of Mendocino County*, Cal.App.2d —, 322 P.2d 292.



163 Cal.App.2d 277

Morris BARNES; Sam Bordan; and Bordan Drug Company, a copartnership,
Petitioners,

v.

The SUPERIOR COURT of the State of California IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Bessie Smith, Real Party in Interest.

No. 23302.

District Court of Appeal, Second District,
Division 3, California.

Aug. 29, 1958.

Proceedings on a petition for writ of mandate directing respondent court to set

328 P.2d—62½

aside its order sustaining a plaintiff's refusal to answer certain questions propounded to her during course of pre-trial deposition. The District Court of Appeal, Patrosso, J. pro tem., held that plaintiff in action for loss of hair allegedly resulting from use of hair straightener sold to plaintiff by defendants, should have been required to answer, during course of a pre-trial deposition, question as to name of family doctor whom she admitted having consulted every six months, as well as question as to whether she had been to any other doctor during period of five years preceding accident.

Order accordingly.

Discovery §40

In action for loss of hair allegedly resulting from use of liquid hair straightener sold to plaintiff by defendants, plaintiff should have been required to answer, during course of a pretrial deposition, question as to name of family doctor whom she admitted having consulted every six months, as well as question as to whether she had been to any other doctor during period of five years preceding accident.

Bolton, Groff & Dunne, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

Petitioners, defendants in an action pending in the respondent court, seek a writ of mandate directing said court to set aside its order sustaining plaintiff's refusal to answer certain questions propounded to her during the course of a pretrial deposition.

The action in which the deposition proceedings were had is one instituted by the plaintiff, Bessie Smith, seeking damages for alleged injury sustained by her. In the complaint it is alleged that the defendants sold her a bottle of liquid hair straightener and warranted the same to be safe for her

use and that as a result of using said hair straightener much of her hair became loose and fell out.

Upon her examination the plaintiff was asked as to how many doctors she had consulted during the year prior to the accident to which she replied that she had a family doctor to whom she went for a check up every six months. She was then asked the name of this family doctor and upon instructions of her counsel she refused to answer. She was then asked if she had been to any other doctor during the period of five years preceding the accident. This question too she refused to answer upon the advice of her counsel.

One of the principal issues in the case is whether the plaintiff lost her hair as a result of using the defendants' product and we are of the view that the questions propounded to the plaintiff which she refused to answer were reasonably calculated to lead to the disclosure of persons who might have knowledge of a pre-existing physical condition which was the cause of plaintiff losing her hair rather than the use of defendant's product.

If such proof were adduced it would be a valid defense to the action, and hence, the questions are relevant to the subject matter involved in the pending action and to the defense of the petitioners. Code Civ.Proc. § 2016(b). There is no suggestion or claim that the compulsory disclosure of the names of the physicians who had treated plaintiff in the past would constitute an invasion of the physician-patient privilege, and if such a claim were made it would in any event be unavailing. Code Civ.Proc. § 1881, subd. 4.

Neither do we believe that the question which sought to elicit the names of all physicians who had treated plaintiff during the preceding period of five years was too broad. We are referred to medical authorities to the effect that baldness may result from illness and a number of physical disorders as well as conditions the etiology of which is unknown. As these or some of them, if existent, may have had their origin

in a more or less remote period of time the scope of the examination designed to lead to the discovery of proof thereof should not be unduly restricted.

Let a peremptory writ of mandate issue directing the respondent court to set aside its order and directing the witness to answer the questions hereinabove referred to.

SHINN, P. J., and VALLÉE, J., concur.



163 Cal.App.2d 319

In the Matter of the ESTATE and Guardianship of Susan Ann BLAIR, also known as Susie A. Blair, an Incompetent.

Rebecca RILEY, as Administratrix of the Estate of Susan Ann Blair, Deceased, Appellant and Objector,

v.

Naomi Blair RUOFF, as Guardian of the Estate of Susan Ann Blair, Incompetent, Petitioner and Respondent.

Civ. 22937.

District Court of Appeal, Second District, Division 2, California.

Sept. 2, 1958.

Hearing Denied Oct. 28, 1958.

Proceedings in the matter of the estate and guardianship of an incompetent decedent, wherein her administratrix appealed from an order of the Superior Court of Los Angeles County, William B. McKesson, J., awarding fees and expenses to the guardian. The District Court of Appeal, Fox, P. J., held that since there was no reporter's transcript of oral proceedings below and since there was nothing in limited record before reviewing court to sustain appellant's contention that award to decedent's guardian for fees and expenses was excessive, reviewing court would have to presume that

trial judge had awarded additional fees only for such services as had been legally compensable, and that inadequacy of record would compel affirmance.

Affirmed.

1. Appeal and Error ⇨901

In order to obtain reversal of judgment, it is incumbent upon appealing party to furnish reviewing court with record showing affirmatively that trial court ruled erroneously to his prejudice.

2. Appeal and Error ⇨907(1)

In absence of contrary showing in record, all presumptions in favor of action of trial court will be indulged by appellate court.

3. Appeal and Error ⇨907(1)

If any matters could have been presented to court below which would have authorized order complained of, it will be presumed that such matters were presented.

4. Guardian and Ward ⇨161

Where there was no reporter's transcript of oral proceedings below, and there was nothing in limited record before reviewing court to sustain appellant's contention that award to decedent's guardian for fees and expenses was excessive, reviewing court would have to presume that trial judge had awarded additional fees only for such services as had been legally compensable, and inadequacy of record would compel affirmance.

Pines & Walsh and Roy B. Woolsey, Los Angeles, for appellant.

Leon U. Everhart, Pasadena, Montgomery G. Rice, Los Angeles, for respondent.

FOX, Presiding Justice.

This is an appeal from an order awarding fees and expenses to Naomi Blair Ruoff, as guardian of the person and estate of Susan Ann Blair, now deceased. The order includes fees for the guardian's counsel. The order declared a lien for the amount of the award upon the assets of the estate of Susan Ann Blair which had been turned over to Rebecca Riley, as administratrix of her estate. This appeal is prosecuted by the administratrix.¹

At the hearing of the petition of the guardian for fees for herself and her counsel the administratrix took the position that the court was without jurisdiction to make any such award, on the theory that the court's jurisdiction terminated with an order of March 5, 1955, approving the closing account and ordering the discharge of the guardian. In pursuance of that theory, the administratrix, upon the order being made, filed a petition for a writ of certiorari seeking to annul the order. A few days thereafter she filed a notice of appeal which, however, was permitted to remain dormant until after the decision of the Supreme Court in the certiorari proceeding holding that the lower court did have jurisdiction to award fees to the guardian and her attorney. *Riley v. Superior Court*, 49 Cal.2d 305, 316 P.2d 956. The administratrix then perfected the appeal that is now before us for disposition. This record involves the identical proceedings and documents that were reviewed in the certiorari proceeding.

In order that the sequence of events and legal maneuvers in this estate may be fully understood, we quote the statement of facts set forth in *Riley v. Superior Court*, supra, 49 Cal.2d at pages 307-309, 316 P.2d at page 957:

1. This is another chapter in the prolonged litigation that has plagued this estate for several years resulting in substantial depletion of its assets through allowances for fees. The earlier chapters, sub nomine, are: *In re Estate of Blair*, 126 Cal.App.2d 759, 272 P.2d 866; *Id.*,

127 Cal.App.2d 130, 273 P.2d 349; *Id.*, 132 Cal.App.2d 305, 282 P.2d 116; *In re Estate and Guardianship of Blair*, 139 Cal.App.2d 832, 294 P.2d 521; *In re Estate of Blair*, 42 Cal.2d 723, 269 P.2d 612; and *Riley v. Superior Court*, 49 Cal.2d 305, 316 P.2d 956.

"On August 8, 1950, Naomi Blair Ruoff was appointed and qualified as the guardian of the person and estate of Susan Ann Blair, an incompetent person. Susan Ann Blair died on May 21, 1951, and one Phoebe L. Bonnen was appointed and qualified as administratrix of her estate and letters of administration were issued to her. Phoebe L. Bonnen acted as administratrix of the decedent's estate until November 3, 1952, when she resigned and was succeeded by Rebecca Riley who has ever since acted as such administratrix.

"On August 31, 1951, Naomi Blair Ruoff filed a first and final account and report of her guardianship, petition for fees and for distribution; on September 27, 1951, the court approved the account and awarded the fees prayed for—\$1,750 to the guardian, Naomi Blair Ruoff, and \$1,800 to the guardian's attorney.

"On November 15, 1951, Naomi Blair Ruoff, hereinafter referred to as guardian, petitioned the superior court to set aside its order approving the account and award of fees so that certain tax matters could be better presented.

"On November 19, 1951, Rebecca Riley, hereinafter referred to as administratrix, moved for an order directing the immediate delivery to her of all assets of the deceased's estate.

"On November 23, 1951, the probate court granted the guardian's petition to set aside its order of September 27, 1951.

"On February 25, 1952, the administratrix filed a second petition for the immediate delivery of all assets.

"On April 22, 1952, the Guardian's amended supplemental report and account was filed. On May 2, 1952, the administratrix filed objections and sought to vacate the vacation order of November 23rd.

"On August 5, 1952, the administratrix filed a third petition for an order directing the Guardian to turn over all funds of the estate. On August 18th, the court directed the guardian to deliver the sum

of \$20,000 to the administratrix for tax purposes.

"On January 6, 1953, a hearing was had on the amended supplemental report and account and the objections and on January 8th the court ordered all assets delivered to the administratrix except for certain sums to be retained by the guardian for miscellaneous closing expenses. The court did not pass on the amended report at this time.

"On January 16, 1953, the guardian turned over to the administratrix the sum of \$205,184.59.

"On June 11, 1953, the court approved, with certain exceptions, the amended report.

"On July 9, 1953, the guardian appealed from certain portions of the order. (In re Estate of Blair, 127 Cal.App.2d 130, 273 P.2d 349.)

"On June 24, 1954, the guardian and administratrix entered into a stipulation which was considered by the District Court of Appeal in a later opinion (In re Estate and Guardianship of Blair, 139 Cal.App.2d 832, 834, 294 P.2d 521; hearing denied by this court on May 9, 1956).

"On November 1, 1954, the guardian filed her account of closing expenses, and on December 14, 1954, the administratrix filed objections.

"On March 5, 1955, the probate court made its order approving and settling the report of closing expenses, the discharge of the guardian, the exoneration of the guardian's bond, and denying the administratrix' petitions for surcharge and vacation of the order of June 11, 1953.

"On March 25, 1955, the guardian filed proposed findings of fact and conclusions of law and a proposed order thereon; the administratrix filed objections. On April 11, 1955, a hearing was had on the proposals filed by the guardian and the objections filed by the administratrix. The objections were overruled and the findings, conclusions, and the order were signed by the trial court. The adminis-

tratrix moved for a new trial which motion was denied.

"On April 26, 1955, the administratrix appealed from the order which was affirmed and a petition for hearing by this court was denied (*In re Estate and Guardianship of Blair*, 139 Cal.App.2d 832, 294 P.2d 521).

"On May 14, 1956, the remittitur issued to and was filed in the trial court.

"On June 14, 1956, the guardian petitioned the court for additional fees for herself in the sum of \$3,250 and for her attorney (as Guardian) the additional sum of \$10,200 for services rendered since her petition of August 31, 1951. On November 27, 1956, the court granted the petition for fees although they were reduced as follows: to the guardian the sum of \$3,250, and to the attorney the sum of \$8,200. The court also declared a lien in favor of the guardian against the estate of the deceased ward." It is from this order of November 27, 1956, that the administratrix appeals.

The record before us consists of the verified petition of the guardian for fees, the administratrix' objections thereto; a copy of the opinion of the District Court of Appeal in *Re Estate and Guardianship of Blair*, 139 Cal.App.2d 832, 294 P.2d 521; the order of the trial court awarding fees to the guardian and her attorney; and various notices. There is no reporter's transcript of the oral proceeding below, and the only exhibit is a certified copy of the register of actions.

[1-4] We shall assume, without deciding, that the order here in question is appealable. But because of the inadequacy of the record herein we are compelled to affirm it. "In order to obtain a reversal of the judgment it is incumbent upon the appealing party to furnish the reviewing court a record showing affirmatively that the trial court rule erroneously to his prejudice." *Finnegan v. Finnegan*, 64 Cal. App.2d 109, 111, 148 P.2d 37; to the same

effect, see *Baldwin v. Baldwin*, 120 Cal. App.2d 493, 494, 261 P.2d 16; *Alexander v. McDonald*, 86 Cal.App.2d 670, 671, 195 P.2d 24; *Smith v. Wiget*, 75 Cal.App.2d 591, 594, 171 P.2d 563. "In the absence of a contrary showing in the record, all presumptions in favor of the action of the trial court will be indulged by an appellate court." *Alexander v. McDonald*, supra, 86 Cal.App.2d at page 671, 195 P.2d at page 25. And as stated in *Riley v. Dunbar*, 55 Cal.App.2d 452, 455, 130 P.2d 771, 772, "if any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented." "These rules apply with particular force where discretion is vested in the trial court." *Smith v. Wiget*, supra, 75 Cal.App.2d at page 594, 171 P.2d at page 564. In the instant matter we are informed by counsel that the entire file in the guardianship proceeding was before the trial judge and that he stated he would examine the same and determine the fees that should be awarded. Thereafter, the trial judge made his award reducing the requested additional attorney's fees \$2,000 (from \$10,200 to \$8,200) and fixing the guardian's additional fee at the amount requested (\$3,250). During oral argument counsel for the administratrix conceded that there were certain services rendered by the guardian and her counsel which justified the award of some additional fees. But he contended that the award was excessive and that some of the services were not compensable. It is clear that there is nothing in the limited record before us to sustain his position. Under the principles above stated we must presume that the trial judge awarded additional fees only for such services as were legally compensable; and it does not appear that he abused his discretion in determining the amount thereof.

The order is affirmed.

ASHBURN and HERNDON, JJ., concur.

**SANTA FE TRANSPORTATION COM-
PANY, a corporation, Plaintiff and
Respondent,**

v.

**STATE BOARD OF EQUALIZATION of The
State of California, Defendant
and Appellant.***

Civ. 22820.

**District Court of Appeal, Second District,
Division 3, California.**

Sept. 2, 1958.

Hearing Granted Oct. 30, 1958.

Action to recover taxes paid. The Superior Court of Los Angeles, Walter H. Odemar, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Patrosso, J. pro tem, held that railroad subsidiary conducting both a highway common carrier business and a city carrier business could segregate the two operations for tax purposes and thus take advantage of motor vehicle transportation license tax law exemption as city carrier; and held that it was immaterial that line haul vehicles were used in subsidiary's intra-city operations, that its contract with railroad included deliveries outside city limits, and that pickup and delivery service constituted an inseparable part of entire contract transportation entered into between railroad and shippers under railroad's bills of lading.

Affirmed.

Automobiles ⇐78

Railroad subsidiary conducting both a highway common carrier business and a city carrier business could segregate the two operations for tax purposes and thus take advantage of motor vehicle transportation license tax law exemption as city carrier; and it was immaterial that line haul vehicles were used in its intracity operations, that its contract with railroad included deliveries outside city limits, and that pick-up and delivery service constituted an inseparable part of entire transportation contract entered into between railroad and shippers un-

der railroad's bills of lading. West's Ann. Rev. & Tax. Code, §§ 9601-10505, 9653.

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann and James C. Maupin, Deputies Atty. Gen., for appellant.

Robert W. Walker and Robert B. Curtiss, Los Angeles, for respondent.

PATROSSO, Justice pro tem.

This is an appeal by the defendant State Board of Equalization from a judgment in favor of the plaintiff for refund of taxes and interest thereon assessed by the board under the provisions of the California Motor Vehicle Transportation License Tax Law (Revenue and Taxation Code §§ 9601-10505) which were paid under protest by the plaintiff.

There is no serious dispute with reference to the facts; the question being whether the gross receipts of the respondent upon which the tax was assessed constitute "gross receipts derived from the transportation of * * * property wholly within incorporated cities or between incorporated cities * * * where no portion of the public highway outside the corporate limits of the cities * * * is traversed in such operation" within the meaning of section 9653 of the Revenue and Taxation Code.

Respondent is a wholly owned subsidiary of the Santa Fe Railway Company. It is a common carrier engaged in the transportation of freight and passengers within the State of California and is authorized by the Public Utilities Commission of the State as a highway common carrier to transport less than carload general commodities moving on the billing of the railway company between San Francisco and Los Angeles and over points intermediate thereto on the main and branch lines of the railway company with certain exceptions not necessary to be here noted. It is also licensed by said commission to operate as a city carrier (Public Utilities Code, §§

* Opinion vacated 334 P.2d 907.

3941, 3942) in all incorporated cities of the State in which it is authorized to serve as a highway common carrier.

By separate agreements with the railway company in effect during the period with which we are here concerned, respondent agreed to perform two types of services for the former; (1) the transportation of passengers and freight between stations of the railway company and (2) pickup and delivery. The pickup and delivery services rendered by the respondent pursuant to one of these contracts are described in the findings "as the transportation from local freight depots of plaintiff in California to customer's warehouse or place of business in the vicinity of such depots and from customer's warehouse or place of business (pickup point) to such local depots, of goods moving on bills of lading of the Railway Company which were either theretofore or thereafter transported by plaintiff under the same bills of lading of the Railway Company from one station to another station over public highways outside the corporate limits of cities." The railway bills of lading required the railroad to make pickup and delivery of such goods from point of origin to point of destination. The railway company did not use the respondent exclusively for pickup and delivery services; pickup and delivery operations at and around some 21 stations to which respondent transported goods for the railway company were carried on by highway carriers other than respondent and at a few such stations respondent performed some of such pickup and delivery operations while others performed the balance.

In the performance of the services required of it under these agreements, respondent used several types of vehicles. In general heavy duty tractors and 24 foot or 35 foot trailers were used for line haul or city to city movements and smaller vehicles consisting of ton and one-half trucks and small trailers were used for pickup and delivery. On occasions, however, line haul vehicles were used for pickup and delivery; a survey of the tonnage handled in 1952,

which it was agreed was a representative year, discloses that approximately 8.8 per cent of the freight handled by pickup and delivery services for the railway company was pickup or delivery in line haul vehicles. It also appears that the employees of the line haul equipment belonged to a different union from those employed in pickup and delivery movements but such line haul drivers did loading and unloading where they made pickups or deliveries.

The pickup and delivery charges were registered by the railway agents within those respective territories the pickup and delivery occurred and forwarded to the respondent by them. Monthly summaries were kept by the respondent and payment was remitted monthly by its agents. These charges or records covered all such operations without reference to whether or not they took place wholly within an incorporated city, and included as well pickup and delivery operations as were performed by line haul drivers or vehicles.

Separate records were maintained of the operations of the pickup and delivery services showing the receipts derived therefrom separately from those derived from respondent's line haul operations although the records of the former included receipts from pickup operations which extended beyond the limits of incorporated cities as well as those confined to the limits of such cities. It is the tax which was assessed against the latter that we are alone concerned with here.

The exemption from tax of such receipts, if existent, is to be found in section 9653 of the Revenue and Taxation Code, which during the times here involved read as follows:

"§ 9653. Operators and receipts exempted. This part does not apply to operators of motor [sic] vehicles operated exclusively within incorporated cities or between incorporated cities or incorporated cities and private property where no portion of the public highway outside the corporate limits of the cities is traversed in such operation.

"* * * The tax does not apply to the gross receipts derived from the transportation of persons or property wholly within incorporated cities or between incorporated cities or incorporated cities and private property or wholly on private property where no portion of the public highway outside the corporate limits of the cities or private property is traversed in such operation."

The interpretation of this statute at a time when it read substantially as quoted above was involved in *California Motor Transport Co. v. State Board of Equal.*, 1947, 31 Cal.2d 217, 187 P.2d 745. The respondent contends and the trial court seemingly agreed that the instant case is ruled by the decision in that case. The facts there were these: The plaintiff *California Motor Transport Company* a subsidiary of the *California Motor Express, Ltd.*, was a highway common carrier operating between the express company's terminal depots in San Francisco and Oakland and its terminal depot in Los Angeles. Under separate contracts with the express company the transport company transported for the former express matter between these terminals and also rendered pickup and delivery services in the three cities; the transport company also being licensed as a city carrier pursuant to statutes of 1935, chapter 312 now Public Utilities Code, section 3941. The transport company rendered bills to the express company for its pickup and delivery services separate and apart from the bills rendered by it for its line haul operations. The transport company also kept distinct records of the income from each of the two services although such records were not maintained in physically separate volumes. The vehicles used by the transport company in its pickup and delivery operations were lighter and different from those employed in its line haul operations and those used in such pickup and delivery operations were not used in highway transportation and did not operate outside of the corporate limits of Los Angeles and Oakland.

Upon these facts the Supreme Court held that the receipts derived by the transport

company from its pickup and delivery operations were exempt from tax under the statute hereinbefore quoted; this holding being predicated upon the conclusion that the transport company was engaged in two separate and distinct businesses: one, that of a highway common carrier and the other that of a city carrier.

Appellant contends that the decision in the *California Motors* case is not applicable here for various reasons.

First, reference is made to the fact that in the cited case it appeared that in its pickup and delivery operations the transport company utilized separate equipment which was not used in its intercity operations, whereas the evidence in the case at bar is to the effect, as previously noted, that a portion (8.8 per cent) of the total tonnage handled by respondent here in its pickup and delivery operations was transported in line haul vehicles. We see no point of distinction between the two cases in this. The character of the operations as pickup and delivery is not dependent upon the type of the vehicles used in the transportation. We see nothing in the opinion in the *California Motors* case to suggest that if in some instances the plaintiff there had used some of its intercity equipment to make a pickup and delivery within incorporated cities that a different result would have followed.

Next it is argued that in the case at bar, unlike the situation in the *California Motors* case, respondent's pickup and delivery contract with the railway company was not limited to intracity operations but included all pickup and delivery whether it involved going outside city limits or not. This fact, however, does not serve to compel a finding that the respondent was not engaged in the capacity of a city carrier in making pickup and delivery within the boundaries of incorporated cities. No question is involved here as to the taxability of the proceeds derived by respondent from pickup and delivery movements which were beyond city boundaries. Respondent concedes that such receipts are taxable and the tax thereon has been paid by it.

Further, it is stated that in the California Motors case the transport company rendered bills to the express company on the basis of intercity and intracity operations, while in the case at bar the separate billing was on the basis of pickup and delivery operations and line haul movements. However it is conceded that the bills which the respondent rendered and the records which were maintained of such services readily disclose those which were confined to the limits of incorporated cities and those which involved intercity operations. To the extent that respondent's pickup and delivery operations extended beyond the corporate limits of the city, it was not acting in its capacity as a city carrier, but this does not serve to establish that the respondent was not engaged in two separate types of operations, one as a highway carrier and the other as a city carrier operating pickup and delivery services within the limits of incorporated cities.

Finally, the appellant contends that the instant case is distinguishable from the California Motors case because of the fact that in the latter it appears that, in its capacity as a common highway carrier, it was not authorized to render pickup and delivery service within the limits of incorporated cities whereas, so it is stated, the respondent here as a common highway carrier was so authorized without being licensed as a city carrier by virtue of the provisions of section 1063 of the Public Utilities Code. We see nothing in this section or any other provision of the law which has been called to our attention which suggests that a common highway carrier, although authorized to render pickup and delivery service within incorporated cities may not be separately licensed by the Public Utilities Commission as a city carrier. The fact that the respondent was so licensed implies a recognition by the commission that a common highway carrier can be separately licensed as a city carrier, which suggests that it may operate two separate types of business in the same manner as the Supreme Court determined in the California Motors case.

Appellant places principal reliance upon *Bekins Van Lines, Inc., v. Johnson*, 1942, 21 Cal.2d 135, 130 P.2d 421. It must be admitted that language is to be found in the opinion in that case which seems to be at variance with the result reached in the California Motors case. However, the *Bekins* case was considered and distinguished in the latter. Basically it is appellant's contention, and this appears to have been the thesis of the *Bekins* decision, that the pickup and delivery service of the respondent constitutes an inseparable part of the entire contract of transportation entered into between the railway company and the shipper under bills of lading of the railway company issued pursuant to published tariffs covering door to door delivery. In this respect, however, there is no difference between the relationship existing between the railway company and its shippers from that which existed between the express company and its customers in the California Motors case. Likewise the relationship between the railway company and respondent is the same as that which existed between the transport company and the express company. In the case at hand the respondent as a highway common carrier transports the goods from station to station as did the transport company, and the latter, as well as the respondent here, in connection therewith performed the pickup and delivery. Moreover, as previously noted, the respondent here did not perform pickup and delivery services for the railway company at all stations. At some 21 of these, such services were rendered by other city carriers, and we do not understand the appellant to contend that the receipts derived by such city carriers for these services are subject to tax under the statute in question. Yet, such pickup and delivery services are as much a part of the contract of transportation entered into between the railway company and its shippers calling for door to door delivery as is the case where the pickup and delivery was performed by respondent.

Substantially the identical contention as that here urged by the appellant was ad-

vanced by it in the California Motors case¹ and rejected by the Supreme Court. It also appears from the briefs filed in that case that the appellant there sought without success to show that it could not be distinguished from the Bekins case upon substantially the same grounds as it undertakes to do in the case at bar.²

In distinguishing the Bekins case the Supreme Court in the California Motors case said: (31 Cal.2d at pages 222-223, 187 P.2d at page 748)

"By contrast, plaintiff in the instant case is not moving the goods of its own customers in intercity operations whereof the pick-up and delivery service forms an integral part of a unitary operation, but is

rather, as found by the trial court, engaging in two separate and distinct businesses, severally authorized by a certificate of public convenience and necessity and by a permit to operate as a city carrier, in which it renders to an express company, which alone deals with the general public, separate services under separate contracts and with separate and independent bills rendered therefor. Manifestly, the fact that the same goods were the subjects of both intracity and intercity transportation does not establish that as a matter of law there was but a single business operation." And it then concluded as follows (31 Cal.2d at page 224, 187 P.2d at page 749): "Unless we are to hold that as a matter of law

1. In the appellant's opening brief in the California Motors case (p. 10) the following appears: "The pick-up and delivery of merchandise is as inseparable a part of its transportation as is its movement to the sidewalk for the purpose of loading. Respondent was engaged in transporting merchandise from terminal to terminal. It acquired a business which enabled it to pick up goods at a store door and deliver them at the customer's direction to any point in another city. It expanded its transportation activities. It did not enter into any new business, or any different business."

And at page 14 of the same brief it is said: "In keeping its books plaintiff treated the income from the pick-up and delivery separately. It entered into separate contracts with California Motor Express for the two portions of its business, but the contracts were complementary and taken together in effect constitute a single contract. Its original permit obtained from the Railroad Commission prohibited it from doing the pick-up and delivery business, but the later permit authorized it to engage in that business. The permits, taken together, authorized it to engage in a complete service from store-door to store-door. The controlling fact, however, is that plaintiff was rendering the complete service, from store-door to store-door. Certainly there is no reason why plaintiff could not have rendered the complete service under a single contract with the California Motor Express and under a single permit from the Railroad Commission. Many line haul carriers have permits authorizing them to operate from store-door to store-door and plaintiff no

doubt would have obtained such a permit but for this tax."

2. Thus in its answer to the petition for hearing in the Supreme Court we find the following: "In the Bekins case as here there was one corporation doing both intercity hauling and pick-up and delivery in connection with that intercity hauling. * * * (p. 4.)

"No valid distinction has been pointed to between the facts of this case and the facts of the Bekins case. Some point is made of the fact that the plaintiff held one certificate from the Railroad Commission (now the Public Utilities Commission) for the intercity carriage and another certificate for the pick-up and delivery service. It is to be noted that these permits, taken together, authorized plaintiff to engage in a complete service from store door to store door and the controlling fact is that plaintiff did render such service. * * * (p. 4.)

"Some point also is made of the fact that separate billing was made for the pick-up and delivery service. This element also was present in the Bekins case. * * * (p. 5.)

"It also is suggested that the use of separate equipment in the pick-up and delivery service should distinguish this case from the Bekins case. But, again in the Bekins case we find that a portion of the pick-up and delivery service there was performed by separate equipment. * * * (p. 5.)

"There is no difference of substance between the Bekins case and this case which would justify the application of the tax in the Bekins case and not here." (p. 6.)

one operator who conducts both a highway common carrier business and a city carrier business cannot segregate the two operations, however separate in fact, for tax purpose, the judgment of the trial court must be sustained. We are satisfied that the true test for tax liability in this case rests in the character of the operation and fact of segregation and not in the identity of the operator."

The foregoing language is equally applicable to the case at bar and we deem it controlling here.

The judgment is affirmed.

SHINN, P. J., VALLÉE, J., concur.



163 Cal.App.2d 15

PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Edward Norman CAHILL, Defendant and
Appellant.
Cr. 1358.

District Court of Appeal, Fourth District,
California.
Aug. 18, 1958.

Defendant was convicted in the Superior Court, San Diego County, John A. Hewicker, J., for possession of marijuana, and defendant appealed. The District Court of Appeal, McCabe, J. pro tem., held that evidence was sufficient to sustain conviction where defendant was discovered in search incident to arrest of alleged prostitute, arrested for residing in house of prostitution, and marijuana was found in reasonable search of immediate surroundings after defendant's arrest and that the search and arrest of defendant were lawful.

Affirmed.

1. Arrest $\S$ 63(3)

An offense is committed in view of officer, within statute authorizing officer to make arrest for misdemeanor when offense is committed in his presence, when officer's senses afford him knowledge that it is being committed. West's Ann.Pen.Code, $\S$ 840.

2. Criminal Law $\S$ 1159(5)

Whether offense was committed in presence of officer, within statute permitting officer to make arrest for misdemeanor when the offense is committed in his presence, is primarily a question for trier of facts and his finding should not be disturbed on appeal unless it is without support in the evidence. West's Ann.Pen.Code, $\S$ 840.

3. Arrest $\S$ 63(3)

Where police officer overheard telephone conversation between sailor and alleged prostitute in which sailor was invited to certain house for purposes of prostitution, and officer saw sailor enter house, offense committed was in view of officer within statute permitting arrest for misdemeanor at any time when offense is committed in presence of officer. West's Ann. Health & Safety Code, $\S$ 11500.

4. Arrest $\S$ 63(3), 68, 71

Where officer overheard telephone conversation between sailor and alleged prostitute in which sailor was invited to certain house for purposes of prostitution and officers saw sailor enter house, officer had reasonable and probable cause to enter house to make arrest for misdemeanor committed in presence of officer and in view of fact that officer merely opened an unlocked door and entered premises without objection it was not necessary for them to exercise statutory authority to break open door to make arrest and when officers discovered defendant, who they recognized as a person previously arrested for possessing narcotics, officers had right to arrest defendant and to make search of immediate surroundings for any evidence reasonably connected with the arrest. West's Ann.Pen.Code, $\S\S$ 315, 840; West's Ann. Health & Safety Code, $\S$ 11500.

5. Arrest ⇨71

Where police officer overheard telephone conversation between sailor and alleged prostitute in which sailor was invited to certain house for purposes of prostitution and officer saw sailor enter house, officers, who entered premises without objection to make arrest and found a nude female on bed in bedroom, had reasonable cause for search of premises. West's Ann. Pen.Code, §§ 315, 840; West's Ann. Health & Safety Code, § 11500.

6. Arrest ⇨71

Officers lawfully arresting defendant for residing in house of prostitution could make reasonable search in an attempt to find evidence regarding defendant's willful residency in the house.

7. Arrest ⇨71

Where officers lawfully arrested defendant for residing in a house of prostitution, action of officers in looking under bed in room in which defendant was found and discovering Manila bag allegedly containing narcotics was not an unlawful search. West's Ann. Pen.Code, § 315; West's Ann. Health & Safety Code, § 11500.

8. Criminal Law ⇨395

Where reasonable search of premises was made incident to lawful arrest of defendant for residing in house of prostitution and bag containing marijuana was found, officer did not have to ignore it but it was proper for him to take it into his possession and the bag and its contents were admissible in evidence in prosecution for possession of marijuana. West's Ann. Pen.Code, §§ 315, 840; West's Ann. Health & Safety Code, § 11500.

9. Poisons ⇨9

In prosecution for possession of marijuana which was discovered on reasonable search of premises made incident to arrest of defendant for residing in house of prostitution, defendant's contention that room where bag was found was left unoccupied and that it was possible that some other person placed bag and contents in place officers found it was refuted by evidence that officer was in charge of others present

until defendant was taken to jail. West's Ann. Pen.Code, §§ 315, 840; West's Ann. Health & Safety Code, § 11500.

10. Criminal Law ⇨1159(2)

Appellate court will not weigh evidence, but will only decide if sufficient facts could not have been found by jury to warrant inference of guilt.

11. Criminal Law ⇨1159(2)

In prosecution for possession of a narcotic, if evidence supported inference that defendant was in unlawful possession of forbidden narcotic, the fact that it would likewise support a contrary finding would not warrant reviewing court in setting aside judgment of conviction on ground of insufficiency of evidence. West's Ann. Health & Safety Code, § 11500.

12. Poisons ⇨9

Constructive possession of narcotic may be proved by circumstantial as well as direct evidence.

13. Poisons ⇨9

Evidence supported conviction for possession of marijuana where defendant was discovered in search incident to arrest of alleged prostitute, arrested for residing in house of prostitution, and marijuana was found in reasonable search of immediate surroundings after defendant's arrest. West's Ann. Pen.Code, §§ 315, 840; West's Ann. Health & Safety Code, § 11500.

Thomas Whelan, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

McCABE, Justice pro tem.

By an information defendant was charged with the possession of a narcotic in violation of section 11500, Health & Safety Code. From the judgment of conviction entered subsequent to a jury verdict of guilty, defendant appeals.

On September 2, 1957, the police department received information from the Chief

Investigator, Naval Training Center, that several sailors had contracted a venereal disease at a particularly described house on K Street; the sailors were being contacted by a man in the downtown area and then taken to this house.

From the same source of information and on September 4, the police department received additional information concerning these activities together with the first name of the alleged prostitute, the description of the car used by the pimp, and the unlisted telephone number supplied to each participating sailor. The police department then obtained the address of the house, drove past it and thus determined the description of a white picket fence previously given by the informant fitted the appearance of the fence at the particular address.

On September 5, the police department enlisted the aid of a sailor and upon being supplied with information, the name Betty, and the telephone number, the sailor in the presence of a police officer telephoned Betty. An agreement was made, price predetermined, and Betty gave him directions on how to reach the house on K Street. A police officer who stood next to the sailor overheard the telephone conversation. In two cars, three police officers in plain clothes and the sailor then proceeded to the address given by Betty. The sailor was supplied with marked money. Upon approaching the address the police officers noticed (1) a car fitting the description of the car supposedly operated by the pimp, and (2) the house was the same as previous information and investigation had described. The sailor got out of the car in which he was riding and approached the house and entered it. One police officer went to the rear of the house, two officers remained in front for a period of a minute or two and then went into the house. Upon entering the living room they noticed a man later identified as Zeb, who was watching television. Their entrance did not disturb Zeb, and he made no objections. The officers located a bedroom, entered it and

found a nude female on the bed, the seated sailor with his hat off and without his marked money. One of the officers arrested the nude female. She then disclosed the location of the marked money.

At no time did the officers have a search warrant, or information concerning narcotics at this address. To this point in the recitation of events, the officers did not know of the presence of anyone else in the K Street house except Zeb, the nude female and the sailor.

An officer was left in the bedroom with the female and sailor, and Officer Morse started through the house. Off the kitchen was a small room with an open door. In this small sparsely furnished room Officer Morse found the defendant lying on the bed partly clothed. Defendant was arrested for residing in a house of prostitution. The police officer who had been at the rear of the house was then admitted into the small room through a door leading to the outside rear of the house. No search of the small room was made at this time. Defendant was left in charge of the third officer. After the defendant and Zeb were transferred to the jail by uniformed officers called for that purpose, the third officer made a search of the small room. There is no direct evidence that anyone entered the small bedroom from the time defendant and the police officer left until it was searched. In making the search he looked under the bed and " * * * found a brown Manila sack at the north wall about half way in the middle of the bed at the head." He testified: " * * * [T]his is the brown Manila sack I observed under the bed * * *." There was no dust or lint on the floor or the Manila sack. At the time of trial an expert testified the contents of the Manila sack was marijuana. After finding the Manila sack and contents and later that night an additional charge of possession of narcotics was placed against defendant. At the jail and after the charge of possession of narcotics was placed against defendant an officer testified

he, in the presence of defendant, removed the debris from the pockets of defendant's shirt and pants.

Witnesses for the defense testified that: On September 2, 1957, defendant rented the small room from Zeb, and only stayed there at night, eating his meals at a relative's home. Defendant testified and denied knowledge or ownership of the narcotics and that on September 3, two days before the arrest, upon permission granted by him, a woman had used his room and bed for a short time and then had changed the linen.

The debris from defendant's pockets and the sack containing marijuana were admitted to evidence over the objections of defendant. Upon this appeal defendant strongly urges that the evidence should not have been admitted because it was obtained through unlawful search and seizure.

[1,2] Under the provisions of section 840, Penal Code, the officer could arrest for a misdemeanor when the offense was committed in his presence. An offense is in the view of the officer when his senses afford him knowledge that it is being committed. Whether the offense was committed in the presence of the officer is primarily a question for the trier of facts, and his findings should not be disturbed on appeal unless it is without support in the evidence. *Elrod v. Moss*, 4 Cir., 278 F. 123; *United States v. Borkowski*, D.C., 268 F. 408; *Davis v. United States*, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453.

[3] A police officer overheard the sailor's conversation with Betty in which the sailor was invited to the K Street house, and saw the sailor enter the K Street house at the address given by Betty. Under these facts the offense was completed in the presence of the police officer. See *In re Chase*, 119 Cal.App. 432, 434, 6 P.2d 577, which held the offense under section 318 Penal Code had not been completed until, as a result of an invitation, a visit was actually made.

[4] The offense having been committed in the presence of an officer an arrest could

be made. It was not necessary for the officers to exercise the authority given to them under section 844, Penal Code, because the officers merely opened an unlocked door and entered the premises without objections. This entry was made to make an arrest for a misdemeanor committed in the presence of an officer, and the officer had reasonable and probable cause to do so.

[5-7] Reasonable cause for a search of the premises was sufficiently established. *People v. Simon*, 45 Cal.2d 645, 648, 290 P.2d 531; *People v. Brown*, 45 Cal.2d 640, 642, 290 P.2d 528; *People v. Boyles*, 45 Cal.2d 652, 656, 290 P.2d 535; *People v. Romero*, 161 Cal.App.2d 404, 327 P.2d 205. Betty's arresting officer proceeded to make a search of the premises. In his search he discovered defendant in the small room, recognized him as a person previously arrested for possessing narcotics, and arrested him under the provisions of section 315, Penal Code. Under these circumstances and the lawful arrest, the officers had a right to make a search of the immediate surroundings for any evidence reasonably connected with the arrest. In this type of case the officers could make a reasonable search in an attempt to find evidence regarding defendant's willful residency in the house. In looking over this small room an officer "leaned down and looked under the bed" and saw the Manila bag. Under the circumstances this cannot be held to be an unlawful search.

In *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 1101, 91 L.Ed. 1399, the Supreme Court of the United States said: "The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.' *Go-Bart Importing Co. v. United States*, 1931, 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374."

[8] In making a reasonable search for incriminating evidence for which defendant was arrested the police officer discovered other evidence, i. e. the marijuana. He did not have to ignore it but it was

proper for him to take it into his possession. In *People v. Roberts*, 47 Cal.2d 374, 379, 303 P.2d 721, 723, our Supreme Court cited and quoted with approval from *Paper v. United States*, 4 Cir., 53 F.2d 184, 185, as follows:

"Where the entry and search are rightful and there is present no element of trespass or fraudulent invasion of the rights of the citizens, there is no reason for excluding evidence of crime discovered in the course of the search. If the officers * * * had discovered in the cellar a counterfeit- ing plant in operation, would it have been their duty to ignore it? If they had come upon the body of a murdered man, would their testimony as to finding the body be excluded?" See also, *People v. Littlejohn*, 148 Cal. App.2d 786, 791, 307 P.2d 425.

We conclude there was no error committed by the trial court in admitting the Manila sack and contents into evidence.

[9] Defendant next contends that there was no evidence to prove defendant possessed the Manila sack and marijuana contents. Defendant argues that after the arrest of defendant the small room was left unoccupied for a period of time and it is possible some other person placed the Manila sack and contents in the place where the police officer found it, and it is possible either the sailor or the female went into the small room and left the Manila sack. These arguments are presented to this court disregarding the evidence that a police officer was left in charge of the female with the sailor present; later the sailor went to one of the police cars and remained there until one of the officers drove away; the female was taken to the jail; and Zeb and the defendant were taken to the jail.

[10] This appellate tribunal is governed by certain rules on this appeal. One of the rules is stated in *People v. Newland*, 15 Cal. 2d 678, 681, 104 P.2d 778, 779, as applicable:

"The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether

upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

[11] Also, if the evidence supports the inference that appellant was unlawfully in possession of the forbidden narcotic, the fact it would likewise support a contrary finding does not warrant the reviewing court in setting aside the judgment on the ground of insufficiency of the evidence. *People v. Bassett*, 68 Cal.App.2d 241, 246, 156 P.2d 457.

In *People v. White*, 50 Cal.2d 428, 325 P.2d 985, 987, it is said:

"Numerous cases have recognized that constructive possession of a narcotic constitutes a violation of section

11500 of the Health and Safety Code.
[Citations.]”

[12] Constructive possession may be proved by circumstantial as well as direct evidence. *People v. Rollins*, 161 Cal.App.2d 560, 326 P.2d 938; *People v. White*, supra; *People v. Blinks*, 158 Cal.App.2d 264, 322 P.2d 466.

[13] The evidence here, and the reasonable inferences to be drawn therefrom, supports the verdict and judgment of conviction, and these will not be set aside since the evidence is legally sufficient to uphold them. *People v. Gonzales*, 116 Cal.App.2d 843, 254 P.2d 603; *People v. Newland*, supra.

Judgment affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.



162 Cal.App.2d 825

**Mary Ann COCHRUM, Plaintiff and
Respondent,**
v.

**William Travis COCHRUM, Defendant and
Appellant.**
Civ. 23016.

District Court of Appeal, Second District,
Division 2, California.
Aug. 18, 1958.

Divorce action, wherein wife applied for modification of interlocutory judgment of divorce. From portion of order of Superior Court of Los Angeles County, Elmer D. Doyle, J., modifying interlocutory judgment of divorce so as to provide for increased alimony payments, divorced husband appealed. The District Court of Appeal, Herndon, J., held that since husband in reliance upon express waiver of alimony by wife in property settlement agreement

permitted his default to be taken in divorce action referred to and identified in agreement by title and docket number, court had no jurisdiction to award alimony without further notice to husband and alimony provision of interlocutory judgment and portion of modification order increasing alimony award were void.

Portion of order appealed from reversed.

1. Divorce ⇨239

Where husband in reliance upon express waiver of alimony by wife in property settlement agreement permitted his default to be taken in action for divorce previously commenced by wife and referred to and identified in agreement by title and docket number, court had no jurisdiction to include award of alimony in interlocutory judgment of divorce without further notice to husband and portion of interlocutory judgment ordering him to pay \$1 per month for support and maintenance of wife was void.

2. Divorce ⇨245(1)

Where portion of interlocutory judgment of divorce ordering husband to pay \$1 per month for support and maintenance of wife was void for want of jurisdiction, subsequent modification of interlocutory judgment increasing alimony award to \$50 per month was without foundation and likewise void.

3. Stipulations ⇨1

References in property settlement agreement to pending divorce action, identified by title and docket number, and recital therein that parties entered into agreement in order to settle issues as to property interests without further litigation and with expectation that agreement would be presented in evidence to court for approval established true character of agreement as a “stipulation” designed to limit and define relief which wife would seek and obtain in pending divorce action.

See publication Words and Phrases, for other judicial constructions and definitions of “Stipulation”.

4. Divorce ⇨203

Prayer for general relief affords sufficient jurisdictional basis for award of alimony in divorce case.

5. Husband and Wife ⇨30

Husband and wife may negotiate agreement in adjustment of their respective interests with reference to their marital and property rights, and such agreement may effectively limit or supplant law-imposed obligations.

6. Divorce ⇨236

Binding effect of wife's contractual waiver of alimony must be recognized unless appropriate procedures are invoked to avoid waiver.

7. Courts ⇨20

Even though it has jurisdiction over the subject matter and parties in the fundamental sense, court may lack jurisdiction or power to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of procedural prerequisites.

8. Divorce ⇨255

Appeal from order modifying interlocutory judgment of divorce by increasing alimony award on ground that court had no jurisdiction to award alimony in view of waiver of alimony by wife in property settlement agreement constituted a collateral attack upon interlocutory judgment of divorce sustainable only by facts appearing from judgment roll or expressly admitted by the parties. West's Ann.Code Civ.Proc. § 473.

9. Divorce ⇨255

Interlocutory judgment of divorce which expressly referred to and identified property settlement agreement and approved and incorporated in judgment all provisions of agreement except waiver of alimony by wife and admissions in wife's brief on appeal by husband from order modifying divorce judgment disclosed sufficient facts to sustain collateral attack on portion of interlocutory judgment awarding alimony to wife in contravention of agreement.

William C. Stein, Los Angeles, for appellant.

James A. Watkins, Torrance, for respondent.

HERNDON, Justice.

Defendant husband appeals from an order entered on August 22, 1957, granting plaintiff's application for a modification of the alimony provision of an interlocutory decree of divorce. The order increases the alimony award from \$1 to \$50 per month. Defendant (appellant) states that: "The sole issue presented by this appeal is whether or not a trial court may order the payment of alimony by the husband to the wife in a case where the parties had entered into a property settlement agreement in writing in which the wife specifically waived alimony, following which a default was entered against the husband and the matter was tried as a default, the husband not appearing."

Chronologically stated, the operative facts are as follows:

On April 15, 1957, plaintiff filed her complaint for divorce on the ground of cruelty, alleging: a marriage of some thirteen years duration; that there were two children of the marriage, and that the community property consisted of two parcels of real property, two automobiles, bank accounts, and numerous other items of personal property. In addition to dissolution of the marriage plaintiff sought by the prayer of her complaint that she be awarded the community property, the permanent custody of the two children and reasonable attorney's fees; that "[d]efendant be ordered to support plaintiff and the minor children, the amount and times of payment to be fixed by the court"; and that she be awarded her costs of suit and "such further relief as the court deems just."

On April 26, 1957, the parties executed a property settlement agreement which had been prepared by plaintiff's then attorney. This agreement recites the pendency of the divorce action and the "mutual desire" of the parties "to effect a final and complete

settlement of their respective property rights with reference to their marital status and to each other, and to effectuate such final and complete settlement they agree particularly as follows: * * * In order to settle the issues as to property interests as raised in the pleadings on file in said lawsuit without the necessity of further litigation as to said property interests, the parties are entering into this agreement with the expectation that said agreement will be presented in evidence to the Court for its approval. * * *

Following the above quoted language there are detailed provisions for the division of the numerous items of real and personal property. Defendant agreed to maintain certain life insurance for the benefit of the children and to pay to plaintiff the sum of \$75 per month for the support and maintenance of each of the two children such payments to continue until the children attained majority, married, or became self-supporting.

The following provisions also appear: "Each of the parties in consideration of the agreement of the other herein expressed hereby waives, releases and relinquishes to the other all claims each may now have, or might hereafter otherwise acquire against the other, as husband and wife, or otherwise, arising out of the marital relation. Each party does hereby release, relinquish and waive to the other any and all claims he or she may now have, or may hereafter acquire against the other, for support and maintenance, or otherwise. * * *

Wife specifically releases husband from any balance which may be due as temporary alimony and child support because of an order of court heretofore made on or about April 25, 1957 * * * and each party has been independently advised by his or her attorney as to the legal effect of executing this agreement. This agreement may, subject to the court's approval, be made a part of any decree of divorce between the parties."

Request for entry of default was filed on May 1, 1957, and on May 29, 1957, the cause was tried as a default. At the con-

clusion of the hearing, the court granted plaintiff an interlocutory judgment of divorce and approved the property settlement agreement except for the provision as to alimony. The court ordered a division of the community property, the payment of child support and attorney's fees, maintenance of life insurance, etc., all in strict accordance with the terms of the agreement, but departed therefrom in ordering defendant to pay to plaintiff for her support and maintenance the sum of \$1 per month. The interlocutory judgment of divorce entered on June 11, 1957, approves the property settlement agreement "excepting for the provision as to alimony" incorporates in *haec verba* the provisions of the agreement relating to the division of property, the payment of attorney's fees and debts, child support, etc., and further orders the defendant to pay alimony in the sum of \$1 per month.

On July 26, 1957, plaintiff filed her application for a modification of the interlocutory judgment to increase the alimony payments from \$1 to \$225 per month, and also to require defendant to pay to plaintiff the sum of \$350 to cover the medical and hospital expenses "pertaining to the birth of [an] expected baby" and "upon the birth of said baby, defendant shall pay to plaintiff the sum of \$75 per month, commencing on the 1st day of the month following the birth of said baby and continuing monthly thereafter." In her affidavit filed in support of this application, plaintiff alleged: that at the time the interlocutory judgment of divorce was granted, she had employment and was in a position to support herself; that unknown to her she was then pregnant; that by reason of her pregnancy she had not been able to work and had not been able to earn the money she had expected; that she had incurred additional medical and other expenses which she had not anticipated, and that the defendant was the father of the expected child.

An order to show cause was issued upon this application, returnable on August 22, 1957. The defendant filed an affidavit in response to the order to show cause in

which he denied generally the allegations of plaintiff's affidavit with respect to her pregnancy and his paternity of the expected child.

The order to show cause was heard by a court commissioner who made findings with respect to the employment and earnings of the parties. The commissioner also found that plaintiff was then pregnant and would be unable to continue her employment as a result thereof. The findings recite a stipulation that the issue of paternity be continued until after the birth of the unborn child. Upon these findings, the commissioner recommended an order requiring defendant to pay to plaintiff \$50 per month for her support, to pay an additional amount to plaintiff's attorney for services rendered in connection with the modification proceedings and to pay the necessary and reasonable medical and hospital expenses for plaintiff's confinement as the same became due. The issue of paternity was expressly left adjudicated. The order as recommended was signed by the judge and duly entered.

On this appeal defendant challenges only that portion of the foregoing order which requires him to pay alimony in the sum of \$50 per month. In his opening brief he declares that he knew nothing of the nominal alimony award contained in the interlocutory judgment until after the modification proceedings were instituted and that it was at the hearing of the latter proceedings that he "was for the first time represented by an attorney."

It may be noted that the time within which an appeal from the interlocutory judgment might have been taken expired after plaintiff filed her application for modification but before the hearing thereon. No appeal has been taken from the judgment nor has either party sought any relief therefrom under the provisions of section 473 of the Code of Civil Procedure. It does not appear that any proceedings, other than those above recited, have been taken by either party to set aside the agreement or to obtain relief from the judgment.

[1,2] We have concluded that the alimony provision of the interlocutory judgment is void by reason of facts which not only appear upon the face of the record but are expressly admitted by both parties. It follows of course that the modification order is without foundation and is likewise void.

In the instant case, precisely as in *Craft v. Craft*, 49 Cal.2d 189, 316 P.2d 345, defendant allowed his default to be taken in justifiable reliance upon an agreement wherein the plaintiff had clearly and definitely waived and renounced any and all claim to alimony. As aptly stated in *Craft* at page 192 of 49 Cal.2d, at page 346 of 316 P.2d: "The stipulation entitled him to believe that the issue of alimony had been eliminated and that no support money would be awarded in the absence of proper notice to him. Under these circumstances he had a right to rely upon the stipulation, and it is apparent that he did so rely when, in accordance with the agreement, he failed to answer the complaint and permitted the case to be heard as a default matter. In the absence of proper notice to defendant or other reason why he should have anticipated that the stipulation would be disregarded, the court had no jurisdiction to include an award of alimony in the interlocutory decree." The following further language from the *Craft* decision (49 Cal.2d at page 193, 316 P.2d at page 347) is directly pertinent:

"While a defendant must ordinarily anticipate an award of alimony in an action for divorce, he should not be required to do so where there is a stipulation waiving that relief, and the existence of such a stipulation precludes the court from awarding support money in the absence of proper notice to the defaulting defendant. Even if we were to assume that at the time of granting an interlocutory decree the court might, under some circumstances, disregard an agreement of the parties with respect to support and maintenance and make an award of

alimony in derogation of the agreement (see *Adams v. Adams*, 29 Cal.2d 621, 624-625, 177 P.2d 265), it could not do so in the absence of sufficient notice to a defaulting party. For suggested procedure, see *Darsie v. Darsie*, 49 Cal.App.2d 491, 494-495, 122 P.2d 64; *Eddy v. Eddy*, 64 Cal.App.2d 672, 673-674, 149 P.2d 187."

The sum and substance of plaintiff's effort to distinguish the *Craft* case is contained in the following quotation from her brief: "Respondent respectfully submits that *Craft v. Craft* is not controlling on the case at bar. Respondent respectfully submits that the Court in *Craft* based its decision on a formal Stipulation filed with the Court wherein wife waived alimony, and on the lack of a prayer in her complaint for alimony. In the case at bar, no such Stipulation as found in the *Craft* case is present, and the plaintiff's complaint specifically prays for alimony."

[3] We find no substance in the suggested distinctions. The instrument involved in *Craft* differed from the instant agreement only in form and that difference is inconsequential. Although the instant agreement is not given the title "stipulation," its true and substantial character as a stipulation (clearly designed and intended to limit and define the relief which plaintiff would seek and obtain in the pending action) conclusively appears from the recital of the pendency of the action (identified by title and docket number) and the further recital as follows: "In order to settle the issues as to property interests as raised in the pleadings on file in said lawsuit without the necessity of further litigation as to said property interests, *the parties are entering into this agreement with the expectation that said agreement will be presented in evidence to the Court for its approval.*" (Emphasis added.)

The instant agreement is no less formal than that involved in *Craft* and the waiver of alimony is expressed in terms of equal

clarity. Each instrument incorporated the terms of a complete property settlement.

[4] Equally without substantial effect is the fact that the complaint in the instant case contained a prayer for a support order whereas in *Craft* the complaint did not pray for alimony. It is clear from the *Craft* decision and other decisions therein cited that a prayer for general relief affords a sufficient jurisdictional basis for an award of alimony in a divorce case. It being settled that the lack of a specific prayer for alimony afforded no basis for a collateral attack on jurisdictional grounds, the lack of jurisdiction necessarily resulted from the terms of the stipulation which, said the court, "amounts to an agreement to remove that issue from the case."

Moreover, it would be utterly artificial and unrealistic to give substantial effect to this distinction. The practical effect of the stipulation is to strike from the complaint any prayer for relief in the form of alimony, or, as stated in *Craft*, "to remove that issue from the case." But the essential basis of decision is not the absence of a prayer for alimony but rather the affirmative and legally sufficient assurance that relief in the form of alimony would be neither sought nor obtained. Any other holding would violate the first principle of procedural due process.

[5-7] It is not well settled that it is competent for a husband and wife to negotiate an agreement "in adjustment of their respective interests" with reference to their marital and property rights and that such agreement may effectively limit or supplant law-imposed obligations. In various situations it has been recognized that "limitations embodied in their agreement constituted limitations upon the court's power to equate the support provisions of the decree with the law-imposed obligations as distinguished from the parties' contractual obligations." *Plumer v. Superior Court*, 50 Cal.2d 631, 328 P.2d 193, 195; *Plumer v. Plumer*, 48 Cal.2d 820, 825, 313 P.2d 549. The binding effect of a

wife's contractual waiver of alimony must be recognized unless appropriate procedures are invoked to avoid it. *Adams v. Adams*, 29 Cal.2d 621, 628, 177 P.2d 265. There may be a lack of jurisdiction although the court has jurisdiction over the subject matter and the parties in the fundamental sense. In many situations the court has no jurisdiction or power to act "except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." *Tabor v. Superior Court*, 28 Cal.2d 505, 508, 170 P.2d 667, 669; *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 288-289, 109 P.2d 942, 132 A.L.R. 715; *Vasquez v. Vasquez*, 109 Cal.App.2d 280, 283, 240 P.2d 319.

[8.9] Although respondent has not argued the matter, we recognize that appellant's present attack upon the alimony provision of the judgment constitutes a collateral attack sustainable only by facts appearing from the judgment roll or by facts expressly admitted by the parties. "[I]n determining whether the order is void on its face we are limited to a consideration of matters which appear in the judgment roll or are admitted by the parties." *Phelan v. Superior Court*, 35 Cal.2d 363, 372-373, 217 P.2d 951, 957; *Thompson v. Cook*, 20 Cal.2d 564, 570-571, 127 P.2d 909; *Akley v. Bassett*, 189 Cal. 625, 639, 209 P. 576. In the case at bar the essential facts appear from the judgment which expressly refers to, identifies and approves the property settlement agreement and incorporates all of its provisions with the exception of the waiver of alimony. The nominal award of alimony is expressly made in contravention of the agreement. These facts are fully detailed and confirmed in respondent's brief and are summarized therein as follows: "Recapitulating, the events were as follows: Wife consulted an attorney regarding divorce; suit for divorce was filed wherein alimony was prayed for in wife's Complaint; service thereafter was made on husband; thereafter written Property Settlement Agreement was entered into by

husband on the one side and wife represented by her attorney on the other, in which Agreement alimony was waived by wife; thereafter no Amended Complaint was filed by wife; default was entered by wife; thereafter wife was granted an Interlocutory Judgment of Divorce wherein the Judge ordered husband to pay alimony of \$1.00 per month to wife, despite the waiver of alimony in the Property Settlement Agreement. Thereafter, wife filed a Modification of this award by Affidavit and Order to Show Cause in which she asked that the \$1.00 per month alimony be increased upwards due to the fact of her inability to continue her work because of her pregnancy."

That portion of the order appealed from, to-wit, the provision purporting to grant alimony, is reversed.

FOX, P. J., and ASHBURN, J., concur.



163 Cal.App.2d 225

In the Matter of the ESTATE of Carrle
Price ROLLINS, Deceased.

Edmund G. BROWN, Attorney General of
the State of California, Appellant,

v.

Eunice C. MOOBERRY, H. Price Webb, and
Mary C. Moyes, Respondents.

Civ. 17883.

District Court of Appeal, First District,
Division 2, California.

Aug. 28, 1958.

Hearing Denied Oct. 22, 1958.

Proceeding in the matter of the estate of the deceased involving the construction of her will. From an adverse decree in the Superior Court, County of Santa Clara, W. W. Jacka, J., the attorney general appealed. The District Court of

Appeal, Draper, J., held that the will created a valid charitable trust and that where it was executed more than 30 days and less than six months before death of testatrix and she was survived by sister, nephews and nieces, not more than one-third of her estate could go to charity.

Decree reversed.

1. Wills ⚡15

Where will was executed more than 30 days but less than six months before the death of testatrix and she was survived by sister and nephews and nieces, not more than one-third of her estate could go to charity. West's Ann.Prob.Code, §§ 41, 43.

2. Charities ⚡6, 18

A charitable trust may exist even though no trustee is named and no intent to create a trust is stated.

3. Wills ⚡491

Where problem in construction of a will was essentially one of construction and no extrinsic evidence was introduced, a question of law was involved upon which the independent judgment of the court is to be exercised.

4. Wills ⚡448

In the construction of wills, that interpretation which will avoid intestacy is to be sought.

5. Wills ⚡449

A residuary clause must receive a broad and liberal interpretation with a view of preventing intestacy as to any portion of the estate.

6. Charities ⚡31

Charitable bequests are favored and such a bequest will not be construed to be void if it can possibly be made good.

7. Charities ⚡10

To create a valid charitable trust, the bequest must limit the use of the fund to charitable purposes and if the language permits noncharitable as well as charitable uses, the bequest cannot be held valid as a charitable trust.

8. Charities ⚡31

Charitable bequests should not be read in an antagonistic spirit to disappoint the general intention of the will.

9. Charities ⚡10

"Charitable uses" are those of religious, educational, political or general social interest to mankind or those for the relief of poverty, the advancement of education or religion, or beneficial to the community generally.

See publication Words and Phrases, for other judicial constructions and definitions of "Charitable Uses".

10. Charities ⚡18, 21(1)

Will providing that the remainder should go to some charitable institution or research fund or for a suitable memorial to "my mother and father (no statue or monument)" created a valid charitable trust though it neither selected a class or beneficiaries nor appointed a trustee or executor to make the selection. West's Ann. Prob.Code, §§ 41, 43.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for appellant.

Edwin B. Lucas, Van Nuys, for respondent Eunice C. Mooberry.

George W. Patterson, R. G. Wilkins, San Jose, for respondents Webb & Moyes.

DRAPER, Justice.

[1] The only question on this appeal is the validity of the residuary clause of a holographic will which reads:

"The remainder to go some charitable institution, or research fund, or for a suitable memorial to my mother and father (no statue or monument)."

By decree determining heirship the probate court found this provision invalid, and ordered distribution of the residue of the estate under the laws of succession. The attorney general appeals. Decedent's will was executed more than 30 days, but less than 6 months, before her death. Since she is survived by a sister, nephews and nieces, it follows that not more than one-

third of her estate can go to charity. Prob.Code, §§ 41, 43. Thus approximately \$50,000 is in issue here.

[2] The parties impliedly concede that this provision, lacking certainty in its denomination of legatees, can be sustained only under the rules applicable to charitable trusts. Such a trust may exist even though no trustee is named and no intent to create a trust is stated. Rest., Trusts, § 397(f); *In re Estate of Faulkner*, 128 Cal.App.2d 575, 275 P.2d 818; *In re Estate of DeMars*, 20 Cal.App.2d 514, 67 P.2d 374.

Respondents contend, however, that the residuary clause does not create a valid charitable trust because it fails to limit the bequest to wholly charitable purposes, and because it fails either to designate a class of charitable beneficiaries or to name someone to make such a selection.

[3-6] The problem presented is essentially one of construction and, since no extrinsic evidence was introduced, is a question of law, upon which the independent judgment of this court is to be exercised. *In re Estate of O'Brien*, 74 Cal.App.2d 405, 407, 168 P.2d 432. In the construction of wills, that interpretation which will avoid intestacy is to be sought (*Le Breton v. Cook*, 107 Cal. 410, 416, 40 P. 552), and a residuary clause is always to receive "a broad and liberal interpretation, with a view of preventing intestacy as to any portion of the estate" (*O'Connor v. Murphy*, 147 Cal. 148, 153, 81 P. 406, 408). Charitable bequests are favored and such a bequest will not be construed to be void, if it can possibly be made good. *In re Estate of Tarrant*, 38 Cal.2d 42, 46, 237 P.2d 505, 28 A.L.R.2d 419, and cases there cited.

[7,8] To create a valid charitable trust, the bequest must limit the use of the fund to charitable purposes. If the language permits non-charitable, as well as charitable, uses the bequest cannot be held valid as a charitable trust. *In re Estate of Sutro*, 155 Cal. 727, 734, 102 P. 920; *In re Estate of Hinckley*, 58 Cal. 457; 10 Am.Jur., Charities, § 100; 10 Cal.Jur.2d, Charities,

237-9. Determination of this question is, of course, a matter of construction of the language used by the testator. 115 A.L.R. 1124 et seq. The earlier decisions were somewhat quick to find the possibility of a non-charitable use. *In re Estate of Sutro*, supra, 155 Cal. 727, 102 P. 920; see also dicta in *In re Estate of Hinckley*, supra, 58 Cal. 457. The more recent cases, however, indicate a more liberal approach, and are less inclined to search minutely for the possibility of a non-charitable use. Indicative of this tendency is the history of the rule in New York. Our Supreme Court in *Re Estate of Sutro*, supra, 155 Cal. 727, 102 P. 920, cited and followed a decision of the Court of Appeals of New York (*In re Shattuck's Will*, 193 N.Y. 446, 86 N.E. 455) holding that a bequest in trust for "religious, educational or eleemosynary institutions" to be chosen by the executor was invalid, because the bequest might go to a private educational institution conducted for profit. This decision has never been overruled, but it has been made clear that charitable bequests "should not be read in an antagonistic spirit to disappoint the general intention of the will," and that the rule of Shattuck should be "strictly confined to its own facts." *In re Durbrow's Estate*, 1927, 245 N.Y. 469, 157 N.E. 747; see also *In re Frasch's Will*, 1927, 245 N.Y. 174, 156 N.E. 656; *In re Everson's Will*, 1944, 268 App.Div. 425, 52 N.Y.S.2d 395; *In re Hamilton's Estate*, 185 Misc. 660, 57 N.Y.S.2d 359.

The later California decisions relied upon by respondents (*In re Estate of Peabody*, 21 Cal.App.2d 690, 70 P.2d 249; *In re Estate of Kline*, 138 Cal.App. 514, 32 P.2d 677, and *In re Estate of Vance*, 118 Cal.App. 163, 4 P.2d 977) have been grouped with the Shattuck case with the comment that they do not "manifest the favorable liberal construction which most courts give to attempted charities." (2A Bogert on Trusts and Trustees 36-7.) In any case, the language of the trusts involved in those cases, as well as in *Re Estate of Hinckley*, supra, and *In re Estate of Sutro*, supra, differs substantially from that of the will

here in issue. Thus the constructions there reached are not controlling here.

Decedent's will makes specific mention of all the heirs at law—those who would take the residue if the charitable bequest is invalid. Decedent's sole surviving sister is left \$15,000, plus Oklahoma property. The will also leaves \$500 each to four nieces and nephews, children of deceased sisters of decedent. There are two nephews to whom no cash bequest is made, but the will states "All other possible heirs are able-bodied and wage earners," and an intent to limit participation by all the heirs is shown by the sentence "If any one contests this will I give any such person \$5.00."

In the light of this plan of testamentary disposition, and of the presumptions against intestacy and in favor of charitable bequests, there seems little doubt that the residuary clause is limited to charitable uses.

[9] There can be no doubt that "some charitable institution" denotes charitable use only. As to a "research fund," the rule seems clear that this also is a charitable use. 2A Bogert, *supra*, 119; *In re Frasch's Will*, *supra*, 245 N.Y. 174, 156 N.E. 656; see also *In re Estate of Purington*, 199 Cal. 661, 250 P. 657; *In re Estate of Irwin*, 196 Cal. 366, 237 P. 1074. The alternative provision for "a suitable memorial to my mother and father" doubtless could be deemed to contemplate a non-charitable use (see *In re Estate of Gay*, 138 Cal. 552, 71 P. 707) were it not for the qualifying phrase "(no statue or monument)." But, once a statue or monument is excluded, it is difficult to conceive of a "memorial" which is not a charitable use. Charitable uses are defined as those of "religious, educational, political or general social interest to mankind" (*In re Estate of Henderson*, 17 Cal.2d 853, 857, 112 P.2d 605, 607), or as those for the relief of poverty, the advancement of education or religion, or beneficial to the community generally (10 Am.Jur. 622). A commercial use would be inconsistent with the desire for a "suitable memorial." Further, the failure to specify

anyone to receive the profits of a commercial venture lends weight to the view that the language of the will contemplates no such activity. Thus none of the uses permitted by the residuary clause is non-charitable. It follows that the use of the disjunctive "or" is not significant, as it was in the cases relied upon by respondents. *In re Estate of Sutro*, *supra*, 155 Cal. 727, 737, 102 P. 920; *In re Estate of Kline*, *supra*, 138 Cal.App. 514, 519, 32 P.2d 677. Further, a fair construction of the language of the will shows that the charitable purpose is controlling in the clause as a whole. The clause is not subject to attack upon the ground that it permits a non-charitable use of the bequest.

[10] Respondents next contend that the residuary provision is not a valid charitable trust because it neither selects a class of beneficiaries nor appoints a trustee or executor to make such selection. This is the rule in some jurisdictions (2A Bogert, *supra*, 78-9), although the better rule appears to be to the contrary (2A Bogert, *supra*, 77-8). The question has been answered in California by a decision filed since the decree was entered by the trial court in this case. In a well-considered opinion by Mr. Justice Fred B. Wood, it was held that a testamentary provision directing that the residue of the estate "go to charity" is a valid and enforceable gift to charity (*In re Estate of Quinn*, 156 Cal.App.2d 684, 320 P.2d 219, 220). Because of the application of Sections 41 and 43 of the Probate Code, the intent of the testatrix can be given effect only as to a third of her estate. Respondents here have therefore taken to an extent clearly contrary to the intent of the testatrix. In the light of the applicable canons of construction, we cannot construe the will to bestow still further benefits upon these unintended beneficiaries. The residuary clause establishes a valid charitable trust. (Rest., Trusts, § 397, comment (f).)

Decree reversed.

DOOLING, J., concurs.

Hearing denied; SHENK, J., dissenting.

163 Cal.App.2d 1

**Janith Phillips BOND, Plaintiff and
Appellant,**

v.

**Kenneth S. PITZER and Russell K. Pitzer,
Individually and doing business as Bron-
sonia Apartments, Pauline L. Powell, Cath-
erine Aull, William Aull, et al., Defend-
ants and Respondents.**

Civ. 22746.

**District Court of Appeal, Second District,
Division 3, California.**

Aug. 18, 1958.

Hearing Denied Oct. 15, 1958.

Action for injuries sustained by tenant when automobile in which janitress of apartment house was sitting moved forward and struck another automobile, causing that vehicle in turn to move forward and push tenant against rear bumper of her own automobile. The Superior Court of Los Angeles County, David Coleman, J., rendered judgment against the janitress and her husband but in favor of the other defendants, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that it had not been error to direct verdict in favor of manager of apartment house and that the evidence sustained verdict for owner of house.

Affirmed.

1. Automobiles ⇨244(28)

In action against owner of apartment house for injuries sustained by tenant when automobile in which janitress of apartment house was sitting moved forward and struck another automobile, causing that vehicle to move forward and push tenant against rear bumper of her automobile, jury could find that janitress had not been acting within scope of her employment at time of accident.

2. Automobiles ⇨245(28)

In action against manager of apartment house for injuries sustained by tenant when automobile in which janitress of apartment house was sitting moved forward and struck another automobile, causing that vehicle in turn to move forward

and push tenant against rear bumper of her own automobile, it was not error to direct verdict in favor of manager of apartment house. West's Ann.Civ.Code, § 2351.

3. Evidence ⇨123(10), 243(4)

In action against owner and manager of apartment house for injuries sustained by tenant when automobile in which janitress of apartment house was sitting moved forward and struck another automobile, causing that vehicle in turn to move forward and push tenant against rear bumper of her own automobile, statement allegedly made by manager seven days after accident did not constitute part of *res gestae*, or constitute an admission against interest of either manager or owner of apartment house, and it was not error to sustain objection to proposed testimony that manager had been overheard stating to resident manager that janitress was employee of apartment and that accident would not have happened if apartment had been properly managed. West's Ann. Civ.Code, § 2351.

4. Appeal and Error ⇨1056(6)

In action against owner and manager of apartment house for injuries sustained by tenant when automobile in which janitress of apartment house was sitting moved forward and struck another automobile, causing that vehicle in turn to move forward and push tenant against rear bumper of her own automobile, photograph taken while plaintiff was lying on street after accident and showing that her legs were broken would have been relevant only on issue of damages, and error, if any, in excluding such photograph from evidence would not require a reversal of judgments for owner and manager of apartment house.

5. Appeal and Error ⇨1056(1)

In action against owner and manager of apartment house for injuries sustained by tenant when automobile in which janitress of apartment house was sitting moved forward and struck another automobile, causing that vehicle in turn to move for-

ward and push tenant against rear bumper of her own automobile, any error in excluding plaintiff's testimony that she had, at time of accident, heard janitress' husband exclaim "Catherine, for God's sake stop that car. You are killing this woman." would not require reversal of judgments for apartment house owner and manager.

Morris Lavine, Los Angeles, for appellant.

Arthur M. Reilly, Los Angeles, for respondents.

PARKER WOOD, Justice.

In this action for damages for personal injuries, judgment upon a verdict was against defendants Catherine and William Aull and was in favor of defendants Kenneth and Russell Pitzer. (The verdict, as to Russell, was directed.) Plaintiff appeals from the portion of the judgment in favor of the Pitzers.

Plaintiff's automobile was parked at the curb on a street in Los Angeles, and plaintiff was standing immediately back of her automobile. A Ford automobile was parked a few feet back of plaintiff's automobile, and a Chevrolet automobile owned by the Aulls was parked a few feet back of the Ford. Catherine Aull was in the front seat of the Aull automobile. That automobile moved forward and struck the Ford, and caused the Ford to move forward and strike plaintiff and push her against the rear bumper of her automobile. Plaintiff was "pinned" between the rear bumper of her automobile and the front bumper of the Ford, and she was severely injured.

On the date of the accident, April 22, 1955, and for approximately five years prior thereto, William and Catherine Aull, husband and wife, were employed as janitors of an apartment house. Kenneth Pitzer, the owner of the apartment house, resided in Berkeley. Russell Pitzer, the manager of the apartment house, resided in Pomona. Pauline Powell was employed

as resident manager of the apartment house. Plaintiff was a tenant there.

Appellant contends that the verdict as to the Pitzers is contrary to law and the evidence. With reference to the verdict in favor of Kenneth Pitzer, appellant argues that Kenneth, as owner of the apartment house, was liable for the acts of his employee, Mrs. Aull, committed in the scope of her employment; that the evidence shows that at the time of the accident Mrs. Aull was on her way to the market to "get some soap powder and other things for the apartment"; and that the jury should have found that she was then acting within the scope of her employment. With reference to Russell Pitzer, appellant contends that the judge erred in directing a verdict in his favor. She argues that Russell, as manager of the apartment house, was also liable for the acts of Mrs. Aull committed within the scope of her employment; and that the question as to whether she was acting within the scope of her employment should have been submitted to the jury.

Appellant (Mrs. Bond) testified that shortly before noon on the day of the accident (Friday), while she was polishing her car in front of the apartment house, Mrs. Aull came out of the apartment house and said: "Mrs. Bond, would you take me down to the garage or some place to get the oil changed in my car; would you show me how to put the brakes on and stop the car, and take me down to Ralph's Market to get some soap powder and something for the building?"; shortly thereafter they entered Mrs. Aull's automobile, and Mrs. Bond drove the automobile to a Chevrolet garage; they returned to a place in front of the apartment house for the purpose of getting a shopping list from Mrs. Bond's mother—a list of articles to be purchased at Ralph's Market; Mrs. Bond parked the Aull automobile "two or three cars" behind her own automobile; she put the brakes on, turned off the ignition, and left the key "in the ignition"; she got

out of the Aull automobile and called to her mother and asked whether the shopping list was ready; her mother said that the list was not ready; Mrs. Aull remained in the automobile; while Mrs. Bond was waiting for her mother to finish the list, she continued polishing her automobile, and she opened the automobile trunk; she heard Mr. Aull ask Mrs. Aull to check "on the gasoline" in the automobile; the next thing she (witness) remembered was that she was hit by the car (Ford) that was behind her.

Mrs. Bond testified further that about ten days before the accident she accompanied Mrs. Aull to Ralph's Market; on that occasion Mrs. Aull purchased 12 cans of Ajax cleaner; Mrs. Aull told Mrs. Bond that she was getting the Ajax cleaner for the apartment; subsequently she observed that Mrs. Aull used Ajax cleaner in cleaning the apartment where Mrs. Bond resided.

Mrs. Meehan, a witness called by plaintiff, testified that about noon on the day of the accident she heard a conversation between Mrs. Bond and Mrs. Aull; Mrs. Aull requested Mrs. Bond to go to the market for some cleaning things for the apartment, and to "stop off" to get the oil changed; Mrs. Bond acquiesced and said that she would get her grocery list from her mother and do that shopping at the same time.

Mrs. Aull testified that on the morning of the accident, while she was walking down the steps in front of the apartment house, Mrs. Bond asked her if she wanted to go for a drive; Mrs. Bond said that she could show Mrs. Aull some "parts about the car [new car of the Aulls]"; she (witness) said that she was on her way to Victor's (a grocery store about one-half block from the apartment house) to get some things to prepare for the Sabbath; Mrs. Bond said, "Oh, come on and let's go"; she (witness) said that she would go over to the Chevrolet place with Mrs. Bond to ascertain how soon the oil should be changed in the automobile; Mrs. Bond drove the automobile of the

Aulls to the Chevrolet place and back to a place in front of the apartment house; Mrs. Bond parked the Aull automobile, and she (witness) and Mrs. Bond got out of the automobile; a few minutes later, Mrs. Aull got back in the automobile to remove the keys; when she got in the automobile, it moved forward and hit the Ford, and the Ford hit Mrs. Bond.

Mrs. Aull testified further that she had never driven an automobile, and she had never tried to drive when she was alone in an automobile; she did not work at the apartment house on Fridays (the accident occurred on Friday); she never bought supplies for the apartment; she did not say anything before the accident "about wanting to go to Ralph's store or any other store to pick up anything for the" apartment house.

Mrs. Powell testified (by deposition) that she was, and for 17 years had been, manager of the apartment house; her duties included the hiring of janitors and the ordering of supplies; she had hired Mr. and Mrs. Aull; Mr. Aull did most of the janitor work, and Mrs. Aull assisted in sweeping and dusting the apartment; Mrs. Aull did not work Fridays; Mrs. Powell bought soap supplies, including Ajax cleaner, from a salesman who called at the apartment house; she had never run out of "any of these supplies" between visits of the salesman; Mrs. Aull never "went" to purchase Ajax cleaner or any other cleaning supplies for the apartment house.

[1] The evidence was sufficient to support the verdict in favor of Kenneth Pitzer (the owner). The jury could find, upon substantial evidence, that Mrs. Aull was not on her way to the market to get soap powder or other things for the apartment house, and that Mrs. Aull was not acting within the scope of her employment at the time of the accident.

[2] The court did not err in directing a verdict in favor of Russell Pitzer, who was the manager of the apartment house. Section 2351 of the Civil Code provides, "A sub-agent, lawfully appointed, repre-

sents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the sub-agent." In *Malloy v. Fong*, 37 Cal.2d 356, at pages 378-379, 232 P.2d 241, at page 254, it was said: "The doctrine of *respondeat superior* is not applicable to the relationship between a supervisor and his subordinate employees. The supervisor occupies an economic and legal position quite different from that of the employer. * * * Section 2351 of the Civil Code * * * has been uniformly interpreted to exempt superior employees from vicarious liability to third persons for the tortious conduct of subordinates."

Appellant contends that the court erred in sustaining an objection of the Pitzers to certain testimony of Mrs. Murray.

Mrs. Murray, called as a witness by plaintiff, testified that she is plaintiff's sister; on April 29, a week after the accident, she (witness) had a conversation with Russell Pitzer in Mrs. Powell's apartment, when Mrs. Russell Pitzer and Mrs. Powell were present; Russell Pitzer told her that he did not feel that there was anything he could do about paying plaintiff's medical expenses and he did not think that there was anything he could be "involved with"; after she left the apartment, and while she was in the hall, she heard a conversation "going on in Mrs. Powell's apartment"; she heard Russell Pitzer's voice.

Then plaintiff's attorney asked Mrs. Murray what Russell Pitzer said in the conversation she heard while she was in the hall. The attorney for the Pitzers objected to the question on the ground that the statement of Russell Pitzer was not material as to Russell Pitzer, and it was irrelevant and hearsay as to Kenneth Pitzer. Plaintiff's attorney then offered to prove that Russell Pitzer said: "If you had been properly managing this apartment this accident would not have happened. I can be held responsible for this accident. Catherine was an employee of the apartment at the time. It has put me in a ter-

rible position." The objection was sustained.

[3] Appellant argues that the statement of Russell Pitzer was an admission by Kenneth Pitzer (the owner), through his agent Russell Pitzer, "to the effect" that Mrs. Aull, the janitress, was on an errand for the owner at the time of the accident and that the owner was liable for damages; that the statement was in the nature of a rebuke for the failure of Mrs. Pitzer to provide sufficient cleaning materials for the apartment house; that the statement was an admission "against interest" by Russell Pitzer, the agent, in the course of his employment; and that the statement was a part of the *res gestae*. The effect of appellant's argument, with respect to the first sentence of the alleged statement, seems to be that the first sentence could be construed to mean that Mrs. Powell had not properly managed the apartment in that she failed to provide enough Ajax cleaner and by reason of such failure Mrs. Aull, the janitress, "was on her way" to the market, at the time of the accident, to get Ajax cleaner for the apartment house. The argument is conjectural. The alleged statement was indefinite. There was no reference therein to cleaning materials or any factual matter which had any connection with the happening of the accident. The portion of the statement to the effect that Russell "could be held responsible" for the accident was an erroneous conclusion of law. The portion of the statement to the effect that Catherine (Mrs. Aull) was an employee was not a statement that she was acting within the scope of her employment when the accident occurred. The portion of the statement that the accident put Russell in a terrible position was not a statement of any fact indicating that he was legally liable for damages. The statement did not constitute an admission "against interest" by either of the Pitzers. As above shown, the alleged statement was made seven days after the accident. It was not a part of the *res gestae*. The court did not err in sustaining the objection to said proposed testimony of Mrs. Murray.

[4] A further contention of appellant is that the court erred in sustaining an objection to appellant's offer to introduce in evidence a photograph of herself, which photograph was taken within a few minutes after the accident and while she was lying on the street. (The photograph showed that plaintiff's legs were broken. The attorney for the Aulls stated [out of the presence of the jury] that the photograph "shows a horrible condition.") The judge, in sustaining the objection, said that he believed there could not be a calm consideration of the evidence if the photograph were received in evidence. It is not necessary to determine this contention regarding the admissibility of the photograph. As above stated, this appeal relates only to the portion of the judgment which was in favor of the Pitzers. Appellant obtained a judgment for damages against the Aulls, and apparently that judgment has become final. The photograph, if received in evidence, would have related to the issue of damages. The photograph did not relate to the question of liability of the Pitzers for the acts of Mrs. Aull. In view of the verdict that there was no liability on the part of the Pitzers, and in view of the above conclusions requiring an affirmance of the judgment as to them, it is not necessary to determine the question (as to the photograph) which relates to the issue of damages.

[5] A further contention of appellant is that the court erred in sustaining an objection to certain testimony of appellant. Appellant testified that at the time she was trapped between the two cars she heard defendant William Aull make an exclamation. When she was asked to state the exclamation, counsel for the Pitzers objected on the ground that it was hearsay as to them. The objection was sustained. That testimony, which was received as to the Aulls, was as follows: "Catherine, for God's sake stop that car. You are killing this woman." The exclamation was not material to the question whether Mrs. Aull was acting within the scope of her employment as an employee of Kenneth Pit-

zer, the owner of the apartment house. The verdict in favor of Kenneth Pitzer included an implied finding that Mrs. Aull was not acting within the scope of her employment. In view of the verdict in favor of the Pitzers and in view of the above conclusions requiring an affirmance of the judgment, it is not necessary to determine the admissibility of the exclamation as to the Pitzers.

The attempted appeal from the verdict is dismissed. The judgment in favor of Kenneth Pitzer and Russell Pitzer is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



163 Cal.App.2d 273

**Leon J. GARRIE, Plaintiff and
Respondent,**

v.

**Frank E. McCAULEY, Administrator of the
Estate of Norma T. McCauley, Deceased,
and J. A. Thompson, Defendants,**

**J. A. Thompson, Appellant.
Civ. 22814.**

District Court of Appeal, Second District,
Division 3, California.

Aug. 29, 1958.

Action by attorney, who had been substituted as attorney of wife in her divorce action at request of her father who was desirous of eliminating his son-in-law from father's business enterprises, against father for attorney fees. The Superior Court, Los Angeles County, George A. Dockweiler, J., entered judgment for attorney, and father appealed. The District Court of Appeal, Vallée, J., held that attorney was not entitled to interest on sum due him prior to judgment, as his claim was unliquidated, and amount due was neither certain, nor

capable of being made certain by calculation.

Judgment modified and affirmed.

1. Attorney and Client ☞166(2, 3)

In action by attorney, who had been substituted as attorney of wife in her divorce action at request of her father who was desirous of eliminating his son-in-law from father's business enterprises, against father for attorney fees, evidence sustained findings that father promised to pay what attorney's services were reasonably worth and that they were reasonably worth \$9,900.

2. Interest ☞39(3)

Where trial court found that client and her father became indebted to attorney for reasonable worth of legal services performed by attorney on their behalf and at their request, attorney was not entitled to interest prior to judgment as his claim was unliquidated, and amount due was neither certain, nor capable of being made certain by calculation. West's Ann.Civ. Code, § 3287.

3. Damages ☞67

Rule that interest in form of damages is not allowed prior to rendition of judgment on unliquidated claim or on amount of demand, which cannot be ascertained either from face of agreement or by reference to well-established market value, applies to claim based on implied contract where amount cannot be determined except by evidence of reasonable value of services rendered. West's Ann.Civ.Code, § 3287.

Irsfeld & Irsfeld and James B. Irsfeld,
Hollywood, for appellant.

Stanley Sapiro, Glendale, and Leon J. Garrie, Los Angeles, in pro. per., for respondent.

VALLÉE, Justice.

Appeal by defendant J. A. Thompson from a judgment in favor of plaintiff for legal services rendered under an oral agreement.

The trial court found that between December 11, 1953 and February 1, 1955 defendant J. A. Thompson and decedent Norma McCauley became indebted to plaintiff in the sum of \$9,900 for legal services performed by plaintiff for and on their behalf and at their special instance and request; the services were reasonably worth \$9,900; \$1,600 has been paid on account of the services, leaving a balance due, owing, and unpaid of \$8,300 by defendants and each of them, together with interest thereon at 7 per cent per annum from February 1, 1955. Judgment followed against defendants J. A. Thompson and Frank E. McCauley as administrator of the estate of Norma T. McCauley, deceased, for \$8,300 with interest. Separate appeals were taken from the judgment by defendants Frank E. McCauley as administrator and J. A. Thompson. The appeal of Frank E. McCauley has been dismissed. The appeal of J. A. Thompson, sometimes called defendant, is before us.

Defendant's main contention is that the evidence does not support the trial court's finding of an implied agreement on his part to pay plaintiff's fees.

Attention is directed at the outset to *Caron v. Andrew*, 133 Cal.App.2d 412, at page 416, 284 P.2d 550, at page 553, in which it is said:

"Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Restatement of the Law of Contracts, sec. 5.

"It is generally held that the existence of an implied contract is usually a question of fact for the trial court. Where evidence is conflicting, or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, a question of fact is presented for decision of the trial court. * * *"

[1] This is a typical conflicting evidence case. Defendant J. A. Thompson was Norma McCauley's father. Frank

and Norma McCauley were husband and wife. Frank had an interest in various business enterprises conducted by his father-in-law, Thompson. Norma sued Frank for a divorce. At defendant's request plaintiff was substituted as attorney for Norma in the divorce action. Defendant was desirous of eliminating Frank from his (defendant's) enterprises. In an effort to accomplish that purpose defendant and various of his enterprises were made parties defendant in the divorce action. After his substitution as attorney for Norma in the divorce action, plaintiff performed numerous services therein. Frank McCauley was eliminated from defendant's enterprises. A reasonable inference from the evidence is that a great part of the services were rendered at the request of and for the benefit of defendant.

"[W]hen services are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a "presumption of law which arises from the proof of services rendered, that the person enjoying the benefit of the same is bound to pay what they are reasonably worth." Mendoza v. Gomes, 143 Cal. App.2d 172, 174, 299 P.2d 707, 709.

The record is voluminous.¹ A detailed statement of the evidence would serve no useful purpose. See Stamler v. Kissinger, 115 Cal.App.2d 171, 174, 251 P.2d 709. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain the findings of fact on which the judgment in favor of plaintiff was reasonably predicated.

[2, 3] The court awarded plaintiff interest on \$8,300 from February 1, 1955 to rendition of the judgment. February 1, 1955 is the date plaintiff's services were terminated. Defendant asserts plaintiff is not entitled to interest. We agree. As a general rule interest in the form of damages is not allowed prior to rendition of judgment on an unliquidated claim or on the amount of a demand which cannot be ascertained either from the face of the agreement or by reference to well established market value.² The rule applies to a claim based on an implied contract where the amount cannot be determined except by evidence of the reasonable value of the services rendered. *Lineman v. Schmid*, 32 Cal.2d 204, 208-212, 195 P.2d 408, 4 A.L.R. 1380; *Swinerton v. Argonaut L. & D. Co.*, 112 Cal. 375, 379, 44 P. 719; 14 Cal. Jur.2d 703, § 78. Plaintiff's recovery is on an unliquidated claim. Plaintiff alleged the reasonable value of the services rendered was \$10,400 and that \$1,600 had been paid. The court found that defendant promised to pay plaintiff what the services were reasonably worth and that they were reasonably worth \$9,900, of which \$1,600 had been paid. And plaintiff testified that the reasonable value of the work performed by him was "a minimum of \$10,500.00." The amount due under the agreement was neither certain, nor capable of being made certain by calculation.

The judgment is modified by striking therefrom the phrase "together with interest thereon at 7% per annum from February 1, 1955." As thus modified, the judgment is affirmed. Plaintiff shall recover his costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.

1. There are 635 pages in the reporter's transcript and 94 exhibits.
2. Civil Code, section 3287: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a par-

ticular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including any political subdivision of the State."

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Joseph CASTALDIA, Defendant and
Appellant.*

Cr. 6134.

District Court of Appeal, Second District,
Division 3, California.

Aug. 22, 1958.

Hearing Granted Oct. 15, 1958.

Defendant was convicted in the Superior Court of Los Angeles County, Joseph M. Maltby, J., for unlawfully accepting a bet on a horse race, and his motion for new trial was denied, and he appealed. The District Court of Appeal, Vallée, J., held that since case had been a close one, misconduct of jurors in giving false answers to questions, put to them on their voir dire, as to whether they would be prejudiced by nature of bookmaking case or by fact that some of events had taken place in a bar, would require reversal of conviction.

Reversed.

1. Gaming $\Rightarrow$ 98(3)

Conviction for unlawfully accepting bet on horse race was sustained by evidence. West's Ann.Pen.Code, § 337a, subd. 6.

2. Criminal Law $\Rightarrow$ 469

Customary manner in which bookmaking is conducted, and significance of terminology employed in bookmaking, are proper subjects of expert testimony; and in prosecution for unlawfully accepting bet on horse race, it was not error to allow officer, qualified as expert on bookmaking matters, to testify as to meaning and significance of words and figures used in conversation between defendant and other unidentified persons.

3. Criminal Law $\Rightarrow$ 435

In prosecution for unlawfully accepting a bet on a horse race, the "scratch sheet," used by expert in explaining book-

making practices and significance of numbers and a name used in conversation between defendant and unidentified persons, was properly received in evidence; not for purpose of establishing truth of what appeared therein but for purpose of establishing that conversation between defendant and unidentified persons had not been without meaning but had been part of system used by bookmakers generally.

4. Criminal Law $\Rightarrow$ 918(3)

Conduct of juror in giving false answers to questions asked of him during selection of jury constitutes misconduct or irregularity on his part sufficient to warrant granting of new trial. West's Ann. Pen.Code, § 1181.

5. Criminal Law $\Rightarrow$ 957(1)

Affidavits may be received as to occurrences during trial which tend to prove existence of prejudice in mind of juror that would prevent him from acting impartially, where state of mind is charged to have been entertained and concealed during his voir dire examination.

6. Criminal Law $\Rightarrow$ 957(1)

An exception to rule, excluding affidavits of jurors to impeach verdict, permits use of jurors' affidavits to show occurrences during deliberations of jury or trial tending to disclose bias of juror or another circumstance existing at time of voir dire examination which if truthfully declared in answer to questions actually put on voir dire, would have been a basis for challenge for cause, but which was concealed by untruthful answers and could not have been detected by party prejudiced before end of trial.

7. Criminal Law $\Rightarrow$ 1186(4)

Where case was a close one, misconduct of jurors in giving false answers to questions, put to them on their voir dire, as to whether they would be prejudiced by nature of bookmaking case or by fact that some of events had taken place in a bar, would require reversal of conviction for unlawfully accepting bet on horse race. West's Ann.Const. art. 6, § 4½.

* Opinion vacated 335 P.2d 104.

Kenneth W. Gale and David A. Fall, San Pedro, for appellant.

Edmund G. Brown, Atty. Gen., and Carl Boronkay, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

In a jury trial defendant was convicted of having unlawfully accepted a bet on January 19, 1957 on a horse race. Pen. Code, § 337a, subd. 6. He appeals from the judgment and the order denying his motion for a new trial. He first contends the evidence is insufficient to sustain the verdict.

In January 1957 Officer Trotsky of the Los Angeles Police Department was conducting an investigation of bookmaking in the harbor area in San Pedro. In the course of his investigation he saw defendant at least twelve times and noted his conduct. On various days defendant was seen frequenting the Bank Café and the Bamboo Café, a few doors away. Defendant would walk back and forth in one bar and then go out to another bar. In the back part of the bars unknown males would walk up to defendant, look at a "scratch sheet," have a conversation with defendant, and hand him currency. On several occasions defendant was seen standing in the doorway of the Bamboo Café. On two occasions unknown males walked up to defendant in the doorway, looked at his "scratch sheet," had a short conversation with him, and handed him currency.

About 3:45 p. m. on January 19, 1957 Officer Trotsky saw defendant enter the Bank Café and stand around the back part of the room by a street entrance for a short while. Two persons approached defendant, looked at a "scratch sheet" or a National Daily Reporter, had a short conversation with him, and handed him some money. About 4 p. m. Officer Trotsky walked from the bar into the men's rest room. Shortly thereafter defendant and a person unknown to the officer went into the rest room and stood by the doorway between the vestibule and the rest

room proper. Officer Trotsky testified: the unidentified person said to defendant, "Make this 7 and 3, and 8 and 4; make it 20 to win on each," and then handed defendant two pieces of currency; the unidentified person said, "No. 5 is Terrang, isn't it?"; defendant replied, "That's right"; defendant had both his hands in front of him and his head was pointing downward, said, "Arrivedechi," and the two men left.

The National Daily Reporter, or "scratch sheet," was a daily publication containing a list of races, the horses that were going to run on the particular day at tracks throughout the United States, and their handicap positions. Horse players in the County of Los Angeles use the "scratch sheet" as a guide, using the number of the race and the handicap position to bet on a particular horse. The terms used by the unidentified person in his conversation with defendant signified a bet on a horse race, the 7 and 3 meaning the seventh race, third horse, and the 8 and 4 meaning the eighth race, fourth horse. The "scratch sheet" for January 19, 1957 showed that the horse scheduled to run that day in the seventh race at Santa Anita occupying the third handicap position was "Terrang."

[1] The foregoing facts, all of which were proved by competent evidence, fully sustain the verdict. *People v. Burch*, 118 Cal.App.2d 122, 123-125, 257 P.2d 44; *People v. Chaney*, 147 Cal.App.2d 740, 741-742, 305 P.2d 955; *People v. Lomento*, 155 Cal.App.2d 740, 318 P.2d 707.

[2] Defendant asserts the court erred in allowing Officer Trotsky to testify to the meaning and significance of the words and figures used in the conversation between defendant and the unidentified person. Officer Trotsky was fully qualified as an expert on bookmaking matters. It is settled that the customary manner in which bookmaking is conducted and the significance of terminology employed in bookmaking are proper subjects of expert testimony. *People v. Newman*, 24 Cal.2d

168, 174-176, 148 P.2d 4; 152 A.L.R. 365; *People v. Race*, 151 Cal.App.2d 678, 684, 312 P.2d 322.

[3] Officer Trotsky used a "scratch sheet" dated January 19, 1957 as a basis for his testimony respecting bookmaking practices in the County of Los Angeles and the significance of the numbers and the name "Terrang" used in the conversation between defendant and the unidentified person. The "scratch sheet" used by the officer was received in evidence over defendant's objection. He asserts error. There was no error. The "scratch sheet," although not found in the possession of defendant, was properly received in evidence not for the purpose of establishing the truth of what appeared therein but for the purpose of establishing that the conversation between defendant and the unidentified person was not without meaning but was part of a system used by bookmakers generally. *People v. Renek*, 105 Cal.App.2d 277, 283-284, 233 P.2d 43.

During the *voir dire* examination of the jury, juror Angela R. Kennedy, in response to questions of defendant's counsel, stated there was nothing in the nature of a bookmaking case to cause her to hesitate to sit as a juror; and if some of the events took place in a bar that would not prejudice her in any manner; she would not suffer herself to be biased against defendant; she would consider the case solely on the evidence; and felt she could keep a free and open mind until all the evidence was in. During the *voir dire* examination juror James Russell stated that the fact the case might involve gambling or that some of the events might have taken place in a barroom would not prejudice him and that he would answer the questions asked Mrs. Kennedy the same way she did.

The verdict was returned on May 22, 1957. In support of his motion for a new trial defendant filed several affidavits. One was by his counsel who had tried the case. This affiant stated that on July 8, 1957 he interviewed Angela R. Kennedy, who was one of the jurors who heard the case and rendered the verdict. Angela R. Kennedy

stated to him that: during her service as a juror in the case she commuted from her home to court and returned by bus; on returning to her home from court she transferred at Sixth and Harbor Boulevard in San Pedro; at the close of the first day of the trial she transferred at that point; after transferring and while waiting for the bus to depart, she had a conversation with the bus driver, named Joe, with whom she had been acquainted for more than ten years; during the conversation with the bus driver she told the driver she was a juror in a bookmaking case, that the defendant was Joseph Castaldia, that the case arose out of bets allegedly made in January 1957 at the Bamboo Hut and Bank Café in San Pedro, that she was going to stop at those establishments sometime and find out what kind of establishments they were, that the driver told her that during the month of January 1957 the police had arrested a number of bookmakers in the area of those cafés; she told the affiant she did not remember the exact number of bookmakers the driver told her had been arrested but she believed it was either 14 or 17; the driver told her there were a great many bookmakers at almost any establishment in the area.

A second affidavit was by Joseph Gualeni. This affiant stated: he was a bus driver; he has been acquainted with Angela R. Kennedy for 15 years; during the month of May 1957 at about 5 p. m. he had a conversation with Mrs. Kennedy in his bus while it was waiting to commence a scheduled run; Mrs. Kennedy asked him if he knew the exact location of the "Bamboo Hut"; he told her he was uncertain as to the exact location but he believed it was located on Sixth Street in San Pedro just west of the Bank Café; Mrs. Kennedy told him the "bookie" involved in the case in which she was sitting as a juror was someone from San Pedro who was picked up in the area; the case involved the "Bamboo Hut" and she was going to take a look at it sometime; near the end of the conversation Mrs. Kennedy stated "that she had no respect for bookmakers and that she wished that they would throw the book at all of them and put

all of them away" and "that the defendant in the case, on which she was then presently sitting, as a juror, didn't have a chance that the jury on which she was then sitting was going to throw the book at him on the following morning"; "on occasions and dates prior to the aforesaid conversation, and at times when the subject of gambling was mentioned in the aforesaid bus or buses, the aforesaid Angela R. Kennedy did, in the presence of affiant, state that she had a dislike for gambling and persons who gambled."

The third affidavit was by Charles W. Ed-
dy, one of the jurors in the case. This affi-
ant stated that: "during the morning that
said case was argued and given to the jury
and while eleven of the jurors were in the
jury room awaiting the arrival of a juror
named Angela Kennedy, who was late, so
that said matter could be resumed; one of
the jurors circulated a certain newspaper
article among the other jurors" (the perti-
nent part of the article is set out in the mar-
gin¹); "That after about the third ballot,
Mr. James Russell, who was the foreman
of said jury, stated that he could explain
about bookmaking to the other jurors. Mr.
Russell stated that he knew a great deal
about things such as bookmaking for he
had in fact lost his house to a bookmaker.
That thereafter the said Mr. Russell spent
approximately fifteen minutes explaining to
the other jurors the use of a scratch sheet,
how bets were made and about various
means of gambling. That during the dis-
cussions and balloting, juror Angela R.
Kennedy, stated that there was not enough
evidence to convict the defendant, but that
she just couldn't turn him loose. Said juror
further stated that she was thoroughly fa-
miliar with the area in which the Bank
Café was situated; that at every shoe shine
stand, cigar stand or news-stand, one could

buy a scratch sheet and place a bet any-
where." Other affidavits of defendant and
his counsel affirmatively showed that both
were ignorant of the facts stated in the
foregoing affidavits until after the rendition
of the verdict.

There was no contradiction of the facts
stated in the affidavits.

Defendant asserts jurors Kennedy and
Russell were guilty of misconduct; that he
was entitled to a new trial because of such
misconduct; and that the court erred in
denying his motion therefor.

Penal Code, section 1181, provides:

"When a verdict has been rendered
or a finding made against the defend-
ant, the court may, upon his applica-
tion, grant a new trial, in the following
cases only: * * *

"2. When the jury has received any
evidence out of court, other than that
resulting from a view of the premises,
or of personal property;

"3. When the jury has * * *
been guilty of any misconduct by which
a fair and due consideration of the case
has been prevented;

"4. When the verdict has been de-
cided * * * by any means other
than a fair expression of opinion on the
part of all the jurors."

[4-6] The conduct of a juror in giving
false answers to questions asked of him dur-
ing selection of the jury constitutes mis-
conduct or irregularity on his part sufficient
to warrant the granting of a new trial.
Sherwin v. Southern Pacific Co., 168 Cal.
722, 726, 145 P. 92; Gackstetter v. Market
Street Ry. Co., 10 Cal.App.2d 713, 723, 52
P.2d 998. Affidavits may be received as to
occurrences during the trial which tend to
prove the existence of prejudice in the mind

1. "The evidence of police officers is often
disregarded.

" * * * * *

"We have it from people who have
served on juries that some jurors take
the position that 'you can't believe any
cop.' And yet that same juror had an-
swered no when asked if he had a preju-

dice against police officers. Otherwise
he would have been rejected from serv-
ing on the case. Any juror who accepts
service on a case involving police testi-
mony who is antagonistic to the police,
is dishonest and a disgrace to the jury
system. He or she deserves to be re-
ported to the judge."

of a juror that would prevent him from acting impartially where the state of mind is charged to have been entertained and concealed during his *voir dire* examination. *People v. Galloway*, 202 Cal. 81, 92, 259 P. 332. An exception to the rule excluding affidavits of jurors to impeach the verdict permits the use of jurors' affidavits to show occurrences during the deliberations of the jury or the trial tending to disclose bias of a juror or another circumstance existing at the time of the *voir dire* examination which if truthfully declared in answer to questions actually put on *voir dire* would have been a basis for challenge for cause, but which was concealed by untruthful answers and could not have been detected by the party prejudiced before the end of the trial. *Shipley v. Permanente Hospital*, 127 Cal.App.2d 417, 421, 274 P.2d 53, 48 A.L.R.2d 964.

People v. Galloway, 202 Cal. 81, at page 92, 259 P. 332, at page 336, says:

"We think the proper rule is this: That under section 1181, subd. 3, it is within the power of the trial court to grant to an accused a new trial because of misconduct of a juror whether such misconduct consists of failure to disclose a prejudicial mind at the time he is sworn or whether such misconduct arises after he is sworn as a member of the trial jury, subject, of course, to the qualification that such misconduct will not be considered sufficient where the accused has failed to exercise diligence in the premises or has knowledge prior to the verdict of such misconduct; nor will it avail an accused when, from a consideration of the whole case, it can be seen that he has suffered no injury therefrom. In other words, a safe rule applicable to the situation would be that the court would not be warranted in setting aside a verdict on account of such misconduct unless from a review of the entire case it can be seen that the accused has not only been diligent but has suffered an injustice by reason of the action of such juror.

"The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution. Upon this proposition all the authorities agree.' [Citations.]

"The holding announced above is in harmony with the declarations of practically all the text-writers. * * *

"[202 Cal. at page 93, 259 P. at page 337.] Then, too, our Constitution, section 7 of article I, provides: 'The right of trial by jury shall be secured to all and remain inviolate.' A defendant is entitled to a speedy public trial by an impartial jury, and we think this right is denied him where there are upon the panel one or more jurors who have actual bias against the prisoner and have concealed or withheld the fact on their *voir dire*. In such case the jury is not *omni majores exceptione*. * * *

"[202 Cal. at page 94, 259 P. at page 337.] 1 Hayne on New Trial and Appeal, page 226, states the rule as follows: 'Sec. 45. If a Juror be Examined as to his Qualifications and He does not Answer Truly, a New Trial will be Granted.—Where the party has examined the jurors concerning their qualifications, and they do not answer truly, it is manifest that he is deprived of his right of challenge for cause, and is deceived into foregoing his right of peremptory challenge.'"

In *Shipley v. Permanente Hospital*, supra, 127 Cal.App.2d 417, 274 P.2d 53, 48 A.L.R.2d 964, it was contended the exception is limited to cases of intentional concealment on *voir dire*. After an exhaustive review of the cases the court stated (127 Cal.App.2d at page 423, 274 P.2d at page 57):

"If the exception is correct in principle there seems no good ground to require proof of intentional (conscious) concealment. The reason for the general rule prohibiting jurors from impeaching the verdict is that 'public policy requires that the sanctity and stability of judicial determinations shall

not be subject to the evidence of jurors who may be tampered with * * *.' [Citation.] The valid ground for the making of exceptions is that another interest is considered to outweigh the danger of tampering and instability. The code itself mentions as exception resort to determination by chance. § 657, subd. 2, Code Civil Procedure. The fact that a juror is disqualified by circumstances which if known would have given rise to a challenge for cause but which, notwithstanding sufficient questioning on *voir dire* intended to reveal the grounds for challenge, were not disclosed by the juror's untrue answers may also be considered to outweigh the ground for the rule. 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution.' [Citations.] The deprivation of this inalienable part of the right to trial by jury without fault of the party prejudiced is independent from the intent of the juror to conceal and the means to show such deprivation should therefore not differ depending on whether the concealment was intentional or not. * * *

"[127 Cal.App.2d at page 424, 274 P.2d at page 57.] Against the whole exception it could be said that where the statute states only one situation in which affidavits of jurors may be used the court cannot add others. However this provision of the statute is contained only in subd. 2 of section 657, Code of Civil Procedure, relating to misconduct of jury, not in subd. 1, relating, among other things, to irregularity in the proceedings of the jury by which a party was prevented from having a fair trial so that the reasoning a *contrario* need not necessarily apply also to such irregularity. [Citation.] The impaneling of a juror who is subject to challenge for cause in consequence of untrue answers which concealed the ground of challenge is certainly such an irregularity."

The court in *People v. Banks*, 39 Cal. App.2d 164, at page 167, 102 P.2d 818, at page 819, stated:

"But the judgment must be reversed for additional reasons. In connection with the proceedings on the motion for a new trial, the record reveals the likelihood or possibility of evidence outside of the record influencing the outcome of the trial, as well as the ruling on the motion for a new trial. For example, the trial judge in passing on the motion for a new trial stated the following, referring to the defendant: 'The Court: * * * I still do not believe him. I am satisfied he is a book-maker; I am satisfied the place that he is hanging around is a bookmaking establishment. In fact, I have seen him in action myself, if that will stop him. Mr. Erbsen (defendant's counsel): Seen him in action? The Court: Yes, down at the Tiffin, and all around there. I have my lunch down there every day.'"

[7] We are of the opinion the conduct of jurors Kennedy and Russell in giving false answers to the questions put to them on their *voir dire* constituted misconduct or irregularity on their part sufficient to warrant a new trial therefor.

The case is a close one. Officer Trotsky was the only witness who testified for the People. At the time he overheard the conversation which he said was between defendant and an unidentified person he was standing at a urinal some 12 feet from the speakers. He had consumed at least five beers that afternoon. He said defendant was wearing a hat. He made no arrest. He did not arrest defendant until January 31, 1957. He did not at any time make any effort to ascertain the identity of the unknown person.

Defendant denied having had the conversation related by Officer Trotsky. He testified: on January 19, 1957 he was employed as a porter at the "Bamboo Hut"; he had been employed there about two years; he owed Johnny Dee some money; on Jan-

uary 19, 1957, a Saturday, he saw him go into the Bank Café; he went into the café to pay him; he talked to him in the outer rest room, the bathroom is inside; it was about 4 p. m.; Johnny Dee was the only person he talked to in the rest room that day. Defendant testified further:

"Q. [by counsel for defendant] What did you say to him? A. I said, 'Johnny,' here is \$20.00 that I owe you.—on some money that I owed him.

"Q. How much money? A. I had the balance of \$73.00.

"Q. Did you mention \$73.00 at the time? A. Yes.

"Q. Did he say anything to you? A. Yes. He said, 'How do we stand?'

"Q. Did you have any conversation with him in regard to how you stood? A. I said, 'I gave you \$8, \$4 and \$20.00.'

"Q. What balance did you owe then? A. \$53.00.

"Q. Did you state the balance owed then? A. Yes.

"Q. Had you previously borrowed money from him? A. It was before the holidays.

"Q. Are you referring to the Christmas holidays? A. Yes.

"Q. You previously paid him \$8 and \$4? A. Yes.

"Q. That day you paid an additional \$20? A. Yes.

"Q. How much did you borrow? A. \$84.

"Q. You paid him \$20.00 and \$8.00 and \$4.00? A. Yes.

"Q. At the time you had this conversation, as I understand, it was in the outer restroom? A. Yes.

"Q. Did you ever actually enter the restroom itself? A. No, sir.

"Q. Was there someone in the restroom? A. Yes.

"Q. What vicinity of the restroom was it in? A. At the urinals. * * *

"Q. How long were you actually in there? A. About a minute and a half.

"Q. Did you leave before Mr. Dee? A. Yes.

"Q. When you left, was there anything said to you by anyone? A. I think he said, 'So long' to me in Italian.

"Q. Can you repeat the words? A. 'Arrividecci,' and something similar to it.

"Q. Is that a term he used or you used? A. No, I never use it. * * *

"Q. What were you wearing on that day? A. I was wearing a trench coat.

"Q. Were you wearing a hat? A. No, sir. * * *

"Q. You handed him some currency? A. Yes.

"Q. What currency did you hand him? A. Four \$5.00 bills.

"Q. Did he hand you any currency? A. No, sir. * * *

"Q. During that conversation, was there anything said respecting the word 'Terrang'? A. No, sir.

"Q. It was never used? A. No.

"Q. Did anybody ever ask you what their number something was? A. No.

"Q. And that money returned to him was solely for the payment of a loan? A. Yes.

"Q. Nothing was said about horse racing in any manner? A. No.

"Q. Nothing that referred to horse racing in any manner? A. No."

John Devlahovich, called in the record Johnny Dee, testified he resides in San Pedro; his business is wholesale ship supplies; the name of his business is "Dee's Ship Supplies"; he had a conversation with defendant about 4 p. m. on a Saturday in the middle of January 1957 in the vestibule before entering the men's restroom in the Bank Café. The witness testified further:

"Q. [by counsel for defendant] You went right into the vestibule then? A. Yes, I went to use the men's room.

"Q. Did you use the men's room? A. No.

"Q. Did you use it? A. No.

"Q. Was anybody in there? A. There was a person there, seemed like he was bending over the urinal. The odor was bad. I walked out and coming out I met Mr. Joe Castaldia.

"Q. You walked out? A. Never entered the restroom.

"Q. You had a conversation in the vestibule of the restroom? A. Yes.

"Q. Would that be in the outer restroom? A. Yes.

"Q. Do you recall the first thing he said to you? A. He said, 'Hello, Johnny.'

"Q. Anything after that? A. He said, 'I want to give you some money I owe you.'

"Q. Did he give you some money? A. He gave me \$20.00 and says, 'This \$20.00 of the \$73.00 I owe you.'

"Q. What denominations did he give you? A. Four \$5.00 bills.

"Q. Continue. A. I said, 'How do we stand?'

"Q. What did he reply? A. 'I will give you \$8, \$4, and \$20, which leaves a balance of \$53.00.'

"Q. How much did he borrow before? A. \$85.00.

"Q. When did he borrow it? A. Before Christmas, I don't remember the particular day.

"Q. Was that the sum and substance of that conversation? A. That is it.

"Q. Did you leave right after that? A. Yes.

"Q. Prior to the time you left did you say anything to him when he left? A. Yes.

"Q. What did you say? A. 'Arrivedeci.' * * *

"Q. Was there anything said about the word 'Terrang'? A. No.

"Q. Anybody ever say what number is it? A. I did not hear a thing.

"Q. Your entire conversation was regarding the money you had loaned him? A. Yes.

"Q. And what he had paid back? A. That's right.

"Q. And you left the restroom because of the smell? A. Yes, went out and used the porthole restroom. It is much cleaner."

In rebuttal Officer Trotsky testified "Mr. Dee" was not the man he saw with defendant on January 19, 1957, although he only got a glimpse of the person who talked to defendant.

On consideration of the entire record we cannot say that in the absence of the misconduct complained of a different verdict would have been improbable. Consequently, the misconduct constitutes a miscarriage of justice within the meaning of the constitutional provision. Const. Art. VI, § 4½; *People v. Newson*, 37 Cal.2d 34, 45-46, 230 P.2d 618.

Other errors claimed by defendant are not likely to occur on a new trial and need not be considered.

The judgment and the order denying a new trial are reversed.

SHINN, P. J., and WOOD, J., concur.



162 Cal.App.2d 740

Alma H. JAMES, Plaintiff and Respondent,

v.

Esther O. PAWSEY, Executrix of the Will of Laura D. Hollenbeck, Deceased, Esther O. Pawsey, Individually, Defendant and Appellant.

Civ. 17987.

District Court of Appeal, First District, Division 2, California.

Aug. 13, 1958.

Action by third party donee beneficiary of agreement to make mutual wills, to give effect to such agreement by impressing trust upon and quieting title to certain prop-

erty. The Superior Court, Contra Costa County, Harold Jacoby, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that where agreement to make mutual wills, signed by husband, wife, and third party in 1922, whereby all property of parties was pooled, effected an implied gift by husband to wife of community property, wife was essential party to agreement, and after her death, in 1949, and devise of her property in accordance with agreement, other parties thereto, who accepted benefits of wife's will, could not rescind agreement and thus cut off plaintiff's rights.

Affirmed.

1. Contracts ⚖️253

Parties to contract entered into for benefit of third persons may rescind or abrogate it without assent of such third persons at any time before contract is accepted, adopted, or acted upon by such third persons. West's Ann.Civ.Code, § 1559.

2. Contracts ⚖️253

Acceptance of contract by third-party donee beneficiary so as to preclude rescission without consent of beneficiary, in absence of reservation of right to rescind, will be presumed, where beneficiary is an infant at the time of making of contract. West's Ann.Civ.Code, § 1559.

3. Wills ⚖️67

Agreement to make mutual wills may be enforced at law or in equity by beneficiary.

4. Wills ⚖️64

Agreement to make mutual wills, under which all parties gave up rights and incurred obligations from moment agreement was executed, was binding and irrevocable as to third-party beneficiary, and enforceable by her.

5. Husband and Wife ⚖️267(2)

Even where, under law in effect, wife had no title to community property nor estate or interest therein, she had rights in relation thereto, the surrender of which

might constitute valuable and adequate consideration for transfer.

6. Husband and Wife ⚖️266

Husband and wife can enter into agreement concerning community property rights, and separate property of each may be converted into community property and community property of both may likewise be converted into separate property of both or either.

7. Husband and Wife ⚖️266

Agreement between spouses to change character of property from community to separate need not be executed with any particular formality.

8. Husband and Wife ⚖️266

Agreement between spouses to change character of property from community to separate may be express or implied, and change in status of property may be shown by nature of transaction or appear from surrounding circumstances.

9. Husband and Wife ⚖️266

Agreement to make mutual wills, signed by husband, wife and third party, whereby all property of parties was pooled, effected an implied gift by husband to wife of community property.

10. Wills ⚖️64

Where agreement to make mutual wills, signed by husband, wife and third party in 1922, whereby all property of parties was pooled, effected an implied gift by husband to wife of community property, wife was essential party to agreement, and after her death in 1949, and devise of her property in accordance with the agreement, the other parties to agreement, who accepted benefits of wife's will, could not rescind agreement so as to cut off rights of beneficiary thereof.

11. Action ⚖️63

Existence of laches is question of fact for trial court.

12. Wills ⚖️67

In action by third-party donee beneficiary of agreement to make mutual wills, to give effect to such agreement by impressing trust upon and quieting title to prop-

erty, evidence sustained finding that plaintiff, who knew of purported rescission of agreement four years before bringing action, but who had been advised by her attorney that purported rescission had no effect on her interest, was not guilty of laches.

13. Estoppel — 119

Existence of estoppel is question of fact to be determined by trial court.

14. Estoppel — 118

In action by third-party donee beneficiary of agreement to make mutual will, to give effect to such agreement by impressing trust upon and quieting title to property, evidence sustained finding that plaintiff did not act so inconsistently with respect to property as to estop her from denying validity of defendant's claim of rescission.

Bray, Baldwin & Ogden, Martinez, for appellant.

Louis J. McKannay, A. J. Engleking, Concord, for respondent.

KAUFMAN, Presiding Justice.

Defendant appeals from a judgment in favor of the plaintiff, in an action to impress a trust and quiet title to Lots 6, 11, and 12 of Block 5 in the City of Martinez. Plaintiff is the third party donee beneficiary of an agreement made in 1922 by plaintiff's parents and plaintiff's aunt on her mother's side, Laura D. Hollenbeck. The defendant, Esther C. Pawsey is another sister of Laura D. Hollenbeck. Defendant claims Lots 6, 11, and 12 as the residuary devisee of the Will of Laura D. Hollenbeck, and asserts the defenses of rescission, laches, and estoppel to the enforcement of the 1922 agreement.

A detailed exposition of the facts is necessary to understand the issues involved in this family controversy. In 1913, Henry M. Hollenbeck conveyed Lots 4, 5, 6, 11 and 12, and the West half of Lot 13 in Block 5 in the City of Martinez, to his daughter Laura. Plaintiff's parents, Char-

lotte Hollenbeck Lytton and R. V. Lytton were married in 1914. In 1915, R. V. Lytton and Charlotte Lytton moved into the old Hollenbeck family home located on Lot 6, where they lived for 36 years. During the next few years, R. V. Lytton and Charlotte Lytton bought the remaining adjoining parcels of property not owned by Laura Hollenbeck, Lots 7, 8, and 9 of Block 5. R. V. Lytton installed electrical wiring and made many other improvements on the old family home property. In 1920 Laura Hollenbeck moved into the old family home with the Lyttons.

On August 7, 1922, R. V. Lytton, Charlotte Lytton and Laura D. Hollenbeck executed in triplicate an agreement which was drafted by Mr. Wight, the family attorney. The agreement stated that as all the parties desired to provide for the care and support of Mrs. C. J. Hollenbeck and the care, support and education of Alma H. Lytton, all of their property, both real and personal that parties possessed at the time of the agreement or would acquire in the future, was to be held jointly, share and share alike. The agreement further provided that in the event of the death of one of the parties, the property would become the property of the survivors, and that the final survivor was to transfer or devise all of the property to Alma H. Lytton. The agreement stated that all parties would execute all devises and deeds necessary for the execution of the agreement. The agreement also contained a recital of consideration, and was signed and sealed by all of the parties.

At the same time, the parties executed mutual wills pursuant to the agreement. The agreement was not recorded until 1950. In August 1922, R. V. Lytton and Charlotte Lytton had an agreement to purchase Lots 2, 3, and the East half of Lot 13. They acquired these properties on September 14, 1922. On September 1, 1923, they acquired Lot 1. For the next 27 years the parties lived together pursuant to the agreement. The earnings and income of R. V. Lytton and Laura D. Hollenbeck were turned over to Charlotte Lytton who man-

aged the finances for the entire family. Charlotte Lytton collected the rents on all the properties and paid all taxes due. R. V. Lytton built a second house on Lot 6; he also built and paid for a house on Lot 11. For some time after her marriage in 1939, plaintiff lived in the house on Lot 11. Except for short absences on home nursing jobs and vacations to visit another sister in Los Angeles, Laura D. Hollenbeck continually lived with the Lyttons.

Charlotte Lytton died on July 31, 1949. Her property was distributed in accordance with her will made pursuant to the 1922 agreement. R. V. Lytton and Laura D. Hollenbeck each received an undivided one-half interest in Lots 1, 2, 3, 7, 8, 9, and the East half of Lot 13. R. V. Lytton went to live with the plaintiff in the house on Lot 11. After the death of her mother, plaintiff collected the rents and paid the expenses on the various parcels of property owned by her father and her aunt. Certain street work that had to be done for Lots 2, 3, 4, 5, 6, 7 and 8 at this time, was paid for out of the "general fund" and \$1,000 borrowed by R. V. Lytton.

Some time in 1951 R. V. Lytton and Laura D. Hollenbeck decided to separate their properties. On January 4, 1952, Mr. Wight, who was R. V. Lytton's attorney, wrote to Mr. Fraga, who was Laura D. Hollenbeck's attorney, as follows: (in part)

"Of course from a legal standpoint the agreement must be given full consideration. The three parties, in good faith, entered into the agreement, and in accordance therewith, and as provided therein, made their wills accordingly, and as we know, proceeded in the carrying out of the agreement. One of the parties to the agreement is deceased, and her will made out in accordance with said agreement was probated and distribution made accordingly, which was in accordance with both the will and the agreement. By reason thereof there is a vested interest in the beneficiaries thereunder, which, in my opinion will need to be fully considered

in any attempt at cancellation of the agreement. I am sure that the two Lytton daughters, who are the beneficiaries, will cooperate in any just plan in the matter."

On February 21, 1952, R. V. Lytton and Laura D. Hollenbeck entered into an agreement to rescind the agreement of 1922 and separate their respective interests in all property. Under the 1952 agreement, each party agreed to waive all rights and claims in the property of the other, arising out of the agreement of 1922, and each agreed to quit claim to the other all of his interest in the property of the other. Accordingly, R. V. Lytton quit claimed all of his interest in Lots 4, 5, 6, 11, 12 and the West half of Lot 13 to Laura Hollenbeck; Laura Hollenbeck quit claimed to R. V. Lytton all of her interest in Lots 1, 2, 3, 7, 8, 9, and the East half of Lot 13.

Plaintiff ceased collecting rents and managing the properties, after she found out in 1952, that her father and aunt were planning to separate their properties. Plaintiff sought independent advice as to the effect of the 1952 agreement and was advised that this agreement in no way affected her rights.

After the 1952 agreement, Laura D. Hollenbeck resumed the management of her properties until her illness. The defendant then took over the management of these properties and also cared for Laura and paid the expenses of her last illness and burial.

Laura D. Hollenbeck died on July 17, 1955. Her will, executed on January 29, 1952 (almost one month before the agreement with R. V. Lytton) was admitted to probate. This will revoked all prior wills, named the defendant as executrix, left one (\$1.00) dollar to the plaintiff, one (\$1.00) dollar to the plaintiff's sister, Ina Lytton, and the residue of the property to the defendant.

On November 17, 1955, defendant filed an inventory and appraisal of the Estate of Laura D. Hollenbeck, listing Lots 6, 11, 12 as the sole assets of the estate. Lots 4 and 5 and the West half of Lot 13

had been sold by Laura Hollenbeck to one Johnson in June 1955. Plaintiff filed her complaint seeking declaratory relief, a declaration of trust, and quiet title, in this action on December 20, 1955. R. V. Lytton and Ina Lytton were also named as defendants. On their failure to answer, a default was entered on the first day of trial. During the trial it was ascertained that there was additional personal property in the Estate of Laura D. Hollenbeck. The court made findings of fact and the following conclusions of law:

"1. That the Agreement of 1922 entered into by and between R. V. Lytton, Charlotte J. Lytton, his wife, and Laura D. Hollenbeck was, and is, a valid and binding agreement between said parties.

"2. That by virtue of the actions of the said R. V. Lytton, Charlotte J. Lytton, his wife, and Laura D. Hollenbeck and by virtue of the decree of distribution in the Estate of Charlotte J. Lytton, the survivors R. V. Lytton and Laura D. Hollenbeck became, were, and are, estopped from making any other or different disposition of their property other than as in said agreement of 1922 provided.

"3. That the agreement between R. V. Lytton and Laura D. Hollenbeck, dated February 21, 1952, had no effect on the rights of plaintiff, Alma H. James, formerly Alma H. Lytton, in or to the property of the said Laura D. Hollenbeck.

"4. That during her lifetime the decedent, Laura D. Hollenbeck, held and owned her real property in trust for Alma H. James, subject only to the right of said decedent to maintain and support herself therefrom.

"5. That the said parcels of real property, to-wit: Lots 6, 11 and 12, all in Block 5, as shown on the original survey of the Town of Martinez, are not property of the estate of the said Laura D. Hollenbeck, and the said Esther O. Pawsey, individually, and

Esther O. Pawsey as Executrix of the Estate of Laura D. Hollenbeck, and all other persons claiming under her and all heirs at law of the said Laura D. Hollenbeck, deceased, be, and they are hereby, restrained and enjoined from claiming or asserting any right, title, or interest in or to said real property, except as to the lien of Esther O. Pawsey, individually, as hereinafter set forth.

"6. That plaintiff, Alma H. James, is entitled to have judgment entered in her favor and against Esther O. Pawsey, individually, and Esther O. Pawsey as Executrix of the Estate of Laura D. Hollenbeck, and R. V. Lytton and Ina Lytton, and that she, the said plaintiff, is the owner of Lots 6, 11 and 12, all in Block 5, as the same are laid out and delineated on the map of the original survey of the Town of Martinez, as recorded in the office of the County Recorder of the County of Contra Costa, State of California, free and clear of any and all claim of right, title or interest of Esther O. Pawsey, individually, Esther O. Pawsey as Executrix of the Estate of Laura D. Hollenbeck, and all heirs, legatees, devisees, creditors, and any and all other persons having any claim against, or interest in, the Estate of the said Laura D. Hollenbeck, deceased. That Esther O. Pawsey, individually, be, and she is hereby granted a lien, against said parcels of real property, in the sum of \$600.00, for taxes, assessments, repairs and maintenance paid by the said Esther O. Pawsey for the benefit of the said real property.

"7. That plaintiff have and recover her costs of suit herein against said defendants. Judgment is hereby ordered to be entered accordingly."

Defendant, on appeal, contends that the trial court erred as:

(1) The agreement of August 7, 1922, was not an inter-vivos transfer and conveyance, but merely an agreement to make

mutual wills, which could be revoked prior to the third party beneficiary's reliance thereon.

(2) The rescission of February 21, 1952, was effective as Charlotte Lytton had only a mere expectancy dependent on her survivorship in the community property which was the subject of the 1922 agreement, and therefore could not devise anything to her husband and her sister.

(3) Plaintiff is guilty of laches as she has had actual and constructive knowledge of defendant's claim for four years before the filing of this action.

(4) Plaintiff is estopped from denying the validity of defendant's claim because of plaintiff's inconsistent action with respect to Lots 1, 2, 3, 7, 8, 9, and the East one-half of Lot 13.

[1-4] Both parties agree that the agreement of 1922, is a valid third party beneficiary agreement. Defendant, relying on a Civil Code, section 1559, argues that the agreement was rescinded before reliance thereon by the plaintiff. The parties to a contract entered into for the benefit of third persons may rescind or abrogate it without the assent of such third persons at any time before the contract is accepted, adopted, or acted upon by such third persons. *Riley v. Riley*, 118 Cal.App. 2d 11, 256 P.2d 1056; 17 C.J.S. Contracts § 50, p. 398; Restatement of Contracts, § 142, p. 168. Acceptance by a third party donee beneficiary so as to preclude rescission without the consent of the beneficiary, in the absence of a reservation of a right to rescind, will be presumed, where the beneficiary, like the plaintiff here, is an infant at the time of the making of the contract. *Rhodes v. Rhodes*, Ky., 266 S. W.2d 790, 44 A.L.R.2d 1266; *Waterman v. Morgan*, 114 Ind. 237, 16 N.E. 590. The agreement in question was an agreement to make mutual wills. It is well settled in this state that such agreements may be enforced at law or in equity by the beneficiary. In *Brown v. Superior Court*, 34 Cal.2d 559, at pages 564 and 565, 212 P.2d 878, at page 881, the court said:

"The contracting party who survives becomes estopped from making any other or different disposition of the property, and his obligations under the agreement become absolutely irrevocable and enforceable against him, at least where he avails himself of the provisions of decedent's will in his favor and accepts substantial benefits thereunder. *Notten v. Mensing*, 3 Cal.2d 469, 473, 45 P.2d 198; *Sonnicksen v. Sonnickson*, 45 Cal.App.2d 46, 52-55, 113 P.2d 495; see *Rolls v. Allen*, 204 Cal. 604, 609, 269 P. 450.

* * *

"In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. (Citations) Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed. The rights of the parties depend upon the contract, and the revocation of the will or other breach of the contract does not prevent the intended devisee or legatee from enforcing the contractual obligations. (Citations) As pointed out in *Re Estate of Rolls*, 193 Cal. 594, 601-602, 226 P. 608, while a will is revocable under section 23 of the Probate Code and the parties contract with knowledge of this fact, the obligation to make the agreed disposition may still be enforced."

The agreement in controversy here differs from the usual mutual will agreement, only in that there are three contracting parties instead of the usual number of two. There is the further difference that in the case of the usual mutual will contract there is no consideration until one party dies and disposes of his property in accordance with the agreement. Here, all of the parties gave up rights and incurred obligations from the moment the agree-

ment was executed. For 27 years, R. V. Lytton, Charlotte Lytton, and Laura Hollenbeck pooled all of their property, real and personal.

[5] Defendant's second contention is that Charlotte Lytton was not a necessary party to the 1922 agreement, as she had only a mere expectancy in the community property. It is not disputed that all of the property owned by R. V. Lytton and Charlotte Lytton at the time of the agreement was community property, or that before 1923, a wife had no testamentary power to dispose of her half of the community property. However, as pointed out in *Re Estate of Brix*, 181 Cal. 667, at page 676, 186 P. 135, at page 138:

"While the wife has no title to the community property nor estate or interest therein, yet she has rights in relation thereto, the surrender of which may constitute a valuable and, according to the circumstances of the case, an adequate consideration for the transfer. She has a 'possible interest in whatever remains upon the dissolution of the community otherwise than by her own death.' In re [Estate of] Burdick, 112 Cal. [387] 393, 44 P. [734] 735."

[6] Furthermore, it has long been the law in this state that a husband and wife can enter into an agreement concerning their community property rights. The separate property of each may be converted into community property and the community property of both may likewise be converted into the separate property of both or either. *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003. In *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 712, at pages 719 and 720, 103 P. 190, at page 193, the court said:

"Under our law there can be no doubt that a husband and wife may enter into a contract with respect to their property whereby one may release to the other all interest, both present and in expectancy. (Citations) In the case last cited [*Kaltschmidt v. Weber*, 145 Cal. 596, 79 P.

272] the following language is used: 'There can be no doubt that the husband may make a gift of the community property to the wife, and that the effect of such gift will be to transmute it into her separate estate. * * *'"

[7-10] An agreement between spouses to change the character of property from community to separate need not be executed with any particular formality. *Woods v. Security-First Nat. Bank*, 46 Cal.2d 697, 299 P.2d 657; *Nevins v. Nevins*, 129 Cal.App.2d 150, 276 P.2d 655. Such an agreement may be express or implied. *Long v. Long*, 88 Cal.App.2d 544, 199 P.2d 47. The change in the status of the property may be shown by the nature of the transaction or appear from the surrounding circumstances. *Title Insurance & Trust Co. v. Ingersoll*, 153 Cal. 1, 94 P. 94. The purpose of the 1922 agreement is clearly stated to pool all property of the parties "for the mutual advantage of the parties" and "whereas all of the parties desire to provide for the care and support of Mrs. C. J. Hollenbeck during her lifetime and for the care, education and support of Alma H. Lytton." We think that the only sensible construction of the 1922 agreement is an implied gift by R. V. Lytton of community property to Charlotte Lytton. It follows therefore that Charlotte Lytton was an essential party to the 1922 agreement, and we cannot agree therefore with the defendant's argument that on the death of Charlotte Lytton all of the community property passed to R. V. Lytton and that he made a gift of one-half thereof to Laura D. Hollenbeck. On the death of Charlotte Lytton her property was devised in accordance with the 1922 agreement. R. V. Lytton and Laura D. Hollenbeck accepted the benefits of the will of Charlotte Lytton. It follows that the 1952 agreement was effective only against the parties thereto and had no effect on the plaintiff's interest.

There remains for consideration only defendant's remaining contentions of laches and estoppel.

Plaintiff alleged in her complaint that she did not know of the 1922 agreement until after the death of her aunt, Laura Hollenbeck, in 1955. At the trial, plaintiff testified she had never seen the agreement, but that her mother had told her about it when she was about 12 or 13, and told her the property would go to plaintiff and plaintiff's sister. C. V. Lytton and Mr. Wight, testified that the plaintiff did not know about the 1922 agreement until the death of Laura Hollenbeck.

[11,12] In her deposition, plaintiff admitted knowledge of the 1952 agreement in 1952, at the time she sought the advice of her attorney. There is uncontroverted evidence, however, that plaintiff had been advised by her attorney that the 1952 agreement had no effect on her interest. Plaintiff testified that she understood that the rescission was only between her father and her aunt, and had no effect on her or her sister. The existence of laches is a question of fact for the trial court. *Austin v. Hallmark Oil Co.*, 21 Cal.2d 718, 134 P.2d 777. We think the trial court's conclusion on this issue finds support in the evidence.

Defendant's final contention is that certain inconsistent actions taken by the plaintiff estop her from denying the validity of the defendant's claim. The evidence on this issue is as follows:

[13,14] On February 27, 1952, R. V. Lytton by grant deed conveyed Lots 1, 2, 3, 7, 8, 9, and the West portion of Lot 13 to the plaintiff and her sister, Ina, reserving to himself a life estate. On August 7, 1953, plaintiff joined her father and sister in two deeds: one conveying Lots 2 and 3 and the East half of Lot 13 to her, subject to a life estate in R. V. Lytton, and the second granting Lots 1, 7, 8, and 9 to Ina Lytton, subject to a life estate in R. V. Lytton. The property, which is the subject of this controversy, are Lots 6, 11, and 12. There is also evidence that in 1952, plaintiff had the insurance changed so that her aunt Laura Hollenbeck would be responsible for the premiums. The existence of estoppel is also a question of

fact to be determined by the trial court. *General Motors Acceptance Corp. v. Gandy*, 200 Cal. 284, 253 P. 137. We think the trial court correctly declined to apply the harsh doctrine of estoppel here. A fair correct and equitable result on all issues was reached.

In view of the foregoing the judgment is hereby affirmed.

DOOLING and DRAPER, JJ., concur.



162 Cal.App.2d 717

Michael D. JEFFERS, Plaintiff and
Appellant,
v.

SCREEN EXTRAS GUILD, INC., Leo Abbey, Claire Andre, George Barton, Louise Bates, Chris Willow Bird, Willie Bloom, Spencer Chan, Ben Corbett, Harry "Doc" Evans, Franklyn Farnum, Art Flavin, Bess Flowers, Richard H. "Dick" Gordon, Victor Groves, Don House, Kenner G. Kemp, Louise Lane, Rita Leonard, Anna Mabry, Thomas A. Martin, Buddy C. Mason, Tina Menard, William H. O'Brien, William J. O'Brien, Beulah Parkington, Rose Plumer, Snub Pollard, Bobby Priest, Edd X. Russell, Jeffrey Sayre, George Sowards, Larry Steers, Florence E. Wix, Buck Harriis, H. O'Neill Shanks, Robert W. Gilbert, Defendants.

Screen Extras Guild, Inc., H. O'Neill Shanks
and Buck Harriis, Respondents.
Civ. 21698.

District Court of Appeal, Second District,
Division 1, California.

Aug. 12, 1958.

Rehearing Denied Sept. 8, 1958.

Hearing Denied Oct. 10, 1958.

Action for alleged libelous statements contained in guild's news letter. The Superior Court of Los Angeles, Harold W. Schweitzer, J., rendered judgment for defendants, and plaintiff appealed. The Dis-

strict Court of Appeal, Lillie, J., held that evidence sustained finding that alleged defamatory article was substantially true, was of a privileged nature and was published without malice.

Affirmed.

1. Libel and Slander ◌19

An alleged libelous publication must be considered as a whole and not divided into segments, it must be construed from expressions used as well as from whole scope and apparent object of writer and its language must be given the natural and popular construction of average reader, not the critical analysis of mind trained in technicalities. West's Ann.Civ.Code, § 45.

2. Appeal and Error ◌171(1)

Where case proceeded in trial court on theory that it was action sounding in libel per se, rather than in libel per quod, review of decision would proceed on same theory. West's Ann.Civ.Code, § 45.

3. Libel and Slander ◌19

In action which proceeded on theory that it was action sounding in libel per se, it was proper for trial court to consider specific meaning of alleged libelous article from language used, apart from any innuendo or inducement. West's Ann.Civ.Code, § 45.

4. Libel and Slander ◌123(1)

Question whether publication is libelous per se is a question of law. West's Ann.Civ.Code, § 45.

5. Libel and Slander ◌101(5)

It is not necessary for defendant in libel action to prove literal truth of allegedly libelous accusation in every detail, so long as imputation is substantially true so as to justify the gist or sting of the remark. West's Ann.Civ.Code, § 45.

6. Libel and Slander ◌101(5)

Where guild's newsletter stated that former official of another union had as his ally an unnamed publication described as the slimiest, dirtiest, most despised scandal

sheet, and as a disreputable, lying, black-guard, yellow rag, statements used terms of general abuse of cumulative nature and, even if meant to be applied to former union official, persons responsible for publication of newsletter were not required to justify each and every word of alleged defamatory matter. West's Ann.Civ.Code, § 45.

7. Libel and Slander ◌112(1)

In libel action arising from alleged defamatory statements made in guild's newsletter, evidence established that alleged libel was published as part of a labor controversy. West's Ann.Civ.Code, § 45.

8. Libel and Slander ◌45(1)

Statements which are made without malice, wholly within ranks of labor union and during a dispute between contending factions over union policies and administration, and which are pertinent thereto, are privileged. West's Ann.Civ.Code, §§ 45, 47, subd. 3.

9. Libel and Slander ◌45(1)

A labor union is an association of persons in a common interest and since labor disputes normally involve considerable differences of opinion and vehement adherence to one side or the other, a necessarily broad area of discussion without civil responsibility in damages is an indispensable concomitant of controversy. West's Ann.Civ.Code, §§ 45, 47, subd. 3.

10. Libel and Slander ◌123(8)

In action for alleged libelous statements made in guild's newsletter, question whether peculiar circumstances disclosed a privileged occasion was mixed question of law and fact to be determined by judge hearing case without jury. West's Ann.Civ.Code, §§ 45, 47, subd. 3.

11. Libel and Slander ◌112(1, 2)

In action for alleged libelous statements made in guild's newsletter during labor controversy, evidence sustained finding that a privileged occasion existed and that defendants' privilege had not been lost or destroyed by the existence of malice. West's Ann.Civ.Code, §§ 45, 47, subd. 3.

12. Appeal and Error ⇨882(16)

In action for alleged libelous statements contained in guild's newsletter, even though an inordinate amount of attention was given to subject of infiltration of Communism in Hollywood and motion picture industry, in view of fact that plaintiff as well as defendants willingly entered into the matter, reversal was not required. West's Ann.Civ.Code, § 45.

13. Trial ⇨18

In action for alleged libelous statements made in guild's newsletter, plaintiff was entitled to opportunities to present his own case and to refute that of his adversaries but was not entitled to more than that. West's Ann.Civ.Code, § 45.

14. Appeal and Error ⇨931(1)

An appellate tribunal must accept as true all evidence and inferences tending to support findings, resolving all conflicts in favor of trial court's determination.

15. Appeal and Error ⇨1010(1)

Where there is substantial evidence to support findings of trial court, a reviewing court possesses no authority to substitute its judgment for that of court which heard the evidence and had opportunity of observing the demeanor of the witnesses.

16. Libel and Slander ⇨112(3)

In action for alleged libelous statements made in guild's newsletter during labor controversy, evidence sustained finding that alleged defamatory article was substantially true. West's Ann.Civ.Code, § 45.

17. Libel and Slander ⇨54

Truth furnished a complete defense to action for alleged defamatory article published in guild's newsletter during labor controversy. West's Ann.Civ.Code, §§ 45, 47, subd. 3.

18. Libel and Slander ⇨45(1)

Qualified privilege furnished a complete defense to action for alleged defamatory article published during labor controversy in guild's newsletter concerning former official of another union, where article was derived from seemingly reliable

sources and there was no malice. West's Ann.Civ.Code, §§ 45, 47, subd. 3.

Perry Bertram, Los Angeles, for appellant.

Gilbert, Nissen & Irvin, Los Angeles, for respondents.

LILLIE, Justice.

The libel action now under consideration was commenced on May 18, 1950, and has now been the subject of three trials and four appeals. See *Jeffers v. Screen Extras Guild, Inc.*, 1951, 107 Cal.App.2d 253, 237 P.2d 51; *Id.*, 1955, 134 Cal.App.2d 622, 286 P.2d 30, and *Id.*, 1956, 140 Cal.App.2d 604, 295 P.2d 417. Plaintiff now appeals from a judgment on the merits in favor of the defendants.

On August 9, 1950, a general demurrer was sustained to the amended complaint which had failed to allege any special damages. On plaintiff's appeal from the resulting order dismissing the action, the appellate court determined that "the words appearing in the complaint" were libelous under the definition of section 45 of the Civil Code and directed the trial court to overrule the demurrer. *Jeffers v. Screen Extras Guild, Inc.*, 107 Cal.App.2d 253, 237 P.2d 51. Thereafter, an answer was filed in which the Guild, its officers and directors, admitted that the News Letter in question had been sent in envelopes to Guild members exclusively, but denied that plaintiff had been libeled or damaged. Both truth and privilege were pleaded. They alleged that the letter had been published by way of reply to plaintiff's own charges and political attacks against the Guild and its board of directors, whereby he gave consent to the countercharges made by the defendants.

The first jury trial of this action lasted from April 2, 1953, to November, 1953, at which time a judgment of nonsuit was granted in favor of all members of the Guild's board of directors except the officers; and the cause was dismissed as against the Guild's legal counsel. The

trial then continued until February 16, 1954, when the jury was discharged for inability to agree.

A second jury trial before a different judge began on July 19, 1954, and on August 18, 1954, a nonsuit was granted in favor of the Guild's five officers. The action then proceeded against the Guild, its executive secretary, H. O'Neil Shanks, and its public relations counsel, Buck Harris, who are the respondents herein. On September 4, 1954, the jury returned a 9 to 3 verdict for plaintiff in the amount of \$10,000 general damages and punitive damages of \$23,750 against defendant Guild, \$1,000 against defendant Harris, and \$250 against defendant Shanks. On November 3, 1954, this verdict was set aside and a new trial ordered "upon the grounds of excessive damages and insufficiency of the evidence to justify the verdict."

The third trial, resulting in the judgment here appealed from, began before a jury on May 12, 1955. During the trial and on June 13, 1955, after the trial judge had investigated the matter, one of the jurors was "discharged for misconduct" and by stipulation replaced with an alternate. Thereafter, upon agreement of counsel, the trial was continued and finally completed before the court sitting without a jury, resulting in a judgment for the defendants. A motion for a new trial was denied and this appeal was taken by the plaintiff.

Before setting forth the essential details of the controversy, we quote in full the alleged libelous publication which was circulated among members of the Screen Extras Guild:

"News Letter to Members.

"Vol. IV No. IV April 5, 1950

"Jeffers Leads Recall Scheme, Attempts to Destroy SEG; Jeffers is SPU and CSU; Extras Don't Want Jeffers nor SPU nor CSU.

"Mike Jeffers, demagogue and would-be dictator, was forced out into the open last

week as the leader of the small clique that seeks to destroy Screen Extras Guild. Jeffers personally solicited signatures on an anti-Guild Petition and he personally handed out an unsigned, mimeographed, lying attack on the officers and directors of the Guild. The Screen Extras Guild accepts Jeffers' challenge and will continue to expose him for what he is—a would-be dictator who seeks to further his own selfish ambitions at the expense of the extra players; a discredited leader of a discredited union which permitted open shop for extra players and started to flood the extras' ranks with non-union newcomers. That is Jeffers.

"Jeffers yells his head off each time one of his underhanded schemes is exposed as a plot by leaders of the defunct SPU to destroy our American Federation of Labor Guild of extra players. Of course he doesn't like it. He would prefer that the extras would forget all about the terrible things he did to extras. Jeffers would like the extra players to forget that he was part of the Commie-influenced Conference of Studio Unions which pulled two disastrous jurisdictional strikes in 1945 and 1946. Jeffers would like you to forget that he never did one thing for the good of the extra players, that all he did was to bring about open shop. But the extra players are not going to forget it—now or ever.

"Jeffers squirms when it's shown that he is responsible for the present situation in which a number of extra players have been forced by the producers to accept \$9.45 calls or do without unemployment insurance. He cannot refute the charge for the Court records prove it and therefore he engages in a lot of double-talk about something that was said at a membership meeting several years ago. The Guild will not allow Jeffers to dodge the issue. Here are the facts, which are a matter of Court record and can be checked by any extra player: The California Appellate Court decision which says that extras must be willing to accept \$9.45 calls in order to be eligible for unemployment insurance was made in the case of Loew's, Inc. versus

California Employment Stabilization Commission. This case was filed in Court on December 26, 1945. On that date, Jeffers' SPU was the bargaining agent for extra players. The producers did not dare take the case into Court while the extras were still in Screen Actors Guild, for the weight of the entire A. F. of L. would have been brought to bear to insure that no extra player would be denied his unemployment insurance rights. The producers waited until Jeffers brought about open shop for extra players and then they took the case to Court, with the result that all extra players are now affected by a Court decision for which Jeffers is mainly responsible. Once an adverse Court decision was entered, it becomes a thousand times more difficult for Screen Extras Guild to correct the harm done, even with full A. F. of L. support. These are the facts and all of Jeffers' ranting and raving won't alter them.

"Jeffers tries to make something out of the fact that the present mob scene rate is \$9.45. In the SPU open shop days, it was \$5.50. In the Spu open shop days, the rate for general extra work was \$10.50. Today, it is \$15.56. In the SPU open shop days, the rate for dress extra work was \$16.50. Today, it is \$22.23.

"Screen Extras Guild is firmly committed to the principle of completely abolishing the \$9.45 rate for legitimate extra players. In our present negotiations with the producers, we have made some progress in that direction—a great deal more progress than Jeffers ever could make. For some years, every time we reach a crucial point in our negotiations with the employers, Jeffers starts a new attempt to split the Guild. This makes it just that much more difficult to get a half-way decent deal. Jeffers' underhanded tactics are hurting all the extra players. But despite Jeffers, we are making progress.

"Jeffers has sunk to a new low in his scheme to destroy the Screen Extras Guild. He now has, as his ally the slimiest, dirti-

est, most despised scandal sheet in the entire history of Hollywood. 'Birds of a feather flock together' and this disreputable, lying, blackguard, yellow rag is now supporting Jeffers in his attempt to split and destroy the Guild. The Screen Extras Guild, its officers and directors are proud to be on the 'blacklist' of this filthy publication. The Screen Extras Guild refuses to be blackjacked into paying tribute under any guise whatsoever to any publication. Jeffers is welcome to his latest rotten associate. SEG dares them to sue us for libel.

"Every union and guild in Hollywood is faced with the greatest unemployment in the history of the studios. All are doing their utmost to improve the situation, working through the American Federation of Labor. What does Jeffers think he could do? Call a strike? Officers and directors of Screen Extras Guild are getting far less work now than before they were elected by the SEG members. Does Jeffers think that he could improve the unemployment situation by taking the extra players out of the American Federation of Labor and bringing back open shop?

"The Screen Extras Guild is working all the time for the good of all legitimate extra players. The Guild is not perfect, for it is made up of humans—extra players—and perfection is not a human trait. But the Guild is so far superior to anything that Jeffers and his cohorts have to offer that the extra players once again by overwhelming majority will repudiate Jeffers and his latest scheme. The legitimate extra players will continue working together within Screen Extras Guild, the American Federation of Labor organization of the legitimate extra players."

The trial was an extended one and resulted in a reporter's transcript of some 4,000 pages. There were numerous items of documentary evidence. All parties engaged in a plenary investigation of various matters related directly or indirectly to the controversy. From this voluminous record, sometimes obscured by more or less ex-

traneous matters, the following facts appear to be germane to the present appeal.

Appellant Jeffers since 1950 has been an "extra player" in the motion picture industry, and is now a suspended member of the respondent Guild, which is a non-profit corporation representing and bargaining collectively for all persons employed as "extra players." The "News Letter to Members," in which the alleged libel was published, is "an informational bulletin or paper for the purpose of disseminating facts and news deemed to be of special interest to the membership of defendant Guild." Buck Harris, defendant, in pursuit of his duties as the Guild's public relations counsel, was the author of the article in question and the distribution of the News Letter was under the supervision of executive secretary, defendant H. O'Neil Shanks.

The events leading up to the publication in question have their genesis in the period immediately prior to 1944 when the extra players had no labor organization, but were "junior" or "B" members of the Screen Actors Guild, Inc. Appellant Jeffers participated in activities of a so-called Screen Players Protective Committee, organized to secure more satisfactory representation for the extra players, and later became business agent for the Screen Players Union, which in December, 1944, was certified as the collective bargaining representative for the extra players. Jeffers served actively in that capacity from early 1945 through March, 1946. He testified that he continued to act as "unofficial business agent" of the Screen Players Union after this organization had been replaced by the Screen Extras Guild as collective bargaining representative.

On March 12, 1945, a jurisdictional strike of motion picture employees occurred, involving claim of the International Alliance of Theatrical and Stage Employees that it was entitled to do certain work previously done only by Set Decorators Local 1421. The right of set decorators to do this work had been confirmed by the War Labor Board. The set decorators, together with

other unions affiliated with the Conference of Studio Unions, elected to strike, and the same evening Jeffers' Screen Players Union voted to support the strike. In October of 1945 mass picketing at Warner Bros. Studio in Burbank erupted with such violence that October 8, 1945, became known as "Bloody Monday." A few days thereafter the strike was ended. As business representative of the Screen Players Union, appellant Jeffers attended strike strategy committee meetings and, as an observer, was present at or near picket lines.

A definite animosity between appellant and the Screen Extras Guild seems to date from about this period. Both before and after the strike there were futile efforts to work out an amalgamation between the two unions. The Screen Extras Guild, in March, 1946, became the certified collective bargaining representative. Then the Screen Extras Guild opposed appellant's candidacy for state assemblyman. From that time on there appears to have been an interchange of charges and counter-charges which ultimately culminated in the alleged libelous publication.

There were, for example, letters from appellant Jeffers and one Don Wayson proposing that the Guild make 50% of its cash surplus available to aid needy and destitute members and requesting a reduction of dues, an economy regime, and other reforms. The Guild did not reply to these letters, but finally on March 15, 1948, sent Jeffers a letter demanding that he refrain from filing "further sham or frivolous charges" against members of the Guild and to disaffiliate from certain committees. Another inflammatory item was the failure of appellant to pay his dues on time; the Guild refused to reinstate him except upon payment of a fine of \$100, and Jeffers declined to make the extra payment. There was also a movement to recall officers and directors of the Guild in which appellant circulated petitions and handed out a circular referred to by the respondents as a "smear sheet." This was followed by the Guild's News Letter, dated April 5, 1950,

on which the present action is based. These activities by no means encompass the entire controversy; they are merely pertinent exemplars of what went on during a hectic period.

The trial court found that the defamatory statements complained of were and are true in substance and fact; that the defendants had probable cause and reasonable grounds for believing in their truth, and did believe that each and all of said statements were true in substance and in fact; that such statements were published in the News Letter "in good faith for the information and benefit of the members of defendant Guild, without malice, and for the sole purpose of protecting the interests of the membership of the defendant Guild."

Along this same line the court found that during the critical period in which the News Letter was published, the Guild was engaged in important bargaining negotiations with the motion picture producers and in conducting an annual election of officers, and that "the hostile actions taken at that particular time against the defendant Guild by the plaintiff embarrassed, interfered with, and damaged the defendant Guild in connection with its normal operation." It was found that during the same period plaintiff published and distributed to numerous members of the Guild a handbill and caused to be published and distributed to numerous members of the Guild and the general public a number of newspaper articles, the contents of which included provocative attacks, hostile criticism, and inflammatory and derogatory statements of and concerning the defendant Guild, and all of its officers and directors, which attacks, criticisms, and statements were false and untrue.

The trial court found that plaintiff engaged in these and numerous other hostile activities throughout several years just previous to April of 1950 in an effort to fulfill his desires to become the union leader of the motion picture extra players, to acquire power and influence over the affairs of the motion picture extra players and to

destroy or at least render impotent the defendant Guild. The court further found that Jeffers had engaged in this conduct "with full knowledge that his actions would provoke an answer and reply thereto by the defendants" and that the News Letter article had been provoked by plaintiff's hostile conduct, and published by the Guild "in self-vindication and by way of reply," in good faith and without malice. The Guild's reply "did not go beyond the reasonable requirements of the occasion; that there was no excessive publication under the circumstances," and any ill will or hostility therein expressed "consisted only of honest indignation." The trial court found that plaintiff had not been damaged in any sum.

Plaintiff's appeal is predicated upon the following points: (1) the court erroneously interpreted the News Letter as not being defamatory of plaintiff on the subject of Communism and on the subject of his having the same evil character and engaging in the same wrongful and illegal activities as Tarantino and his Hollywood Life Magazine; (2) the court erroneously admitted irrelevant and prejudicial evidence, erroneously excluded relevant and admissible evidence, and prejudicially restricted appellant's redirect examination and the cross-examination of respondents and their witnesses; and (3) the court's findings on the issues of truth and malice are not supported by any substantial evidence.

Although this appeal might be adequately disposed of by observing that appellant's various contentions are not sustained by the record, that substantial evidence is disclosed in support of the findings, and that no reversible error is apparent, a more detailed survey will be made.

Apropos the contention that the trial court erred in its interpretation of the News Letter publication, appellant's brief lays considerable stress on the fact that in one of his previous appeals, *Jeffers v. Screen Extras Guild, Inc.*, 107 Cal.App.2d 253, 237 P.2d 51, this court held that the words charged in the complaint are to be

deemed libelous and that the trial court erred in holding otherwise. The previous appeal, however, was concerned only with the question whether the complaint stated a cause of action. It did not involve the merits of the case nor purport to determine whether, under circumstances shown by the evidence, the charge was actionable. However, the trial court in the instant case did follow that decision and held that the publication did contain defamatory matter, but found that the same was substantially true, and that it was also privileged in the absence of malice. The previous appeal, then, adds nothing in support of appellant's position.

In this connection it is to be noted that the trial court was not dealing solely with the problem whether appellant had been wrongly accused of Communistic activities. Although much prominence was given this phase of the controversy, appellant's complaint is manifestly predicated upon the *entire* News Letter. According to the article, plaintiff is a "demagogue and would-be dictator," who "seeks to destroy Screen Actors Guild" and he is charged with "underhanded schemes," and as having "as his ally the slimiest, dirtiest, most despised scandal sheet in the entire history of Hollywood." The sum total of all this is that appellant is charged with being a generally undesirable representative whom the screen extras should not trust. The statement that "he was part of the Commie-influenced Conference of Studio Unions," serious as it is, seems to have been a mere portion of the entire article.

The trial court did not find that the appellant was a Communist, nor is the decision based upon this isolated portion of the News Letter. What the court did do was to appraise the publication as a whole and determine that in view of the surrounding circumstances, the article considered as an entirety could not be deemed libelous.

[1] It is conceded by all parties that an alleged libelous publication must be considered as a whole and not divided into segments. As stated in *Bates v. Campbell*, 213 Cal. 438, 441, 2 P.2d 383, 385, the pub-

lication is to be construed "as well from the expressions used as from the whole scope and apparent object of the writer," quoting from *Stevens v. Storke*, 191 Cal. 329, 334, 216 P. 371. And, "* * * it is the duty of the court to give the language used the natural and popular construction of the average reader, not the critical analysis of a mind trained in technicalities." *Sullivan v. Warner Bros. Theatres, Inc.*, 42 Cal. App.2d 660, 662, 109 P.2d 760, 762.

[2-5] The case proceeded in the trial court on the theory that this action was one sounding in libel *per se* rather than in libel *per quod*, in which latter case special damages would have had to be alleged and proved. The present review must therefore proceed on the same theory. *Shumate v. Johnson Publishing Co.*, 139 Cal.App.2d 121, 293 P.2d 531. Such being the nature of the case, it was proper for the trial court to consider the specific meaning of the article from the language used, apart from any innuendo or inducement. And whether such a publication is libelous *per se* is a question of law. *Smith v. Los Angeles Bookbinders Union*, 133 Cal.App.2d 486, 284 P.2d 194. Among the many cases stating these basic principles is that of *Emde v. San Joaquin County, etc., Council*, 23 Cal.2d 146, 143 P.2d 20, 150 A.L.R. 916. Also applicable to the present situation is the statement of the reviewing court in the *Emde* case, 23 Cal.2d at page 160, 143 P.2d at page 28: "It is generally agreed that it is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true so as to justify the 'gist' or 'sting' of the remark." These principles appear to have received proper consideration and application in the instant case.

What has been said of appellant's charge that the News Letter tended to "pin the Commie tag on me," will apply with equal force to another isolated portion of the article known as the "Tarantino" paragraph. There was evidence that appellant had contributed certain material or articles to Tarantino's *Hollywood Life Magazine*, preceding publication of the respondents'

News Letter which stated that Jeffers "now has as his ally the slimiest, dirtiest, most despised scandal sheet in the entire history of Hollywood," and made similar statements linking appellant with this publication.

[6] This again was but a small, although integral, part of the entire publication. As pointed out in the respondents' brief, the News Letter speaks of the unnamed publication as "the slimiest, dirtiest, most despised *scandal sheet*"; as a "disreputable, lying, blackguard, yellow rag"; and as a "filthy *publication*." (Emphasis added.) These epithets are not directly applied to Mr. Tarantino, its publisher, nor to Mr. Jeffers, but to the publication itself. They were terms of general abuse of a cumulative nature and even if meant to be applied to appellant, as previously mentioned, defendants are not required to justify each and every word of the alleged defamatory matter. *Hearne v. De Young*, 119 Cal. 670, 52 P. 150, 499; *Smith v. Los Angeles Bookbinders Union*, 133 Cal.App.2d 486, 284 P.2d 194.

The trial court's conclusions that the News Letter was issued on a privileged occasion and was qualifiedly privileged within the meaning of section 47, subdivision 3 of the Civil Code, "and that plaintiff, having the burden of proof, had failed to establish the existence of actual malice or any other abuse of the defendants' qualified privilege by a preponderance of the evidence," predicated upon the findings that the article was published in good faith for the information and benefit of the members of defendant Guild, without malice, and for the sole purpose of protecting the interests of the membership, are assailed by appellant on the ground that there is no substantial evidence to support the finding that respondents were not guilty of publishing the libel. More specifically, appellant claims that the violence of the language establishes actual malice, and the conduct, acts and statements of the respondents toward appellant, from 1946 on, demonstrate the existence of malice.

[7,8] There is abundant evidence, indeed it is not controverted, that the alleged libel was published by the defendants as a part of a labor controversy. This being so, the principle enunciated in *De Mott v. Amalgamated Meat Cutters*, 157 Cal. App.2d 13, 320 P.2d 50, 58, is applicable: "Statements made without malice wholly within the ranks of a labor union during a dispute between contending factions over union policies and administration, and pertinent thereto, should be regarded as privileged," citing *Emde v. San Joaquin County, etc., Council*, 23 Cal.2d 146, 143 P.2d 20, 150 A.L.R. 916. This sort of privilege is covered by section 47 of the Civil Code, which provides that "A privileged publication * * * is one made * * * 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent * * *".

In respect to the element of malice which will defeat the claim of privilege in question, the court in the *De Mott* case just cited made this statement, 157 Cal. App.2d at page 26, 320 P.2d at page 58, which seems applicable to the present controversy: "In an authoritative article 'Proof In Libel Actions In California' Mr. John M. Hall, of the Los Angeles Bar, wrote as follows: '* * * Thus the ill will which is to be identified with malice must be re-defined as an ill will going beyond that which the occasion apparently justifies, or, as defined by one discriminating judge, "some motive actuating the defendant different from that which *prima facie* rendered the communication privileged, and being a motive contrary to good morals."' (Citation.) (So.Cal.L.Rev., vol. XXIV, No. 4, p. 350.)"

[9] A labor union such as the respondent Guild is, by its very nature, an association of persons in a common interest. And, as stated in *Smith v. Los Angeles Bookbinders Union*, 133 Cal.App.2d 486, at page 493, 284 P.2d 194, at page 197, "Since

labor disputes " * * * normally involve considerable differences of opinion and vehement adherence to one side or the other, a necessarily broad area of discussion without civil responsibility in damages * * * [is] an indispensable concomitant of the controversy.' Emde v. San Joaquin County, etc., Council, 23 Cal.2d 146, 155, 156, 143 P.2d 20, 26. Moreover, when the alleged defamatory matter is susceptible of an innocent interpretation it is not actionable *per se*."

[10, 11] This, then, was the situation with which the trial court was confronted in the instant case. The question whether the peculiar circumstances disclosed a privileged occasion was a mixed question of law and fact to be determined by the judge hearing the case without a jury. The parties to this litigation appear to have fully litigated these questions, and there was abundant evidence bearing on the question of privilege and malice from which the court determined that a privileged occasion existed and that the defendants' privilege had not been lost or destroyed by the existence of malice. No error either as to fact or law has been satisfactorily pointed out.

[12] Reversible error has been assigned to the admission and exclusion of evidence and alleged restriction of appellant's cross-examination and redirect examination. This is directed largely to the proposition that the trial court prejudicially permitted respondents to try the issue of "Communism in Hollywood." It is true that the record discloses much evidence on the subject of the infiltration of Communism in Hollywood and the motion picture industry and that at times this topic received an inordinate amount of attention. But the record also reveals that the appellant, as well as the respondents, willingly entered this field and canvassed the matter quite thoroughly. This did little or nothing to assist the court or clarify the problem. On the contrary, it probably prolonged the trial unduly and tended to obscure the fundamental issues.

While it may well be that too great latitude was accorded the parties in this respect, it does not follow that any prejudice resulted therefrom, and the record refutes the idea that appellant in any manner suffered from this or any other alleged error, if any there was. In some respects, appellant may have actually benefited from the broad latitude which was permitted. Certainly no reversible error is here apparent.

[13] The appellant claims to have been unduly restricted in offering evidence, cross-examination, etc., on the subjects of "blacklist," "blackjacking into paying tribute," Jeffers' alleged alliance with one Tarantino, publisher of a so-called scandal sheet, and other persons, and divers matters directly or indirectly connected with the controversy. No reversible error has been made manifest here or elsewhere and the record indicates that appellant was at all times given proper leeway and was not unduly restricted at any point. He was accorded ample opportunity to present his own case and to refute that of his adversaries. Appellant was entitled to no more than this.

[14, 15] The appellant's contention that the trial court's findings in respect to truth, privilege, and malice, etc., are not supported by the evidence is untenable. Notwithstanding his asseverations that the reviewing court is not being asked to reweigh the evidence, this in effect appears to be exactly what the appellant here seeks. It is a fundamental principle that an appellate tribunal must accept as true all evidence and inferences tending to support the findings, resolving all conflicts in favor of the trial court's determination. Where there is any substantial evidence in support of the findings, a reviewing court possesses no authority to substitute its judgment for that of the court which heard the evidence and had the opportunity of observing the demeanor of the witnesses. *Primm v. Primm*, 46 Cal.2d 690, 299 P.2d 231.

The present appeal is documented by a voluminous transcript of the evidence which presents at least the normal amount of conflict. In such a situation it is not difficult for an appellant to segregate certain evidentiary items which seemingly dispute the findings. This the appellant has done, but his references to the record by no means support his argument that the findings are "wholly and completely incompatible" with the evidence. On the contrary, the trial court's findings are adequately supported at all points.

[16-18] It was found that the alleged defamatory article was substantially true and also that it was of a privileged nature and published without malice. Either of these matters, truth or qualified privilege, furnishes a complete defense to the action. It follows that the judgment must be affirmed if the findings on either issue are supported by any substantial evidence. As already indicated, the existence of such support cannot well be doubted.

There is, for example, credible evidence to indicate that Buck Harris, author of the News Letter article, derived his information from seemingly reliable sources, and that the defendants were actuated by a sense of obligation to safeguard what they regarded as the best interests of the Guild. From Jeffers' own testimony may be gleaned various references and admissions, express and implied, tending to support the findings. Certainly there was much evidence in reference to his zealous activities in behalf of the extra players' organizations, and his unequivocal attacks launched against the Guild and its officers. Testimony of the defendants Shank and Harris, various directors of the Guild, and other witnesses, likewise furnishes substantial support for the decision reached. The trial judge had a right to believe this evidence and there should be no appellate interference with the conclusions derived therefrom.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

162 Cal.App.2d 804

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Clyde WOOTEN, Jr., Walter Bradley
Gelder, and James William Rose,
Defendants,**

**Walter Bradley Gelder, Defendant and
Appellant.**

Crim. 6171.

**District Court of Appeal, Second District,
Division 1, California.**

Aug. 18, 1958.

Defendant was convicted of an assault by means of force likely to produce great bodily harm and from a judgment and an order denying his motion for new trial in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., the defendant appealed. The District Court of Appeal, White, P. J., held that the evidence sustained conviction on the ground that defendant was shown to be a principal in the commission of the offense charged; that evidence tending to show motive which activated defendant in joining the group which assaulted the victim was admissible and that testimony of a telephone conversation was not inadmissible as hearsay.

Judgment and order affirmed.

1. Criminal Law §59(3)

A person cannot be characterized as a principal simply because he is present while a crime is perpetrated provided he takes no part in it, but he must render aid to the actor and share the criminal intent of those who actually committed the offense to render him an abettor. West's Ann.Pen.Code, § 31.

2. Criminal Law §59(4, 5)

Though there is a common unlawful purpose between the actual offenders and person abetting their actions, latter is guilty as a principal only when his acts are done in pursuance of the unlawful scheme and when in addition to being present he actually aided and encouraged the perpetra-

tors with knowledge of the felonious intention. West's Ann.Pen.Code, § 31.

3. Criminal Law Ⓒ59(5)

Where persons are not actors in the actual commission of the crime charged but aid and abet others in its commission or procure others to commit the crime, all are equally guilty. West's Ann.Pen.Code, § 31.

4. Assault and Battery Ⓒ92

Evidence sustained conviction of assault by means of force likely to produce great bodily harm as against claim of defendant that there was no evidence from which it could be concluded that he was a principal in the commission of the offense charged and claim that defendant was a mere bystander in the assault upon the victim where the evidence established that defendant stood by prepared to take hand in the assault and aggressively entered into it when he thought the proper time had arrived for his intervention. West's Ann. Pen.Code, §§ 31, 245, 1237, subd. 1; West's Ann.Code Civ.Proc. §§ 1958, 1960.

5. Assault and Battery Ⓒ92

In prosecution for assault by means of force likely to produce great bodily harm, evidence was sufficient to support the existence of a conspiracy to injure the victim though there was no direct evidence thereof, since a conspiracy can generally be established only by circumstantial evidence. West's Ann.Pen.Code, §§ 245, 1237, subd. 1.

6. Criminal Law Ⓒ741(1), 742(1)

Credibility of witnesses and verity or weight of the evidence is for the trier of fact.

7. Criminal Law Ⓒ390

In prosecution for assault by force likely to produce great bodily harm, prosecution could show the motive which activated defendant in joining the group which assaulted the victim and hence testimony that defendant was friendly with person arrested and was seen around with him was admissible as tending to establish a motive for the defendant's alleged conduct and action. West's Ann.Pen.Code, §§ 245, 1237, subd. 1.

8. Criminal Law Ⓒ386

In prosecution for assault with intent to produce great bodily harm, admitting testimony of a telephone conversation between the People's witness and unknown person whose voice was not recognized and who said if the witness reported the assault to the police he would get killed next time, over the objection of hearsay, was not error. West's Ann.Pen.Code, §§ 245, 1237, subd. 1; West's Ann.Code Civ.Proc. § 1870, subd. 2.

Joseph R. Grillo, South Gate, for appellant.

Edmund G. Brown, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendants were accused of the crime of assault by means of force likely to produce great bodily injury, in violation of Penal Code, § 245. Appellant entered a plea of not guilty and when the cause was called for trial a jury trial was duly waived. Appellant was adjudged guilty of the crime charged against him. His motion for a new trial was denied. Proceedings were suspended and appellant was granted probation on certain conditions. From the "Judgment" (Penal Code, § 1237, subd. 1), and from the order denying his motion for a new trial appellant prosecutes this appeal.

We regard the following as a fair epitome of the factual situation surrounding this prosecution. On August 9, 1957, Thomas Phillips was walking along Bryson Avenue in the city of South Gate, Los Angeles County. He noticed one Gary Masters drive by in an automobile. Later, Masters returned in his automobile, and while he did not know how many persons alighted from the vehicle, Phillips did see appellant and his two co-defendants get "out of the car". The record reveals that the complaining witness Phillips had acted

as an informant for the narcotics squad of the sheriff's office in connection with one Bryan Lord and a Howard Chambliss. The complainant testified that as to the acquaintance of appellant with the men just mentioned, "I have seen him around Lord; I have never seen him with Chambliss".

When the occupants of the automobile alighted as aforesaid, they approached the complaining witness. According to the testimony of Mary Eyster, "it looked like four boys got out and run across the street". Defendant Clyde Wooten stood in front of Mr. Phillips and said, "I hear you ratted on me". Phillips replied he would call the police "if anybody started anything". Thereupon, Phillips was struck "more than one time" about the face and "all over my back and my neck". The complainant testified he did not know which of the men actually struck him. When he fell down he was kicked a couple of times while appellant and defendants Wooten and Rose were near him.

According to the testimony of Mrs. Mary Eyster who lived across the street on Bryson Avenue and witnessed the fight, "I thought I saw that boy (appellant Gelder) with his hand around his (Phillips) neck". The witness also testified, "I thought that (defendant Wooten) was the boy that did the kicking, but it seemed to me that his hair was lighter than what it is now". During the further direct examination of this witness, the following occurred:

"Mr. Lenoir (Deputy District Attorney): Although you may or may not be able to say what each boy did specifically you are able to say whether or not all three of the boys participated in beating the one boy?

"The Witness: Yes, sir.

"Mr. Lenoir: Did that happen? A. It did.

"Mr. Lenoir: That is all.

"Q. By Mr. Grillo (attorney for appellant): Mrs. Eyster, one of the reasons that you say these boys participated is the fact that you see them here now in answer to this crime,

right? Try to be honest with yourself, the court and these defendants. The day after this happened, would you have been able to recognize either of those five or six boys that took part in that incident? A. No.

"Q. You would not and the only reason you recognize them now is because they are here and you know they took part in that incident, right? A. That's right."

While the assault upon him was in progress, the complaining witness heard a lady from across the street state that she had the license number of the car and she was calling the police. After this statement, appellant Gelder, Wooten, Rose and the two other occupants got in the car and left the scene. The license number she took was LML-748.

The foregoing events took place about 11 o'clock in the morning. About one-half hour later the complaining witness received a telephone call. The latter did not recognize the voice of his caller. The telephone message to Mr. Phillips was: "* * * if I reported it to the police, I would get killed next time". The complaining witness testified that just prior to the preliminary examination, he asked appellant Gelder who made the telephone call and the latter stated that "they made a telephone call" and that one Masters actually "made the call", from the home of Richard L. Mataisz's where appellant and defendants Rose and Wooten went after the altercation.

Sworn as a witness for the defense, Gary Masters, a 16-year-old boy, testified that he was the driver of the automobile here in question. That at no time prior to August 9th (date of the fight) did he or any of the other men "talk about or plan to hit Tom Phillips". That on the morning in question when the witness arrived, Richard Mataisz was washing the latter's automobile and appellant was assisting him. That appellant had on a pair of blue denims and a T-shirt, but no shoes. That when the witness arrived he said, "Tom Phillips is down there. Let's go talk to him". That

defendant Wooten then said, "I want to talk to him because Richard (Mataisz) had said he (Phillips) had said some things about me". The remainder of the testimony of this witness as to the ensuing events was substantially the same as that testified to by Richard L. Mataisz, appellant Gelder and his co-defendants Wooten and Rose, and which may be summarized as follows. The four boys had planned to leave to obtain something to eat after washing the automobile. After Gary Masters arrived, and following defendant Wooten's statement as aforesaid, the boys finished washing the automobile, and left with the announced purpose of defendant Wooten and Mataisz talking to the complaining witness Phillips. There was no talk of hitting, striking, or beating of Tom Phillips. Upon arriving where Tom Phillips was, Richard Mataisz and Clyde Wooten got out of the car, one on each side thereof, and when they were halfway or almost up to the curb, appellant Walter Gelder and defendant James Rose left the car. And up to this time there was no talk of beating, hitting or striking Tom Phillips.

When defendant Wooten and Phillips came face to face, Wooten accused Phillips of saying things about him; Phillips denied it; Richard Mataisz called Tom Phillips a liar and then hit him. At this point defendant Rose came upon the immediate scene, thought Phillips was going to hit him and Rose swung first, "throwing two to five blows"; thereupon appellant Walter Gelder grabbed Tom Phillips, defendant Clyde Wooten grabbed James Rose, and were in the process of pulling Rose and Phillips apart when Mrs. Eyster started to yell. The boys then ran back to the car, defendant Clyde Wooten still holding and pushing defendant James Rose back to the car.

The defense witnesses further testified that appellant Gelder did not "throw" any blows at the victim, did not hit, punch or threaten him, did not kick him, did not know Gary Masters, and had met but did not go around with James Rose. That as a result of an injury received in an auto-

mobile accident approximately one year before the fight, appellant Gelder is unable to make a tight fist with his left hand but is righthanded; that except for previous conversation between Mataisz and Wooten, none of the boys had ever discussed Tom Phillips, his being beaten or hit or assaulted among themselves; that although some of the six boys involved did know some of the others, not one knew all five others; that there was no plan of action, concerted activity, or conspiracy behind the events leading up to the fight with Tom Phillips.

As his first ground for reversal of the judgment and order, appellant Gelder earnestly insists that the judgment of conviction is against law in that there is no evidence from which it can legally be concluded or inferred that appellant was a principal in the commission of the offense charged.

[1, 2] Insofar as here pertinent, a principal is thus defined by Section 31 of the Penal Code:

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission."

We are therefore, confronted with the question whether the evidence reasonably justifies the conclusion that appellant joined the group and was present for the purpose of assisting in the consummation of the assault upon Mr. Phillips. A person cannot be characterized as a principal simply because he is present while a crime is perpetrated provided he takes no part in it. He must render aid to the actor and share the criminal intent of him or those who actually committed the offense to render him an abettor. And, though it be the theory of the prosecution that there was a common unlawful purpose between the actual offenders and the person abetting their actions, the latter is guilty only when his acts are done in pursuance of the unlawful scheme, and when, in addition to being present, he actually aided and encouraged the perpetrators with knowledge of the

felonious intention (People v. Luna, 140 Cal.App.2d 662, 664, 295 P.2d 457; People v. Hill, 77 Cal.App.2d 287, 293, 294, 175 P.2d 45. If, as contended by appellant, he was so to speak, a mere bystander, whose only activity was an attempt to stop the fight then, of course, he was not an accessory to a principal in the felonious assault upon Phillips. However, primarily, and as a factual matter, whether appellant was a bystander and acted only to preserve the peace, or was a participant, was for the duly authorized arbiter of the facts to decide. The sole question on appeal is whether the determination of that factual matter finds support in the evidence and the reasonable inferences to be drawn therefrom. In that regard, the prevailing rule is thus stated in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779:

"* * * The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the *circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also rea-*

sonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury.'" (Emphasis added.)

See also People v. Perkins, 8 Cal.2d 502, 518, 519, 66 P.2d 631; People v. Daugherty, 40 Cal.2d 876, 885, 886, 256 P.2d 911; People v. Cullen, 37 Cal.2d 614, 625, 234 P.2d 1.

[3] In the case at bar there is evidence that Thomas Phillips had acted as an informant for the sheriff's narcotic squad in connection with two men, one of whom was known to appellant, and both of whom were acquainted with the co-defendants. One Gary Masters drove by in an automobile while Phillips was walking on the sidewalk. Masters proceeded to the home of Richard Mataisz where the latter and appellant were washing Mataisz's automobile. Upon Masters' arrival he announced that he had seen Phillips as aforesaid. Thereupon defendant Wooten announced, "I want to talk to him because Richard (Mataisz) had said he had said some things about me." After concluding the car washing job, appellant and the other four boys left, as stated by appellant in his brief, "with the announced purpose of (defendant) Wooten and Mataisz talking to Phillips". When they encountered Phillips, appellant and at least two others left the automobile and approached Phillips. Defendant Wooten stated to Phillips, "I hear you ratted on me", and thereupon Phillips was struck from one side, and, as stated by the witness Mary Eyster, "They all ganged up on him, I thought." This witness placed defendants Wooten and Rose on either side of Phillips, and placed appellant behind Phillips with his hand around the latter's neck. This would seem to amount to more than mere presence of appellant at the scene of the altercation. The testimony of the complaining witness shows that he was set upon by at least three of the men, struck with a fist, and kicked in the back, neck and stomach. It has been held that, "* * * Where persons are not actors in the actual commission of the crime charged, but aid and abet others in its commission or pro-

cure others to commit the crime, all are equally guilty." *People v. Cowan*, 38 Cal. App.2d 231, 239, 101 P.2d 125, 130.

[4] In this state of the evidence, could the trial judge reasonably indulge in the inference that there was concert of action and purpose between the assailants of Mr. Phillips, including appellant, and that the latter concededly present, stood by prepared to take a hand in the assault and aggressively entered into it when he thought the proper time had arrived for his intervention? We are satisfied the answer must be in the affirmative.

Section 1958 of the Code of Civil Procedure defines an inference as, "* * * a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect."

And Section 1960 of the same code provides:

"When An Inference Arises. An inference must be founded:

"1. On a fact legally proved; and,

"2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

Weighed in the crucible of both law and reason, and in the light of the code section just quoted, we are persuaded that under the facts and circumstances of the instant case, the only reasonable inference to be drawn therefrom is that those involved in the assault here under consideration, banded themselves together to punish Phillips because he "ratted" on two friends of theirs, and to deter Phillips from further activity as an informer for law enforcement agencies. Having in mind "the usual propensities or passions of men", it would do violence to reason and challenge credibility to conclude that appellant and his associates intended merely to "talk" to Phillips, and "peacefully" remonstrate with him on the evils of violating the established code of "ethics" of the "underworld".

[5] Appellant next sets forth the statement of the trial judge that, "We really treated this matter as a conspiracy on the part of all these boys". He then challenges the sufficiency of the evidence to support the existence of a conspiracy. Appellant's contention that the record is barren of any *direct* evidence which would support the existence of a conspiracy was answered by our Supreme Court in the recent case of *People v. Osslo*, 50 Cal.2d 75, 323 P.2d 397, at page 407, wherein it is stated:

"* * * It is true that there is no *direct* evidence of a conspiracy; all the direct evidence bearing on the question is to the effect that the defendants who actually participated in the assault and battery had been instructed to avoid the use of violence. But 'A conspiracy can generally be established only by circumstantial evidence. It is not often that the direct fact of a common unlawful design can be proved other than by the establishment of independent facts bearing on such design.' (Cases cited.)"

See also *People v. Robinson*, 43 Cal.2d 132, 136, 271 P.2d 865; *People v. Steccone*, 36 Cal.2d 234, 237, 238, 223 P.2d 17.

As pointed out by respondent, "The testimony of Thomas Phillips indicating that he had informed on one Mr. Bryan Lord to the narcotics squad, coupled with the fact that Phillips had seen appellant Gelder with Mr. Lord, provides a motive for the concerted action of appellant Gelder, along with Clyde Wooten and the others.

"These crucial facts are just a small part of a whole record which discloses a picture of five boys irritated with the knowledge that Thomas Phillips had been informing on any or all of them. The record discloses these five boys driving to a spot where one of them, Gary Masters, had spotted Phillips, and at that spot leaving the car and proceeding to accost Phillips and 'square' matters." The evidence is sufficient to establish a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose accompanied by overt acts in furtherance

of the object of the corrupt agreement, thereby establishing a conspiracy within the contemplation of law.

Appellant directs our attention to the remarks of the trial judge on the hearing of appellant's motion for a new trial, as follows: "There is no evidence that Gelder (appellant) ever put his hand on this boy at all * * * Gelder didn't actively participate." However, there was testimony which placed appellant behind the victim with his hand around the latter's neck.

[6] Appellant's contention that the court arbitrarily ignored testimony for the defense because there is no substantial conflict between the People's witnesses and those for the defendant is untenable. The testimony of the complaining witness and that of Mrs. Eyster is in direct conflict with the testimony of appellant himself. Since there are very basic conflicts in the evidence, appellant's argument, asking as it does that we reweigh the evidence is obviously without substance when presented to an appellate tribunal. Such argument, going as it does to the credibility of witnesses and the verity or weight of the evidence, is for the trier of fact (*People v. Osslo*, supra, 50 Cal.2d at page 91, 323 P.2d at page 405.).

Finally, appellant asserts that the trial court committed prejudicial error in admitting irrelevant, immaterial and hearsay evidence over objections thereto.

With regard to the line of questioning objected to by appellant as irrelevant and immaterial, the record reflects the following, which occurred during the direct examination of Thomas Phillips, the complaining witness:

"Q. Prior to your seeing these persons had you assisted the Narcotics Squad—

"Mr. Grillo (attorney for appellant): If Your Honor please, I object to the question on the ground it is irrelevant and immaterial and not binding upon these defendants.

"The Court: I don't know whether it is.

"Mr. Grillo: It calls for a conclusion.

"The Court: I don't know. Objection overruled without prejudice, with permission to strike it if it is not material.

"Q. By Mr. Lenoir (Deputy District Attorney): Had you acted as an informant for the Narcotic Squad of the Sheriff's Office? A. Yes.

"Q. Was that in connection with a Mr. Howard Chambliss and a Mr. Bryan Lord? A. Yes.

"Q. Were those parties arrested? A. Yes."

Subsequently, on cross-examination of the witness Phillips, he was asked:

"Q. By Mr. Grillo: Now will you answer the question, Mr. Phillips? Did you ever see Walter Gelder in the presence of either Chambliss or Lord at any time in your lifetime?

"A. I have seen him around Lord; I have never seen him with Chambliss."

The rule governing inquiry into a collateral fact is stated in *People v. Billings*, 34 Cal.App. 549, 552, 553, 168 P. 396, 398, as follows: "The relevancy of proffered proof in a criminal case depends upon whether or not it tends to sustain a legitimate hypothesis of the guilt of the defendant and, generally speaking, an incidental fact is relative to the main fact in issue when, in accord with the ordinary course of events and common experience, the existence of the incidental fact, standing alone or when considered in connection with other established facts, tends in some degree to make the main fact in issue certain. It is not necessary that such incidental fact should bear directly upon the main fact in issue, for it will suffice as a pertinent piece of proof if it can be said to constitute a link, however small, in the chain of evidence, and tends thereby to establish the existence of the main fact in issue. (Citing authority) * * * "See also *People v. Kristy*, 111 Cal.App.2d 695, 709, 245 P.2d 547.

[7] The prosecution had a right to show the motive, if any, which activated appellant in joining the group which assaulted Mr. Phillips. Hence any fact is relevant evidence which naturally tends to establish a motive on the part of appellant to retaliate against the complaining witnesses for acting as an informant against either Howard Chambliss or Bryan Lord. Testimony that appellant was friendly with Lord and was seen "around" with him might well be a link tending toward the establishment of a motive for appellant's alleged conduct and actions.

A similar contention was presented by the appellant and rejected by the court in *People v. O'Brand*, 92 Cal.App.2d 752, 754, 207 P.2d 1083, 1084, wherein the court said:

"Having been convicted of attempted burglary in the second degree defendants have assigned five errors as grounds for reversal of the judgment.

"They contend that their cause was prejudiced by the court's allowing 'evidence of narcotics to be introduced.' The fact that such proof might have been prejudicial is not a ground for exclusion. * * *

On this point the court said further, 92 Cal.App.2d at page 754, 207 P.2d at page 1085:

"* * * While the general rule forbids the admission of evidence of other crimes and degrading practices unrelated to any issue on trial, it is the settled law that where such proof is relevant to an issue in the case on trial, it is admissible notwithstanding it tends to show immoral conduct or other crimes. The law will not permit justice to be defeated by rejecting evidence simply because it involves other crimes or gross immorality. (Cases cited.) Proof of motive will not be excluded merely because it may be prejudicial to the accused if it is relevant and material. (Cases cited.)"

And, again in *People v. Weatherford*, 78 Cal.App.2d 669, 687, 178 P.2d 816, 827, we find the following: "Evidence of motive adds warp to the pattern of guilt woven of circumstance. Whatever fact tends legiti-

imately to show motive is proper proof of an assumed motive for the crime. *People v. Soeder*, 150 Cal. 12, 15, 87 P. 1016." See also *People v. Hall*, 27 Cal.App.2d 440, 444, 81 P.2d 248; *People v. Richards*, 74 Cal. App.2d 279, 287-289, 168 P.2d 435.

[8] Next appellant insists that prejudicial error "was also committed in the admission of hearsay evidence over timely objections, to-wit: the substance of a telephone conversation between People's witness Phillips and an unknown person whose voice was not recognized by Phillips, and who allegedly said if Phillips reported it to the police he would get killed next time." The objection made to the introduction of this evidence was grounded on the claim that, "it was purely hearsay, not binding upon appellant, and irrelevant to the issue of defendants' guilt. In addition thereto, by inference, Phillips testified that it occurred on October 9th, 2 months after the incident."

An examination of the record discloses that the complaining witness Phillips testified that about a half hour after the assault he received a telephone call, and that he did not recognize the voice. The witness then testified that the party who telephoned him said, "that if I reported it to the police, I would get killed next time". The witness testified further that just preceding the preliminary examination of appellant he had a conversation with the latter wherein "he (appellant) wanted me to drop charges". That he (Phillips) mentioned the telephone call to appellant and "I asked him who made the call and he said they went to Mataisz's house after that * * *". In answer to the question, "He did not tell you that he was present when that telephone call was made, did he?", the witness answered, "Well, he said he was over there * * * at Mataisz's place." When asked if appellant told him who made the telephone call, Mr. Phillips replied, "That Masters did". Masters was the one who drove the automobile which conveyed the participants in the assault to the scene thereof. Manifestly, appellant's statement to the victim just prior to the preliminary

examination showing as it did, that appellant knew of Masters' call to the complaining witness and its content, is a statement against the former's interest (*People v. Lindsey*, 90 Cal.App.2d 558, 565, 203 P.2d 572; Code Civ.Proc. § 1870, subd. 2). There was therefore, no error in the ruling of the court.

For the foregoing reasons the judgment granting probation (Penal Code, § 1237, subd. 1) and the order denying the motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.



163 Cal.App.2d 179

Lillian P. SMITH et al., Plaintiffs and Appellants,

v.

James WALKER, Defendant and Respondent.

No. 22832.

District Court of Appeal, Second District,
Division 3, California.

Aug. 26, 1958.

Action against driver of automobile which struck pedestrian while pedestrian was attempting to cross driveway on employer's premises. The Superior Court of Los Angeles County, Alfred E. Paonessa, J., rendered judgment for driver and denied pedestrian's motion for new trial, and pedestrian appealed. The District Court of Appeal, Nourse, J. pro tem., held that question whether either driver or pedestrian or both were negligent was for jury.

Appeal from order denying motion for new trial dismissed and judgment affirmed.

1. Automobiles ☞245(6, 72)

In action against driver of automobile which struck pedestrian while pedestrian

was attempting to cross driveway on employer's premises, question whether either pedestrian or driver or both were negligent was for jury.

2. Appeal and Error ☞928(1)

Where record on appeal did not contain instructions to jury given by court but contained only instruction which court refused, it would be assumed that were the entire charge to jury before reviewing court, it would not show any error.

3. Appeal and Error ☞216(4)

Where trial court properly refused instruction upon doctrine of last clear chance, reviewing court was not called upon to determine whether, under the evidence, a proper instruction upon such doctrine would have been applicable.

4. Appeal and Error ☞110

Order denying motion for new trial is not appealable.

Niesen & Schermer, Pacoima, for appellants.

Spray, Gould & Bowers, Los Angeles, and Robert M. Maslow, Beverly Hills, for respondent.

NOURSE, Justice pro tem.

Plaintiff brought this action to recover damages for personal injuries which she alleged she sustained by reason of the negligence of the defendant. The jury having returned a verdict in favor of defendant, the plaintiff appeals from the ensuing judgment and from the order denying her motion for a new trial.

Plaintiff makes but two assignments of error.

(1) That the evidence is insufficient to support the verdict.

(2) That the court erred in refusing to give an instruction requested by her on the doctrine of last clear chance.

The accident in question occurred while the plaintiff was attempting to cross a driveway on the premises of the employer of both plaintiff and defendant. The drive-

way was one used by employees leaving the premises by automobile. There were two lines of cars moving towards the exit when plaintiff attempted to cross the drive by passing between defendant's car and the one in front of it. The evidence was in conflict as to whether defendant's car was in motion when plaintiff left a place of safety and stepped into the path of defendant's car; and, as to whether plaintiff was seen by defendant before she was at point directly in front of defendant's car and but a few feet from it. Plaintiff was struck by the right front of defendant's car (she was crossing from the driver's left to right). The impact was light and plaintiff was not caused to fall but her lunch pail was knocked from her hand.

[1] Under the evidence, the question whether either or both parties were negligent was clearly one of fact for the jury and not one of law to be addressed to this court. There is no merit in plaintiff's first assignment of error.

[2] The second assignment of error is also untenable. The record here, although augmented twice by plaintiff, does not contain the instructions to the jury given by the court but contains only the instruction above mentioned which the court refused. It must, therefore, be assumed that were the entire charge to the jury before us it would not show any error. *Johnstone v. Morris*, 210 Cal. 580, 590, 292 P. 970, and cases there cited.

[3] It is unnecessary, however, to base our decision upon the assumption just stated. The instruction requested was instruction number 205 of B. A. J. I., 4th edition. In *Brandelius v. City and County of San Francisco*, 47 Cal.2d 729, 306 P.2d 432, a decision rendered some four months prior to the trial of the present action, the Supreme Court held this instruction to be an incorrect statement of the doctrine of last clear chance and that the giving of it justified the granting of a new trial.¹ The trial court here, therefore, properly refused the instruction requested. This being so, we are

not called upon to determine whether, under the evidence, a proper instruction upon the doctrine of last clear chance would have been applicable.

[4] The order denying plaintiff's motion for a new trial not being appealable the appeal therefrom is dismissed and the judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



162 Cal.App.2d 840

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Homer C. MILLS, Defendant and
Appellant.
Cr. 6250.

District Court of Appeal, Second District,
Division 2, California.
Aug. 18, 1958.

Defendant was convicted of selling and offering for sale shares of stock without having a permit from the commissioner of corporations and of offering to sell certificates of interest in a mining title and lease without having such a permit. The Superior Court of Los Angeles County, LeRoy Dawson, J., entered judgment, and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Ashburn, J., held that the defendant violated the statutes even though the persons to whom he offered to sell the stock were to be corporate directors and officers.

Judgment and order affirmed.

1. Licenses ☞40

Defendant who offered to sell stock without permit from commissioner of cor-

1. The instruction in question is set forth in full at pages 737, 738 of the opinion.

porations was guilty of violating statute prohibiting such offer to sell, notwithstanding that the persons to whom the offer was made were to be corporate directors and officers. West's Ann.Corp.Code, §§ 25009, 26104.

2. Criminal Law Ⓒ1144(13)

In examining sufficiency of evidence to sustain conviction, District Court of Appeal must assume in favor of the verdict of guilty the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

3. Licenses Ⓒ40

Under the statutes, the offeror's attempts to sell as well as the sale of securities without permit from commissioner of corporations is proscribed. West's Ann.Corp.Code, §§ 25009, 26104.

4. Licenses Ⓒ18½(22)

Where defendant did not have permit from commissioner of corporations to sell or offer for sale the stock of a Nevada corporation and where offer to sell the stock was made and accepted in California and the price was to be paid and the stock was to be delivered in California and proposed meeting in Nevada was for the sole purpose of transferring a so-called lease of a mine to the corporation and of having the stock issued there and delivered to the defendant and by him brought to California for delivery to the buyers, the mere fact of issuance of the stock in Nevada did not prevent conviction of defendant for violation of the statutes prohibiting the sale of securities or the offering or attempting to sell securities without permit from commissioner of corporations. West's Ann.Corp.Code, §§ 25009, 26104.

5. Criminal Law Ⓒ814(8)

In prosecution for selling and offering to sell securities without permit from commissioner of corporations, where there was no trickery, fraud or persuasion and where conception and planning of offense was not that of the officers rather than defendant, instruction that entrapment is the con-

ception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated the offense except for the trickery, persuasion and fraud of the officer was properly refused. West's Ann.Corp.Code, §§ 25009, 26104.

6. Criminal Law Ⓒ829(1)

The refusal to give requested instruction was not error where the court gave full instructions which amply covered the subject.

7. Licenses Ⓒ42(3)

Information charging that defendant did "knowingly sell and offer to sell" described shares of stock and that defendant did "offer to sell" an interest in a mining title and lease without having a permit from commissioner of corporations sufficiently charged the offense of offering to sell a security without a permit. West's Ann.Corp.Code, §§ 25009, 26104.

8. Indictment and Information Ⓒ110(3)

An indictment or information properly may charge a crime in the language of the statute. West's Ann.Pen.Code, § 952.

9. Licenses Ⓒ42(5)

In prosecution for selling and offering to sell securities without permit from commissioner of corporations, requested instruction to the effect that any one in the exercise of his inalienable rights may dispose of his property in such innocent manner and for such price as he pleases was inappropriate and was properly refused. West's Ann.Corp.Code, §§ 25009, 26104.

10. Licenses Ⓒ42(5)

In prosecution for selling and offering to sell securities without permit from commissioner of corporations, proposed instruction to the effect that the corporate securities law has no application to a purely private transaction as described in other instructions given did not correctly state the law and was properly refused. West's Ann.Corp.Code, §§ 25009, 26104.

11. Criminal Law Ⓒ829(9)

In prosecution for selling and offering to sell securities without permit from com-

missioner of corporations, requested instruction that it could not be presumed that defendant would offer to sell stock without permit was adequately covered by instructions on reasonable doubt and presumption of innocence and was properly refused. West's Ann.Corp.Code, §§ 25009, 26104.

12. Criminal Law 814(1)

In prosecution for selling and offering to sell securities without permit from commissioner of corporations, it was not error to refuse a requested instruction concerning delay in taking defendant before magistrate notwithstanding his demands therefor, and that "you can take these facts and circumstances into consideration in arriving at your verdicts, in determining whether the officer and others participating in the arrest of the defendant acted in good faith", since the assumed facts, if true, had no bearing on defendant's guilt or innocence or upon the fairness of his trial. West's Ann.Corp.Code, §§ 25009, 26104.

13. Criminal Law 1037(1)

Defendant could not complain for the first time on appeal that prosecutor's argument disclosed prejudicial misconduct.

14. Criminal Law 1169(1)

The admission of testimony, even if erroneous, did not require a reversal, where defendant could not have been harmed by such testimony.

15. Indictment and Information 129(1)

Defendant could be charged in one count with selling and offering for sale shares of stock without permit from commissioner of corporations and in another

count with offering to sell certificates of interest in a mining title and lease without having such permit, notwithstanding that both offenses arose from a single set of facts. West's Ann.Pen.Code, § 952; West's Ann.Corp.Code, §§ 25009, 26104.

Homer C. Mills, in pro. per.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant appeals from a judgment entered pursuant to his conviction of violation of two counts of the Corporate Securities Act (§ 26104(a) Corporations Code.¹ The charges were that (1) on August 1, 1957, he sold and offered for sale to Robert H. Meng and Edwin A. Shrader 200,000 shares of stock in Clark Uranium & Copper Company, a Nevada corporation, without having a permit from the Commissioner of Corporations so to do, and (2) that on said date he offered to sell to said persons certificates of interest in a mining title and lease without having a permit from the Commissioner of Corporations. Defendant was also charged with two prior convictions of felony, one of which was violation of said § 26104(a), Corporations Code. At the beginning of the trial said felony convictions were admitted. Defendant was sentenced on each count for the term prescribed by law, said sentences to run concurrently with each other and with the sentence in Superior Court case No. 172196, which is the case reviewed and af-

1. Corp.Code, § 26104: "Every officer, agent or employee of any company and every other person, who does any of the following acts is guilty of a public offense * * *: (a) Knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division, or of the Constitution of this State."

Corp.Code, § 25009: "(a) 'Sale' or 'sell' includes every disposition, or attempt to dispose, of a security or interest in a security for value.

"'Sale' or 'sell' includes all of the following, whether done directly or by an agent, circular letter, advertisement, or otherwise: An offer to sell; an attempt to sell; a solicitation of a sale; an option of sale; a contract of sale; a taking of a subscription; an exchange; any change in the rights, preferences, privileges, or restrictions on outstanding securities."

firmed in *People v. Mills*, 148 Cal.App.2d 392, 306 P.2d 1005. Defendant also appeals from an order denying his motion for new trial.

[1] Appellant's major contention is that there was no "security" involved in his transaction with Meng and Shrader because they were to become members of a four-member board of directors of the corporation, Clark Uranium & Copper Company, and were to be vice-president and treasurer of the corporation, respectively, and one of them was to co-sign all checks with defendant Mills acting as president. Invoking *People v. Staver*, 115 Cal.App.2d 711, 252 P.2d 700, and *People v. Jaques*, 137 Cal.App.2d 823, 291 P.2d 124, appellant argues that any profit upon their investment could be reaped only through personal efforts of Meng and Shrader and hence the rule of cases such as *People v. Syde*, 37 Cal.2d 765, 768, 235 P.2d 601, *People v. Gould*, 37 Cal.2d 885, 235 P.2d 604, and *Austin v. Hallmark Oil Co.*, 21 Cal.2d 718, 727, 134 P.2d 777, becomes applicable and controlling. In the *Austin* case the court said, 21 Cal.2d at page 727, 134 P.2d at page 782: "If the transaction is one in which the assignee is merely an investor who for a consideration is given the right to share in the profits or proceeds of an enterprise to be conducted by others, the instrument representing such interest is a security. Where, however, as in the present case, the assignee is to share in the conduct of the enterprise, the instrument representing an assignment of a fractional interest in the production of oil is not a security within the act."

[2] The facts impliedly found by the jury do not bring this case within the aegis of the cited authorities. In examining the sufficiency of the evidence at bar we must "assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict." *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 780. Hence the following résumé

of the facts is based primarily upon evidence favorable to the prosecution and made in the light of the impeachment of defendant's testimony growing out of his previous conviction of two felonies, which testimony presumptively was rejected by the jury and trial judge.

Mills, a disbarred lawyer (*Mills v. State Bar*, 6 Cal.2d 565, 58 P.2d 1273) who refers to himself as a retired lawyer with wide experience in mining matters and many years of familiarity with the Corporate Securities Law of California, inserted in the *Los Angeles Times* of July 21, 1957, an advertisement reading: "Assoc. wanted for gold prospect. So. Cal. Good roads, rich ore. Box D-65, Times." Meng and Shrader were investigators on the staff of the District Attorney; their superior officer, Lieutenant Morse, called Meng's attention to the advertisement and gave him certain instructions; Meng on July 22nd wrote to "Box D-65" stating that he was interested in the ad, that his funds were limited but if the property sounded good he was in position to obtain additional money; he asked the addressee to contact him. On the 23rd defendant telephoned Meng and arranged a meeting for the 24th; they conversed on that day at the Plaza Hotel in Hollywood. Mills referred to a certain Clementine mine located about 35 miles from Barstow, California, and said he had discovered a vein bearing gold ore worth \$1,400 per ton which ultimately should run around \$60 a ton. Meng asked how much it would take to open the property and Mills said \$10,000; when told that Meng then had only \$3,000 but could raise more, he said that was enough to start with; that if it ran over \$10,000 he would match dollar for dollar from the investing standpoint and each of them would receive 50 per cent; that it would be so set up; he would use a Nevada corporation known as Clark Uranium & Copper Company. Mills also said he held a lease on the mine and wanted Meng to go to the property to see the ore. Meng was to call him the next day. The asserted lease when received in evidence proved to be an option

to buy the Clementine mining claim for \$500 on or before January 1, 1958, with immediate possession and right of exploration conferred. For this document Mills had paid nothing. It bears the same date as the newspaper in which the advertisement was run. The parties finally arranged to go to the mine on the following Tuesday. When Mills arrived at Meng's house, Investigator Shrader was there and was introduced as a friend who was interested in the property and might invest some money. The three of them drove to Barstow and then to the mining claim. On the way, defendant was asked for proof that he had a lease and he exhibited the document of July 21st above mentioned; he called it a lease with option to purchase. Meng testified: "On the trip to Barstow we discussed the matter of how the stock was to be issued, at which time Mr. Mills stated that 50 per cent of the stock would be issued to Mr. Shrader and myself. He also stated that he would hold the remaining 50 per cent of the stock and then he proceeded to describe what was to be done on the property. * * * He stated that there had been no application or articles of incorporation filed in the State of California and that no stock had ever been issued in the Clark Uranium. * * * and that there had never been a permit issued in the State of Nevada, either.

"He further stated that he would hold a meeting in Los Angeles here, at which time Mr. Shrader and myself would be placed on the board of directors, a members of the board of directors, and one of the other two parties who was on the board would be dropped and the meeting would then be adjourned and would reconvene in the El Cortez Hotel in Las Vegas, Nevada, at which time any changes in the articles of incorporation that had to be made would be made at that time and the stock would be issued up there and he would come back with the stock to California." Proposed development and rental of one Duncan's equipment were also discussed. After an inspection of the property, at which no gold ore was visible, Mills said he could

easily find the vein of ore and if they did not put up the money he would go ahead with the development himself; also that he would handle the operation and supervise it without salary until the mine was paying a profit; that Meng and Shrader would be members of the board of directors, one of them vice-president and the other secretary, but so far as the operation of the mine was concerned they would have nothing to do with it; would merely be members of the company board of directors. He also said the funds would be placed in a bank and either Meng or Shrader would sign checks.

Meng and Mills met again on July 31st, defendant saying "he was very anxious to see me." On that occasion defendant exhibited a copy of the articles of incorporation of the Clark company and two copies of a written "Proposal" for Meng and Shrader. That document had been prepared by defendant who declared it needed no explanation. On the next day, August 1st, Meng and Shrader met defendant again at the Hollywood Plaza Hotel, having telephoned him that they would have their checks ready. At this meeting Mills explained that they would have a joint bank account in the company's name and he and one of the other two would be joint signers on any checks. Meng then said that business is business and he wanted something to show for his money, so Mills in his own handwriting dated the proposal, added "O.K." and placed his signature thereon. He also delivered a copy of minutes which he had drawn for a meeting of the corporate board of directors to be held on the next day in Long Beach and then adjourned to Las Vegas where the lease would be transferred to the company and shares of stock issued to Mills, Meng and Shrader, after which Mills was to bring back the stock to Meng and Shrader in California. He asked how they wanted the certificates issued and they told him. Defendant said no stock had been printed but "we could use blank stock and fill those in or he could fill them in for us." The corporation had no assets, had issued

no stock, had no permit to sell stock and only one meeting had been held, that for the purpose of organization. Mills told Meng and Shrader to make their checks to the company; when Meng handed his check to defendant he in turn gave it to Shrader who was to be corporate treasurer. Upon signing and delivery of the proposals and the checks Meng gave a signal and other officers who were in the background came forward and arrested Mills.²

The written proposal sets forth a "plan," the essential portions of which are quoted in the margin.³ The minutes for the planned meeting of August 2nd say: "Director Homer C. Mills reports to the Board that he has contracted to purchase the Clementine Mining claim located 20 miles from Barstow, California, which contains commercial Tungsten deposits and a promising Gold-Silver deposit and that it appears to be economical to operate. He also reports that he has two parties who will advance up to \$10,000.00 for the purpose of exploring and developing such property. He recommends that their offer to finance the property be accepted by this Company on a basis of one-half interest.

"Inasmuch as the Corporation is a Nevada Company and is not allowed to sell or offer for sale any stock in the Company,

2. The violation of the act was complete before the parties inspected the property; the transaction was carried forward to this point in order to obtain evidence over Mills' signature corroborating the prospective testimony of the two officers, Meng and Shrader.

3. "That we take Clark Uranium & Copper Co., a Nevada Corporation, and use it to operate with. I am exhibiting to you a certified copy of the Article and the Charter issued by the Secretary of State, Carson City, Nevada. While the seal has been ordered, no stock has ever been issued or printed. It is immediately available. It's capital is \$1,500,000.00, divided into shares 10¢ each, par value.

"For the commitment of you two men to provide \$10,000.00, altogether, I suggest that there be issued to you 200,000 shares of this Corporation in the proportions and amounts each of you contribute. I will take the same amount of shares to myself or order, which makes us 50-50

the matter of transferring this claim to the Corporation and paying therefore in shares of the Corporation and the dividing up of the shares to be issued for the property between the parties financing the operation and the Board of Directors, the latter being the sole shareholders or having any rights to shares, all acts of the Corporation to complete transaction must take place in Nevada.

"This meeting is hereby adjourned to meet at the El Cortez Hotel, Las Vegas, Nevada, at 8:00 P.M. on Saturday August 3, 1957, at which time the transfer of the mining property herein mentioned will be contracted to be conveyed to the Clark Uranium and Copper Co., and the shares to be issued in payment therefore will be issued and delivered. The meeting will also select a Bank in which all funds of the Corporation will be deposited and checked out on the joint signatures of the President and Treasurer of the Corporation. At said meeting the two parties acquiring an interest in the Corporation are to be placed on the Board of Directors and one is to become Vice-President and the other Treasurer of the Corporation."

[3] Under the California statute an offer or attempt to sell comes within the defi-

owners of this Corporation, whereupon I will deed to the Corporation the Clementine claim.

"This whole program can be completed at a single meeting of the Board of Directors at Los Angeles, California, when your funds are available. * * *

"We will place you two men on the Board as Directors and one of you can be Treasurer and all checks are to be signed by the President and Treasurer and to be used solely for the operation of the property in question. * * *

"The Directors for the time being will be yourselves J. H. Rinehart and myself. Mr. Rinehart is Secretary and I am President. You boys can determine among yourselves which one will be Treasurer and Vice-President. The Articles provide for a Board of 7 members and if some of my Las Vegas boys come and buy stock at 10¢ par, we may place one of them on the Board. I expect to go to work on the property next week."

dition of sale (§ 25009, Corp.Code), and a sale made without an appropriate permit constitutes a crime (§ 26104). *People v. Mills*, supra, 148 Cal.App.2d 392, 407, 306 P.2d 1005; *Ogier v. Pacific Oil & Gas Development Corp.*, 135 Cal.App.2d 776, 779-780, 288 P.2d 101. It is said in the cited case of *People v. Jaques*, supra, 137 Cal. App.2d 823, 832, 291 P.2d 124, 129: "Even an agreement to reach an agreement to sell stock would be, at least, an 'offer to sell' which is prohibited by section 25009."

[4] The evidence at bar discloses a palpable attempt at evasion of the California Corporate Securities Act. The offer to sell the stock was made and accepted in this State; the price was to be paid and the stock delivered here. The proposed meeting in Nevada was for the sole purpose of transferring the so-called lease to the corporation and having the stock issued there, delivered to Mills (the real seller)⁴ and by him brought to Los Angeles for delivery to the buyers. The mere fact of issuance of the stock in Nevada does not save the transaction from the stigma of calculated evasion or from the sanctions prescribed by the statute for violation of its terms. That such is the law is attested by *Boteler v. Conway*, 23 Cal.App.2d 35, 39, 72 P.2d 208; *Leven v. Legarra*, 103 Cal. App.2d 319, 320, 229 P.2d 383; *Pollak v. Staunton*, 210 Cal. 656, 662, 293 P. 26; *Auslen v. Thompson*, 38 Cal.App.2d 204, 210, 101 P.2d 136; *Hardy v. Musicraft Records, Inc.*, 93 Cal.App.2d 698, 701-703, 209 P.2d 839; *People v. Sears*, 138 Cal.App. 2d 773, 791, 292 P.2d 663; *People v. Sears*, 124 Cal.App.2d 839, 849, 269 P.2d 683; *B. C. Turf & Country Club v. Daugherty*, 94 Cal.App.2d 320, 329, 210 P.2d 760. In the first cited *Sears* case it is said: "The Corporate Securities Act clearly prohibits a foreign corporation from soliciting in California a sale of stock of its own issue without first securing a permit, even though in good faith the issuance of the stock and

transfer of title are to take place in a foreign state." *People v. Sears*, supra, 138 Cal.App.2d 773, 791, 292 P.2d 663, 674.

The contention that the status of Meng and Shrader as corporate directors and officers precludes the application of the general rule cannot prevail. The point made by appellant is that the venture could not function without the active participation of Meng and Shrader because they were to be two of four directors, and all company checks were to be signed by one of them; hence without their consent no money could be spent and no board action taken. The rule that where "the assignee [buyer] is to share in the conduct of the enterprise, the instrument representing an assignment of a fractional interest * * * is not a security within the act" (quoting *Austin v. Hallmark Oil Co.*, supra, 21 Cal.2d 718, at page 727, 134 P.2d 777, at page 782), did not arise from any such corporate internal situation, nor was it intended to apply thereto. The doctrine grew out of the necessity of determining what is an investment contract or a certificate of interest or a participation in an unincorporated venture, such as a real estate subdivision, an oil well, a mine, or the like. See, *People v. Steele*, 2 Cal.App.2d 370, 374, 36 P.2d 40; *Gillis v. Pan American Western Petroleum Co.*, 3 Cal.2d 249, 255, 44 P.2d 311; *People v. Syde*, supra, 37 Cal.2d 765, 768, 235 P.2d 601; *People v. Davenport*, 13 Cal.2d 681, 685, 91 P.2d 892; *Hollywood State Bank v. Wilde*, 70 Cal.App.2d 103, 107, 160 P.2d 846; *People v. Hoshor*, 92 Cal.App.2d 250, 255, 206 P.2d 882; *People v. Rankin*, 160 Cal.App.2d 93, 325 P.2d 10. To apply it to a sale of corporate stock would open a broad avenue for safe evasion of the statute in cases of small operations. It would be necessary only to make the buyers corporate officers and directors with a controlling vote and sales of the company stock could be made without a permit and with impunity. Many a rascal would relinquish

4. "A sale of stock or other undivided interest in a corporation which is the seller's alter ego spells a sale by the issuer

in legal contemplation." *People v. Mills*, supra, 148 Cal.App.2d 392, 406, 306 P. 2d 1005, 1015.

control of a speculation for cash in hand. Such an interpretation of the law would permit most closed corporations to issue stock without consulting the Commissioner of Corporations and later to resell the same to members of the public.

The initial "Blue Sky" legislation in this State was the Investment Companies Act (Stats.1913, Ch. 353, p. 715) which confined its definition of security to "stock, stock certificates, bonds, and other evidences of indebtedness, other than promissory notes not offered to the public by the maker thereof" (§ 2(b)). Note 13 on page 544 of 6A Cal.Jur. (§ 306), says: "The defect in the original act of 1913 was that it applied only to the issuance and sale of stock by the corporation itself, not to anything but 'stock' and not to resales of stock issued in other states by corporations thereof, and not to bonds, participation shares other than stocks, or to shares in unincorporated companies and trusts." The law proved defective because of the many investment arrangements devised to defeat its ends. Accordingly, it was strengthened by including participations of various sorts in the definition of security. Speaking of the Corporate Securities Act, as passed in 1917 and amended in 1919, the Supreme Court said, in *In re Girard*, 186 Cal. 718, 723, 200 P. 593, 594: "The provisions regarding companies, trusts, and trustees were inserted in the act for the evident purpose of preventing evasions such as would follow if the operation of the act was confined to corporations alone." The task then devolved upon the courts to determine what is a "security" (not what is a share of stock, the primary type of security), and in so doing to protect ordinary business transactions that are not within the evil at which the act is aimed (see, *People v. Syde*, supra, 37 Cal.2d 765, 768, 235 P.2d 601; *People v. Rankin*, supra, 160 Cal.App.2d 93, 325 P. 2d 10), and to prevent evasion of the statute on the other hand. It was this problem that gave rise to the line of cases typified by *People v. Steele*, supra, 2 Cal.App.2d 370, 374, 36 P.2d 40, and other cases above cited, cases prescribing the test of whether

the investor expects his profits to flow from his own efforts or from those of others. None of said cases holds or intimates that a corporate structure can be set up which will exempt sale of the stock from control of the statute. We hold that appellant's attempt thus to evade the law cannot succeed; that sale of stock without a permit violates the statute regardless of the control of the shares of the issuing corporation. A sale of 75 per cent of the stock in one block is as much a violation of the act as a sale of 5 per cent. The actual rulings in *People v. Staver*, supra, 115 Cal. App.2d 711, 252 P.2d 700, and *People v. Jaques*, supra, 137 Cal.App.2d 823, 291 P. 2d 124, relied upon by appellant, are not opposed to the views just expressed.

Staver dealt with an agreement which the attorney general claimed to be invalid as a preorganization agreement, i. e., one made before incorporation. Concerning this contention the court said, 115 Cal.App. 2d at page 722, 252 P.2d at page 706: "It is not the taking of subscriptions for shares of a domestic or foreign corporation made prior to the inception thereof that is prohibited. Corp.Code, Sec. 25153. What is prohibited by the section is the collection of any portion of the consideration to be paid on account of subscriptions made prior to incorporation, unless a permit has been issued by the commissioner authorizing such collections.

"Here we are confronted with a situation wherein the agreement of the contracting parties was that they would form a corporation in the future, and that when such corporation was organized the manager of each store being operated by the Staver Building Material Company would take stock in the corporation based upon the inventory value of his business and other considerations. It cannot be assumed in a criminal prosecution that any stock would be issued without the permission of the Commissioner of Corporations. We fail to perceive wherein the agreements here in question can be regarded as a collection of a consideration to be paid on

account of subscriptions for stock made prior to such incorporation." Language found at page 721 of 115 Cal.App.2d, at page 706 of 252 P.2d intimating that the philosophy of *People v. Syde*, supra, 37 Cal.2d 765, 235 P.2d 601, might be applicable merely repeats a concession made by the attorney general.

The Jaques case, supra, dealt with an arrangement whereby one Weaver advanced \$7,500 to be used for purchase of stock in a corporation which was to be formed for prosecution of a certain venture, but upon condition that he have employment agreeable to himself. The court said that the facts showed a sale of a security "unless the fact that Weaver's purchase was contingent upon his being employed by the proposed corporation changes the legal effect." 137 Cal.App.2d at page 832, 291 P.2d at page 129. It was held that *People v. Syde*, supra, 37 Cal.2d 765, 235 P.2d 601, and *People v. Davenport*, supra, 13 Cal.2d 681, 91 P.2d 892, were not controlling. After discussing those cases the court said, 137 Cal.App.2d at page 834, 291 P.2d at page 131: "A general rule may be deduced from the cases to the effect that if the enterprise is in the nature of a joint venture or if the investor is to have an active participation in its formation, or its operation is dependent for its success partly on the efforts of the particular investor, then, in any such event, the Corporate Securities Law does not apply." This statement is too broad, as appears from the court's reliance upon certain Minnesota cases reviewed at page 835 of 137 Cal.App.2d, at page 131 of 291 P.2d, and from this concluding paragraph of the discussion: "In our case, the agreement was that Weaver was to receive stock and to work for the corporation as vice president or secretary. The Gopher Tire case [*State v. Gopher Tire & Rubber Co.*] supra [146 Minn. 52], 177 N.W. 937, indicates that where the corporation can operate just as well without the services of the one agreeing to buy stock, the agreement comes within the terms of the Blue Sky Law. (See 25 S.Cal.L.Rev., p. 210.) Applying

that test here, it appears that the proposed corporation when formed could operate without Weaver. While there was some discussion of his helping in the advertising of the proposed corporation and in the selling of stock, his services were not indispensable. His participation either before or after incorporation was not to be the active participation which would make the enterprise a joint adventure, or would make the agreement any the less an 'investment contract' or an agreement to buy corporate stock." This case was not passed upon by the Supreme Court and we consider that intimations in the opinion that agreed personal services of the buyer can immunize a sale of stock without a permit do not bind us. Certainly the ruling in the case, as distinguished from its general language, is not opposed to the holding at bar. We do not mean to say that a bona fide joint venture would violate the statute merely because of an expressed intention to incorporate in the future and then issue stock. See, *Polizzi v. Porcaro*, 110 Cal. App.2d 395, 399, 242 P.2d 949; *Nicholl v. Ipsen*, 130 Cal.App.2d 452, 457-460, 278 P.2d 927. That is not the situation before us.

The foregoing ruling disposes of the contention that the court erred in refusing to give a requested instruction (found at page 44, Clerk's Transcript) which reflects defendant's theory of the applicability of *People v. Syde*, supra, and similar cases.

[5, 6] Appellant urges, as he did below, the defense of entrapment. He complains of refusal to give the following instruction: "The court instructs the jury that 'entrapment' is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated the offense except for the trickery, persuasion and fraud of such officer." Its language is inappropriate, for there was no trickery, persuasion or fraud here. More importantly, there is no evidence that the "conception and planning" of the offense was that of the officers rather than defendant. The

court gave full instructions on this subject which are not criticized and which amply covered the matter. One of them, set forth in the footnote, was sufficient of itself to occupy the entire ground.⁵

This issue was resolved against appellant by jury and by judge. It would have been difficult and erroneous to reach a different conclusion. In *People v. Bowlby*, 135 Cal. App.2d 519, 529, 287 P.2d 547, 554, 53 A.L.R.2d 1147, it is said: "It is essential to such a defense that the criminal intent originate with the one who is alleged to have entrapped defendant and that the crime be induced by him through persuasion or the like. His merely furnishing the occasion for one engaged in illegal activities to ply his trade does not amount to entrapment. *People v. Braddock*, 41 Cal.2d 794, 802, 264 P.2d 521, 525: 'The many decisions in this state which define the defense of entrapment were reviewed in *People v. Lindsey*, 91 Cal.App.2d 914, 205 P.2d 1114, and the law stated as follows: "Where the doing of an act is a crime, regardless of the consent of anyone, the courts are agreed that if the criminal intent originates in the mind of the accused and the offense is completed, the fact that an opportunity was furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. (Citation.) If the officer uses no more persuasion than is necessary to an ordinary sale, and the accused is ready and willing to make the sale, there is no entrapment." 91 Cal.App.2d at page 917, 205 P.2d at page 1115. More recently it was held: "It is not the entrapment of a criminal upon which the law

frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment.'" *People v. Terry*, 44 Cal.2d [371, 372], 282 P.2d 19, 20: 'As to the first contention, "entrapment" is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is on trial.' (Citing cases.)" Entrapment as a matter of law is not established where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused.' And the question is one of fact for the trial court's determination. *Id.*, 44 Cal.2d at page [375], 282 P.2d at page 21." To the same effect, see, *People v. Malotte*, 46 Cal.2d 59, 65, 292 P.2d 517; *People v. Nunn*, 46 Cal.2d 460, 471, 296 P.2d 813.

It was defendant who started the violation of the law by placing his advertisement in the Los Angeles Times. Its aroma excited the interest of the district attorney's office. When Meng's letter was received defendant telephoned and arranged to meet him. Defendant volunteered the information that he had the Clementine mine with a showing of \$1,400 ore, proposed that Meng, if he put up the necessary money, would receive 50 per cent; it would be so set up and to that end he would use a Nevada corporation. Mills volunteered to show Meng the mine, exhibited a so-called lease bearing the same date as the newspaper advertisement; said that 50 per cent

5. "The Court instructs the jury that the law does not tolerate a person, particularly a law enforcement officer, generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime, thus entrapping such person into the commission of a crime which he would not have committed, or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had

of the person so entrapped as his acts do not constitute a crime.

"If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose, but the crime was suggested by another person acting with the purpose of entrapping and causing the arrest of defendant, then the defendant is not criminal [sic] liable for the acts so committed."

of the corporate stock would be issued to Meng and Shrader; told of the absence of a permit to sell stock and outlined his plan to evade the law by issuing the shares in Nevada. In all this there is nothing to raise an inference that the criminal intent originated in the minds of the officers or anywhere other than defendant's own thinking. The officers merely gave him opportunity to ply his unlawful trade.

[7, 8] It is argued that no crime is alleged in the information and that the proof does not establish the commission of one. The contention is based upon the difference in the language of §§ 26104 and 25009, Corporations Code. The former brands as a felon anyone who "aids in the issue or sale of * * * or sells, or causes or assists in causing to be issued, executed, or sold, any security" etc. Section 25009 says that "sale" or "sell" includes every "disposition, or attempt to dispose, of a security"; also, "an offer to sell; an attempt to sell; a solicitation of a sale." The argument is that appellant was not charged with selling, but merely offering for sale, and hence the crime defined in § 26104 was not alleged, for that section does not mention an offer or an attempt. Actually the charge of Count I of the information is that defendant did "knowingly sell and offer to sell" the described shares of stock; that of Count II is that defendant did "offer to sell" an interest in a mining title and lease. Thus defendant had explicit notice in both counts that he was called upon to answer to a charge of offering to sell a security without a permit. It is obvious that the definition of sale found in § 25009 inheres in § 26104, and hence a charge of selling includes a charge of offering to sell. It is well settled that an indictment or information properly may charge a crime in the language of the statute. Pen.Code, § 952. And any uncertainty arising from that type of averment is dispelled by reference to the transcript of the preliminary or grand jury hearing which defendant receives as a matter of right. "An information is for-

mally sufficient if, in substance, it charges the defendant with the commission of a public offense in words 'sufficient to give the accused notice of the offense of which he is accused.' Pen.Code, § 952. To be material, a variance between the information and proof must be 'of such a substantive character as to mislead the accused in preparing his defense, or * * * likely to place him in second jeopardy for the same offense.'" *People v. Braddock*, 41 Cal.2d 794, 799, 264 P.2d 521, 524. "It is only required that the pleading be 'in any words sufficient to give the accused notice of the offense of which he is accused.' (Pen.Code, § 952.) Notice of the particular circumstances of the offense is given not by detailed pleading but by the transcript of the evidence before the committing magistrate (or the grand jury); defendant is entitled to such transcript under section 870 (or section 925) of the Penal Code." *People v. Roberts*, 40 Cal.2d 483, 486, 254 P.2d 501, 503. See, also, *People v. Randazzo*, 48 Cal.2d 484, 489, 310 P.2d 413; 26 Cal.Jur.2d § 38, p. 495. In *People v. Sears*, supra, 138 Cal.App.2d 773, 793, 292 P.2d 663, 675, it is said: "Appellant's claim that the statute is vague and indefinite and for that reason does not state a public offense is untenable. The language of the Corporate Securities Law provides an adequate warning as to what conduct comes within its prohibition. [Citations.] The language conveys a sufficiently definite warning from which any person engaging in the business of issuing or selling securities may ascertain whether his business or enterprise has a sanction of law. Appellant was charged with the crime in terms of the enactment describing the offense and was informed of the action of which he was accused to the extent sufficient to enable him to defend himself. Furthermore, at the trial, appellant was fortified with a copy of the testimony given before the committing magistrate. Penal Code, § 870."

There is no merit in the claim that the information charged no offense or that the statute is too vague to be constitutional.

The foregoing authorities preclude any other holding.

Appellant makes numerous other contentions which require but brief comment.

[9] Refusal of defendant's requested instruction to the effect that anyone in the exercise of his inalienable rights may dispose of his property in such innocent manner and for such price as he pleases, was not error. It was clearly inappropriate.

[10] The proposed instruction to the effect that the Corporate Securities Law "has no application to a purely private transactions as described in other instructions herein given," was properly refused. It would have taken the case from the jury and, as hereinabove shown, does not correctly state the law.

Appellant says in his opening brief: "It was error to refuse defendant's requested instruction based upon the defense that the transaction never was completed and if and when completed, would have been a Nevada contract." The point is not well taken, this for the reasons appearing in the above discussion of whether the instant transaction involved a security. Moreover, the evidence would not support an inference that the transaction, if and when completed, would have been a Nevada contract. It was made and to be performed in California. The last act was not to be done in Nevada but in California when the stock was delivered to Meng and Shrader. *Oakley v. Rosen*, 76 Cal.App.2d 310, 173 P.2d 55, is not apposite. It dealt with a bona fide joint venture and a contract which was to be completed and performed in New York. Neither of those controlling facts is proved or inferable at bar.

[11] Defendant asked the court to instruct that "it cannot be presumed that the defendant would offer to sell any stock in Clark Uranium & Copper Co., without a permit from the Commissioner of Corporations of California." This language was borrowed from *People v. Staver*, supra, 115

Cal.2d 711, 722, 252 P.2d 700, wherein it was used in discussing the effect of the evidence. That does not mean that it necessarily was proper as a jury instruction. *Sloan v. Stearns*, 137 Cal.App.2d 289, 299-300, 290 P.2d 382. The subject was adequately covered by instructions on reasonable doubt and presumption of innocence.

[12] The contention that it was error to refuse a requested instruction concerning delay in taking defendant before a magistrate notwithstanding his demands therefor, and that "you can take these facts and circumstances into consideration in arriving at your verdicts, in determining whether the officer and others participating in the arrest of the defendant acted in good faith," cannot prevail. The assumed facts, if true, had no bearing upon defendant's guilt or innocence or upon the fairness of his trial. Cf. *People v. Allen*, 142 Cal.App. 2d 267, 286, 298 P.2d 714; *People v. McCrasky*, 149 Cal.App.2d 630, 637, 309 P.2d 115; *People v. Jablon*, 153 Cal.App.2d 456, 461, 314 P.2d 824; *Cicenia v. La Gay*, 78 S.Ct. 1297, 2 L.Ed.2d 1523, 1528.

[13] Asserted prejudicial misconduct of the prosecutor finds no support in the record. Matters of which appellant complains constituted legitimate argument. Moreover, defendant made no assignment of misconduct at the trial, nor did he move to strike any of the prosecutor's remarks except in one instance. The record shows that the assignment was unfounded, that the prosecutor was making a statement the truth of which defendant insisted upon. The objection comes too late. See, *People v. Sieber*, 201 Cal. 341, 356, 257 P. 64; *People v. Weiss*, 50 Cal.2d 535, 327 P.2d 527. "A party is not privileged to sit silent in the presence of statements deemed detrimental to his interest and rely for salvation upon an appeal." *People v. Stewart*, 109 Cal.App.2d 334, 340, 240 P.2d 704, 707.

[14] Error, if any, in receiving the testimony of one Harold I. Lyvers was not

prejudicial. He, a mining engineer, saw and pursued defendant's advertisement of July 21, 1957, had a conversation with Mills in which, according to his testimony, he was not offered any stock or any interest in the mine. He was not looking for an investment but wanted employment with a mining operator. When Mills found that Lyvers was not a prospective investor that closed the interview. This conversation was received in evidence over defendant's objection, but upon the prosecutor's assurance that it was part of proof of a general scheme and plan on defendant's part. That scheme and plan was not further developed, but Lyvers' testimony was in no wise hurtful to defendant and could not possibly work a reversal if found to have been erroneously received.

[15] The claim that the People should have been required to elect between Counts I and II when defendant so moved at the close of the trial cannot be sustained. The theory of the motion seems to be that sub-

mitting both counts to the jury would be a denial of due process because both offenses arise from a single set of facts. Section 954, Penal Code, governs such a situation. It specifically authorizes charging in a single accusatory proceeding "two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts." It further says: "The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged." The constitutionality of § 954 has been upheld. See, *People v. Kelly*, 203 Cal. 128, 133-135, 263 P. 226; *In re Culver*, 84 Cal. App. 295, 297, 257 P. 876; *People v. Grossman*, 28 Cal.App.2d 193, 203, 82 P.2d 76.

Judgment and order affirmed.

FOX, P. J., and HERNDON, J., concur





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